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THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE CALCUTTA AND MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT, AND CIRCULAR ORDERS OF THE BOARD OF REVENUE; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

BY D. SUTHERLAND,
MIDDLE TEMPLE.

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INDEX

(CIVIL RULINGS).

Page.

A.

ABATEMENT.
In suit to recover arrears of rent it is competent to a Court to adjudicate on a plea of —— ... 117
See Limitation (10)
See Measurement (1)

ACCOUNTS.
In a suit for —— it is not enough for the Court to decree that —— should be taken. They should be examined and settled, and if not produced, opportunity should be given for establishing a claim for compensation ... 388
See Manager (1)
See Procedure (1)
See Special Appeal (9)

ACQUIESCENCE.
Before a man can be held to have given by his conduct an implied assent to a transaction, it must be shown that he was fully aware of what the transaction was, and what effect it would have on his interests ... 341
See Waiver (1)

ACT I. OF 1845.
Section 21. *See Privy Council Rulings* (5)

ACT IX. OF 1850.
Section 32. *See Original Jurisdiction* (8)

ACT XXV. OF 1857.
Sections 3 & 9. *See Original Jurisdiction* (1)

ACT XL. OF 1858.
(1) Although it is irregular for a guardian to pledge the property of a minor without obtaining the sanction of the Court under——, s. 18, the irregularity ought not to prevail when the mortgage-transaction was a proper one, and there was subsequently a decree in a suit in which the minor was represented under which the property was sold ... 47

Page.

ACT XL. OF 1858—*(Continued)*.
(2) Where a Civil Court, in the exercise of its discretionary power, refuses to recall a certificate granted under ——, there is no appeal from such refusal ... 479
(3) Power of a Judge under——, s. 9 ... 490
See Minor (1)

ACT VIII. OF 1859.
(1) Section 246 applies only to immoveable property or to specific moveable property, not to a debt due. When a debt due to a judgment-debtor is attached in the hands of the person who owes it, he may put it into Court voluntarily under s. 241, or under compulsion under s. 242, or be sued for it under s. 243 ... 36
(2) Computation of the year mentioned in ——, s. 246 ... 68
(3) Under ——, s. 5, an action may be brought, either in the forum of the place where the contract was made, or in that where the performance was to have taken place. *Quære.*—Does this rule apply if both parties to the contract are at the time in a district where neither of them has either a dwelling or place of business? ... 79
(4) ——, s. 270, lays down a mere rule of procedure for determining questions between rival decree-holders, which was never intended to alter or limit rights secured by contract independently of the Code of Civil Procedure ... 98
(5) A suit initiated under ——, s. 230, cannot be tried as a regular suit without a proper plaint and stamp, unless the plaintiffs or petitioners complain of actual ouster ... 103
(6) A party who has parted with the actual occupation of land to another is not thereby, as an absolute rule, without restriction, barred from taking the advantage of——, s. 230 ... 123

ACT . III. OF 1859—*(Continued).* Page.

(7) A case under ——, s. 230, is to be treated in all respects as a regular suit ... 123

(8) Where an objector's claim under ——, s. 246, having been disallowed, he brings a regular suit to establish his right and stay the sale, and this being dismissed, brings a second suit for declaration that the property (which is still in his possession) is his, and is not affected by the sale, HELD that, in calculating limitation, no deduction can be made for the time consumed in the first suit, and that the cause of action in the second suit is the same as that in the first. 162

(9) The provisions of ——, s. 206, are applicable to proceedings under Act X. of 1859 ... 204

(10) Where an Appellate Court, in pursuance of ——, s. 354, sends an issue down to the first Court for evidence to be taken upon it and returned, the result is not to remand the case for re-trial; the first Court being *functus officio* in respect to such portion of the matter as it had already considered and determined ... 207

(11) *Quære.*—May not the creditor of a member of a joint Hindoo family have, under ——, s. 206, some remedy against the property to which his debtor may be entitled? 214

(12) Under ——, s. 208, the assignee of a decree must be considered and treated in all respects as if he were the original decree-holder, and in that character a party to the suit ... 235

(13) The general design of the provisions in s. 273 and the following sections of —— set forth ... 257

(14) The first Court's refusal to summon five of plaintiff's witnesses, notwithstanding that it postponed the case for 10 days, although fifteen other witnesses were present, is a sufficient reason within ——, s. 355, for the Lower Appellate Court to send for and take their evidence ... 268

(15) Following the decision of the Privy Council in the 10th Moore's Indian Appeals, p. 522, the High Court set aside judgments of the lower Courts founded on the law as it stood prior to that decision... 270

(16) ——, s. 206, applies only to proceedings taken while the decree is in execution ... *ib.*

(17) Before applying the provisions of either s. 127 or s. 170, ——, it is absolutely necessary that the Court should strictly conform to the law in making the order for the attendance of a party to the suit. 270

(18) An order of a competent Court releasing property from attachment after investigation of a claim put forward ought not to be interfered with on any ground of mere irregularity, unless a failure of justice has occurred ... 277

(19) Where plaintiff claims property as duly acquired from others who would have been otherwise entitled thereto, and the Court is not satisfied of such acquisition, it ought to bring the third parties on the record under ——, s. 73, and try the entire question of liability between the plaintiff and defendants ... 278

(20) The fact, that one of two defendants jointly and severally liable is excluded from a decree for want of jurisdiction, does not debar the plaintiff from his remedy in a Court possessing jurisdiction with respect to the balance of claim irrecoverable from the other defendant ... 290

(21) A suit to enforce a contract by which a dispute is adjusted between a decree-holder and judgment-debtor is not barred by ——, s. 206 ... 298

(22) ——, s. 6, regulates the practice of Courts, but does not take away jurisdiction from any Court having general jurisdiction. Accordingly, where an irregularity does not prejudice the appellant, the High Court does not enter into the question of valuation to determine in what Court the suit should be brought ... 301

(23) It is within the discretion of the Court, under s. 15, ——, to admit a suit for a declaration that a nullah, in respect to which certain criminal proceedings had been brought, is the plaintiff's exclusive property, and cannot come under either s. 430 or s. 432 of the Criminal Procedure Code ... 329

(24) An Appellate Court, in referring a case under ——, s. 354, has no power to order the first Court to call upon the parties to the suit to agree to arbitration, or on their failing to do so, to appoint arbitrators. Where this is done, and the parties, waiving the irregularity, consent to the matter being

Page.

ACT VIII. OF 1859—*(Continued).*

tried by arbitrators, they cannot afterwards on special appeal object to the proceedings ... 396

(25) ——, s. 230 does not limit the applicant to any particular manner of obtaining possession; and s. 264 contains nothing to prevent the purchaser at an execution-sale from obtaining possession, if he can, without the assistance of the Court ... 406

(26) Where a party, holding a perpetual lease of property to the extent of 12 annas under co-sharers who covenant in the pottah that he shall be entitled to claim partition sues the owner of the other 4 annas for a partition, the Court of first instance should, under ——, s. 73, make his lessors co-plaintiffs. 437

(27) Where M suing A and others on a bond-debt obtains a decree against A alone, and appeals to the District Judge who passes a decree declaring all parties to be liable jointly; and on the decree-holder taking out execution, two of the defendants apply to the Sub-Judge under ——, s. 119: HELD that the Sub-Judge has no jurisdiction, but the proper course for the parties is to apply to the District Judge under s. 119 ... 537

(28) To have a sale set aside under the provisions of ——, s. 256, the judgment-debtor must prove that the irregularities in the sale led naturally to diminution in the price given for the property. 550

Section 2. *See Ejectment* (2)
See Res-adjudicata (1) (5)
See Right of Suit (4)
Section 7. *See Act VIII. (B. C.) of 1869* (7)
See Bond (3)
See Damages (3)
Section 16. *See Encumbrance* (1)
Section 23. *See Arrears of Rent* (7)
Section 46. *See Putnee Talook* (1)
Section 73. *See Arrears of Rent* (6)
See Co-sharer (4)
See Religious Endowment (1)
Section 119. *See Ex-parte Decree* (1)
See Onus Probandi (7)
Section 122. *See Set-off* (3)
Section 122. *See Written Statement* (1)
Section 206. *See Injunction* (1)
Sections 206 & 207. *See Execution* (1)
Section 216. *See Notice* (1) (4)
Section 223. *See Execution* (9)
Section 243. *See Limitation* (1) (2)
Section 246. *See Attached Property* (2)
See Limitation (1) (2)

Page.

ACT VIII. OF 1859—*(Continued).*

Section 246. *See Lis Pendens* (1)
See Stamp (2)
Section 256. *See Notice* (2)
Section 270. *See Execution* (15)
Section 276. *See Review* (7)
Section 324. *See Arbitration-award* (3)
Section 348. *See Cross-appeal* (1)
Section 353. *See Remand* (2)
Section 355. *See Special Appeal* (11)
Section 378. *See Review* (3)
See Res-adjudicata (3)

ACT X. OF 1859.

——, s. 108, applicable to a suit for rent and the balances due under the decree on account of a 7-anna rukkum of a tenure, and where the sale-certificate passed the right and interest of the defaulting under-tenant ... 414

Section 13. *See Enhancement* (9)
Section 106. *See Act VIII. (B.C.) of 1865* (1)
See Bastoo Lands (1)

ACT XI. OF 1859.

The rights of an auction-purchaser under ——, s. 37, may be transferred to another person if the transfer follows immediately on the sale or within a reasonable time thereafter ... 29

See Partition (5)

ACT XIV. OF 1859.

Section 1, cl. 3. *See Limitation* (3)
Section 1, cl. 16. *See Limitation* (11)
Sections 13 & 14. *See Limitation* (5)
Section 15. *See Limitation* (8)

ACT XXVII. OF 1860.

(1) Where an estate is sold, subsequent to the death of the owner, for arrears of revenue, the sale-proceeds being payable to the estate of the deceased, there is nothing in the law to prevent the Judge from entertaining the widow's application for a certificate ... 45

(2) A certificate under —— gives no title to the property in succession to the deceased, nor does it authorize the holder to sue for and collect debts which have accrued due after the death of the deceased to persons who have subsequently become owners of his property ... 102

(3) Where a certificate under —— for a moiety of the estate of the deceased was granted to each of two heirs, one of the half-blood, and the other of the full-blood, the High Court, on the appeal of the latter who

Page.

ACT XXVII. OF 1860—*(Continued).*

possessed the title-deeds, and had performed the shradh, ordered the certificate of the whole estate to be given to him ... 274

See Certificate (2)
See Title (1)

ACT XXIII. OF 1861.

Where X, Y, and Z obtained a decree in the Sub-Judge's Court against B, who afterwards obtained a decree in the Moonsiff's Court against them, and they applied to the Sub-Judge for an attachment of the decree of B who, pending the application, assigned it to R after which attachment was effected; and R then applied to the Moonsiff, and obtained an order for full execution, X, Y, and Z sued R to have their title to a set-off declared: HELD that the question raised by X, Y, and Z was one raised between the parties relating to the execution of the decree within the meaning of ——, s. 11, and therefore the suit could not lie. 235

ACT VI. (B.C.) OF 1862.

Section 10. *See Jurisdiction* (10)
See Measurement (3)
Section 27. *See Small Cause Court* (1)

ACT XVIII. OF 1863.

See Trust (1)

ACT XX. OF 1863.

See Religious Endowment (2)

ACT VIII. (B.C.) OF 1865.

(1) A zemindar cannot bring a suit for rent against a person other than the one whom he knows to be the proprietor of the under-tenure and from whom he has been receiving rent ... 46

(2) The right given to a purchaser under ——, s. 16, explained ... 541

Section 11. *See Act X. of 1859* (1)
Section 14. *See Enhancement* (9)
Section 16. *See Auction-purchaser* (2)
See Right of Occupancy (1)

ACT X. OF 1865.

(1) Where the first Court decreed a suit for possession of land claimed under a will, the Lower Appellate Court was held to have done right in reversing the decision on the ground that plaintiff had not taken out probate under ——, s. 187 ... 174

(2) Probate intended by s. 187 explained ... *ib.*

Section 50, cl. 3. *See Probate* (1)

Page

ACT XI. OF 1865.

Section 6. *See Damages* (2)

ACT XX. OF 1866.

(1) In suit on a bond specially registered under —— for repayment of a loan for which property is pledged and sureties are found, who undertake to be responsible in case the amount is not recovered: HELD that no decree can be made except for the money lent with interest and costs, and the Court cannot make a declaration against the property pledged or make the sureties liable ... 2

(2) Where the requirements of the law have been fulfilled, a report by the Sub-Registrar expressing his intention to reject a document does not affect its claim to being a well-registered document within the meaning of ——, s. 49 ... 31

See Registration (1)

ACT VIII. (B.C.) OF 1869.

(1) The increase of productive power alluded to in s. 18 must be an agency subsisting and operative at the time when the notice is issued ... 1

(2) The Full Bench decision (21 W. R., p. 94), by which the right of a purchaser in execution of a rent-decree prevails over that of an earlier purchaser, does not apply to the case of a sale under ——, s. 64 ...

(3) An increase, either permanent or likely to last for a considerable time, caused by natural agency in the productive power of the land is one of the elements to be considered in determining its increased value within the meaning of ——, s. 18 ...

(4) ——, s. 52, does not apply to a talookdar who has power to transfer his land and is liable, under the terms of his kubooleut, to immediate ejectment in the event of default ...

(5) Where no question as to a title to, or interest in, land has been determined, s. 102, ——, does not apply ...

(6) Procedure prescribed in ——, ss. 38 and 39 ...

(7) A suit under —— is not maintainable if brought with a view of bringing in a third party, and of having tried, under color of a rent-suit, a question of title between the plaintiff and that party ...

Page.

ACT VII. (B. C.) OF 1869—*(Continued).*

(8) Where an under-tenure is sold under the provisions of —— in execution of a decree obtained by the zemindar for rent due to him as the separate proprietor, after butwarra of a share of the talook in which the tenure is situated, the sale is properly conducted, not under s. 64, but under s. 59 of the above law ... 530

Section 4. *See Uniform Payment of Rent* (1)

Section 6. *See Full Bench Rulings* (1)
See Right of Occupancy (1)

Section 18. *See Enhancement* (3) (11) (15) (17)

Section 38. *See Measurement* (2)
See Bastoo Lands (1)
See Jurisdiction (11)

ACT X. OF 1870.

(1) How ——, s. 35, should be construed ... 136

(2) How the words "may appeal therefrom to the Court of the District Judge" in s. 35 must be understood ... *ib.*

(3) An appeal does not lie under this Act on the question of the amount of costs, which the Judge is to determine in the same way as is done in suits by the Taxing Officer on the original side of the High Court ... *ib.*

See Appeal (1) (3)

ACT IX. OF 1871.

See Execution (18)
See Full Bench Rulings (3)
See Limitation (4) (13)

ACT I. OF 1872.

(1) A statement made by defendant in another suit may be used as an admission within the meaning of ——, s. 18 ... 303

(2) Sections 76 and 77 of —— refer to public documents, and are not applicable to kobalas ... 355

(3) The proceedings in suits in which a former holder of the tenure of the person who was said to have created the itmamee right was a party come within the meaning of "any transaction" in ——, s. 13, and are admissible as evidence in a suit to establish itmamee right under s. 43 ... 365

Section 83. *See Bond* (2)
See Evidence (10) (12) (15)
See Special Appeal (13)

Page.

ACT X. OF 1872.

The expression "taken into account" in ——, s. 308, explained ... 336

Sections 430 & 432. *See Act VIII. of 1859* (23)

ACT III. OF 1874.

See Original Jurisdiction (18) (19) (20)

ADMISSION.

(1) Where, in a suit for enhancement of rent, plaintiff admits that defendant and his predecessors have been holding the tenure without any change in the rent, but alleges that the tenure had its origin long after the permanent settlement, HELD that defendant cannot avail himself of the first part of the —— without accepting the latter part ... 220

(2) A defendant's ——, if taken at all, must be taken as a whole; but it cannot bind co-defendants ... 519

See Act I. of 1872 (1)
See Arrears of Rent (3)

ADOPTION.

Where G executes an *unoomotee-potro* to his wife S to adopt five sons in succession, and on the death, 10 or 12 years later, of the first adopted son, she adopts another, whose adoption it is sought to have declared invalid on the ground that the first son lived long enough to secure the spiritual benefit for which the deed was executed, HELD that a son in the situation of the first adopted son cannot exhaust the whole of the spiritual benefit which a son is capable of conferring on his deceased father ... 121

AGENT.

See Original Jurisdiction (6)

ALIENATION.

An —— of property during the owner's minority is open to be questioned, when the minor comes of age, even if it was effected partly through the intervention of a Civil Court ... 119

See Mitakshara Law (2)
See Onus Probandi (2)

AMEEN.

The deputation of an —— to ascertain the respective liability of several judgment-creditors is not an improper course for a Court to pursue, and at all events is not

Page.

AMEEN—*(Continued).*

a ground for interfering in special appeal with the concurrent judgments of the lower Courts ... 183
See Evidence (8)
See Special Appeal (13)

ANCESTRAL PROPERTY.

A sale in execution of a decree against some of the members of a joint Hindoo family of the interest of those persons in the family-property does not give the purchaser a right to recover possession of a definite quantity of land ... 214
See Onus Probandi (3)
See Privy Council Rulings (1)

APPEAL.

(1) There is an —— from an assessment of compensation in Calcutta by the High Court on the original side, in the same way as from its judgment in a suit; and if the Local Government substitutes for the High Court a Judge specially appointed, his decision is subject to —— ... 136

(2) Where, in a suit for rent less than Rs. 100, the decision turns upon whether, in a former suit against plaintiff by a third party, a decree was recovered for possession of a portion of the land now in dispute, HELD that, as neither the land nor the rent of such portion was claimed by the defendant, the question as to title was not decided between parties having "conflicting claims" thereto; consequently there was no right of—— 205

(3) Where a Judge appointed under Act X. of 1870, and one of the assessors differ as to the amount of the compensation to be awarded, but the difference is so slight that the Judge waives his doubts, the party claiming compensation is not entitled to —— ... 305
See Act XL. of 1858 (2)
See Act X. of 1870 (1) (3)
See Interest (1)
See Jurisdiction (7)
See Review (1) (3)

ARBITRATION.

So much of the matter in a suit as has already been dealt with, cannot be referred by the first Courts to —— ... 207
See Act VIII. of 1859 (24)

Page.

ARBITRATION-AWARD.

(1) An —— is illegal where it is not signed by all the arbitrators, and there has been no agreement to abide by the decision of the majority, or that the voice of the umpire should prevail ... 129

(2) Where the parties concerned in an —— do not take steps to set the Subordinate Judge right in his decision, the High Court cannot interfere; but the effect of the decision is to dispose of the award altogether, and not to divide it into two parts, of which one might form the foundation of a future judgment. The application to give effect to the unenforced portion of the award ought to be dismissed ... *ib.*

(3) Where one of the arbitrators was never present during the course of the arbitration, and only signed the award after completion, the Moonsiff was held to be justified in setting aside the —— under Act VIII. of 1859, s. 324, and the ruling of the High Court at 8 W. R., p. 171 ... 418

(4) Where two arbitrators gave an award in one sense, and the third in an opposite sense, a Moonsiff was held not to be authorized to set aside the ——, because he surmised partiality ... 447

ARBITRATOR.

See Jurisdiction (7)

ARREARS OF RENT.

(1) In a suit for —— for two years, the rate claimed for the second year being an enhanced rate after notice, the Lower Appellate Court is right in decreeing —— for the second year at the rate found to be the true rate, although less than the enhanced rate claimed. 13

(2) In a suit for —— at a specified rate, the jummabundee-papers of a former putwaree were held to be valueless as evidence without the personal testimony of the putwaree. 256

(3) Where, in a suit for ——, defendant admits tenancy and his liability for a certain rate of rent, plaintiff is entitled to recover arrears to the extent admitted unless defendant establishes his plea of payment. *ib.*

(4) In a suit for —— where defendant sets up the claim of a third party, no question of title to land as between plaintiff and that third party can be determined in such a way as to bind that third party. 326

Page.

ARREARS OF RENT—*(Continued).*

(5) In a suit for —— plaintiff must show some contract to pay rent entered into by defendant ... 347

(6) Where B intervenes in a suit for —— stating that he had acquired the rights of the tenants, and had paid to plaintiff a smaller rent, and the Moonsiff making B a third party dismisses the case, HELD that B's application and the order thereon came within the purview of Act VIII. of 1859, s. 73. 384

(7) In a suit for ——, under Act VIII. of 1859, s. 23, a plaintiff can only succeed by proving his title to recover under a contract, expressed or implied ... 528

(8) A shareholder who pays up —— due from the whole of the tenure in order to save it from sale in execution is entitled to recover contribution from other shareholders who were in possession during the period within which the —— accrued, even though the tenure should be in the name of another, and the decree be nominally against such other alone. 531

See Abatement (1)
See Execution (6)
See Under-tenure (1)

ASSIGNEE.

(1) An —— of property is not entitled to recover against his assignor on the footing of a champertous contract ... 535

(2) An —— whose assignor was not in possession when the assignment was made can only recover, even from the hands of third persons, upon showing that he would have a right to enforce specific performance of his contract against his assignor, if the property were come back to the hands of the assignor. *ib.*

ATTACHED PROPERTY.

(1) In a suit to establish a claim to property attached in execution of a decree obtained by one defendant against another, which plaintiff alleges to be collusive, HELD that the plaint discloses a cause of action ... 389

(2) Where there are two distinct orders for payment of costs against two sets of defendants, and the property of one of the former is taken in execution of the order against the latter, the application of the aggrieved defendant for the release of his property falls within

Page.

ATTACHED PROPERTY—*(Continued).*

the provisions of Act VIII. of 1859, s. 246 ... 392

See Evidence (11)

ATTACHMENT.

The owner of any property is not precluded by law from selling it before ——, even though he knows that a judgment-creditor is seeking to get process of execution against it ... 473

See Act VIII. of 1859 (1) (4)
See Execution (4) (15)
See Limitation (1)
See Regulation V. of 1812 (1)

AUCTION-PURCHASER.

(1) Where the —— of the property of a member of a joint Hindoo family under the Mitakshara Law fails, in his suit for possession, to prove separate acquisition, plaintiff's remedy lies in a suit for partition. 116

(2) An ——, at a sale under Act VIII. (B. C.) of 1865, may get rid of an intermediate holding such as a howla, so far as to substitute himself for the howladar in respect of the collection of the ryot's rents ... 311

See Act XI. of 1859 (1)
See Execution (14)

AZEEMABADEE RUPEES.

See Privy Council Rulings (8)

B.

BASTOO LANDS.

Where the rent for —— is paid separately from the rent paid for the cultivated lands, but the tenure of the —— is a ryotwaree tenure, the distinction in the mode of paying the rent does not exclude those lands from the operation of Act X. of 1859, or Act VIII. (B.C.) of 1869 ... 511

BENAMEE.

Where a person, other than the nominal owner, is in possession of an estate, a purchaser is bound to inquire what is the nature of his possession; otherwise he takes subject to the rights of the person in possession ... 8

See Mala Fides (1)
See Purchaser (1)

BENEFICIAL OWNER.

See Purchaser (1)

Page.

"BHABAK MEHALS."
See Hindoo Law (4)

BILL OF LADING.
See Original Jurisdiction (3)

BONA FIDES.
See Limitation (4)

BOND.
(1) Where a —— stipulates for a higher rate of interest in the event of the money not being paid at the appointed time, the stipulation is, not in the nature of a penalty, but of liquidated damages. 223
(2) Where a —— is in the hands of the obligor or who is not shown to have stolen it, it is rightly presumed that the obligation has been discharged ... 265
(3) The holder of a —— on which he obtains a decree, part of which is infructuous for want of jurisdiction, is not precluded, by Act VIII. of 1859, s. 7, from maintaining a second suit to enforce such part of his claim against a third party deriving his title through the borrower subsequent to the date of the —— ... 308
(4) Where a woman sues to recover money advanced on a —— executed in her name, it is open to the obligee to plead that the money was not lent by the woman, but that the —— was merely an acknowledgment of indebtedness from him to her husband ... 413
(5) The clause in a —— relating to a higher rate of interest, if principal and interest were not repaid within a certain time, is a penalty-clause not enforceable in a Court of Equity ... 474
See Act XX. of 1866 (1)
See Penalty (1)

BOUNDARY.
See Right of Suit (3)

BUTWARRA.
Principle to be adopted where after partition of an estate under Regulation XIX. of 1814, one shareholder (A) claims from another (B) 2½ beeghas as having been allotted to him by B under a prior engagement in lieu of certain lands originally held by him which fell into B's puttee, and A brings a suit against B for his claim in the Civil Court ... 453

Page.

C.

CAUSE OF ACTION.
(1) Where parties applying for registration of name in the Collectorate books are successfully opposed by others claiming on the ground of a conveyance made to themselves, such opposition is a good —— to the first mentioned parties, if they have the right of title they allege ... 9
(2) Unless lessees hold over after the expiration of their lease, or hold under a yearly tenancy after notice to quit, the lessor has no —— against them to recover possession ... 44
(3) In a suit for possession of a share in an estate on the ground that a private partition had been annulled by a decree, HELD that the plaintiff has no ——, unless he proves that he has been actually evicted consequent on the decree. 105
(4) Where a plaintiff, having pledged himself to prove a specific fraud, and made his —— entirely dependent on that, fails, he cannot be allowed to succeed on a collateral matter ... 222
(5) The fact of an agent furnishing his principal with an account under his signature with a letter upon which a balance appeared due is a —— irrespective of Act X. of 1859, s. 33; and the principle is applicable to cases decided under the present law ... 338
See Attached Property (1)
See Contract (2)
See Foreclosure (2)
See Mortgage (14)
See Origin of Right (1)
See Possession (1)
See Possessory Suit (2)
See Privy Council Rulings (4)

CERTIFICATE.
(1) A purchaser can, under a Collector's —— of sale conveying a mehal and all proprietary rights which the Government formerly had in it, claim land re-formed on the original site of lands forming part of the mehal, or the accretions he is entitled to under the law ... 230
(2) The decision of a Court granting a —— under Act XXVII. of 1860 is conclusive as to the right to a ——, and the remedy lies in a regular suit to recover any sum received by virtue of that ——. A suit will not lie merely to set aside the —— ... 312
See Act VIII. of 1859 (15)

Page.

CERTIFICATE—*(Continued).*

See Act XXVII. of 1860 (1)
See Declaratory Decree (2)
See Execution (13)
See Purchaser (2)
See Registration (2)

CESS.

The —— which a ryot consents to pay over and above the original rent forms, with the old rent, a new rent lawfully claimable under the contract ... 12

CHAMPERTY.

See Privy Council Rulings (2)

CHARTER ACT.

The High Court's interference under s. 15 of the —— will not be exercised where another remedy is open to the party complaining 277

CO-LESSEE.

See Rent (1)

COLLECTOR.

See Parties to a Suit (2)

COMMENSALITY.

See Limitation (5)

COMMON CARRIER.

See Original Jurisdiction (2) (3)

COMPENSATION.

How to determine the —— to be allowed for land taken for public purposes, where the Court distinguishes between the occupied and the unoccupied land ... 233

See Act X. of 1872 (1)
See Contract (7)
See Decree (4)

COMPROMISE.

See Privy Council Rulings (7)

CONSTRUCTION.

(1) Where the final sentence in a judgment of the High Court makes no mention of a matter specified in the previous words, and the District Judge has the option of taking the latter to throw light on the former, or the former to be controlled by the latter, he is entitled to follow the effect of previous judgments delivered by the same Judge of the High Court ... 203

(2) Where the —— of a pottah is treated as a question of law, the Court must look to the surrounding circumstances, one of which is the possession given by the grantor and accepted by the grantee ... 285

See Privy Council Rulings (9)
See Sale Certificate (1)
See Sub-lease (1)

CONTRACT.

(1) Where no place of performance is prescribed by the agreement or exacted by the necessities of the case, the Court must look to the intention of the parties, to be ascertained from their acts and the surrounding facts ... 79

(2) An obligor is bound to seek the obligee and tender the money due at the place where the engagement was entered into, or at the residence of the creditor; and failure to fulfil this obligation is a cause of action ... *ib.*

(3) A contractor for work who failing to fulfil his——forfeits the money deposited by him as security, cannot also be held liable for damages for breach of —— unless the damages exceed the money deposited. 254

(4) In a zur-i-peshgee lease for a period commencing with 1276 and granted by the defendant to the plaintiff, there is an implied —— to put plaintiff in possession at the beginning of 1276, and where plaintiffs are unable, in spite of their best endeavours, to obtain possession, the——is broken ... 260

(5) Where in respect of a zur-i-peshgee lease granted by defendants to plaintiffs for a period beginning with 1276, defendants cannot give the possession stipulated for, still defendants should make good the ——, so far as might be if plaintiff thought proper to enter into the—— ... *ib.*

(6) The same principles in regard to ——s applicable here as in the English Court of Chancery ... 341

(7) Where plaintiff failed in a suit for the establishment of conjugal rights on the ground that the girl was of age and had not consented to the ——, and then sued the father to recover as damages the value of presents made: HELD that the expense not having been incurred in consequence of the breach of ——but voluntarily, could not be recovered as damages; and plaintiff could only claim a compensation for the loss of the girl as his wife ... 403

Page.

CONTRACT—*(Continued).*

(8) One who asks to have a——treated as void is bound to take steps for this purpose at the earliest moment without avoidable delay ... 529

(9) Although one of the parties to a —— is induced to enter into it by fraud of the other, he is bound by the —— until he repudiates it, and this he cannot do when he has allowed that to occur on the footing of the —— which makes it impossible for the parties to be put *in statu quo*. His proper remedy then is by an action for damages ... *ib.*

See Act VIII. of 1859 (21)
See Assignee (1) (2)
See Measurement (1)
See Original Jurisdiction (7)
See Privy Council Rulings (2)
See Specific Performance (1)

CONTRACT ACT (IX. OF 1872).

(1) The practice of looking more at the illustrations in the —— than at the words of the sections is a mistake ... 367

(2) —— applies in the Calcutta Small Cause Court to suits between Hindoos for damages for breach of contract ... 370

(3) The words "restrained from exercising a lawful possession, trade or business," in s. 27 explained ... *ib.*

CONTRIBUTION.

See Arrears of Rent (8)
See Mortgage (10)
See Set-off (3)

CONVEYANCE.

Where the executants of a deed of —— omit to have it registered, and the property is sold to a third party who takes it *bonâ fide* for valuable consideration, the party in whose favour the —— was executed should seek his remedy against the executants, not in a suit for specific performance, but in an action for damages ... 164

See Original Jurisdiction (4)
See Right of Suit (2)

COPIES.

See Evidence (10)

CO-SHARER.

(1) One shareholder alone in a joint estate, or his assignee, cannot claim to cultivate any portion of the property which is not his zerait, and without the consent of the other sharers, merely on the ground that he is willing to pay a reasonable rent for it ... 74

(2) The new Limitation Law, s. 27, does not apply to a suit to restrain one —— in a joint property from appropriating to his own particular use a portion of such property without the consent of other——s 286

(3) One —— building against the wishes of others must take the consequences in case his building is ordered to be pulled down ... *ib.*

(4) If a —— desiring to bring a suit for rent due, cannot join the others as plaintiffs with their consent, he may claim the whole of the rent due, and ask the Court under Act VIII. of 1859, s. 73, to make the other——s plaintiffs with him... 394

(5) A —— of a talook compelled to pay a quota of the Government revenue due on account of a share not his own, in order to save the whole estate from being sold, is entitled to a charge on such share of the estate ... 411

(6) A suit by a —— against ryots for rent in proportion to his share will not lie where plaintiff has never been in receipt of the rent from any ryot separately in proportion to such share ... 526

See Execution (7)
See Limitation (7)

COSTS.

Persons who without their consent are made parties to a suit in the appellate stage, are not liable for —— simply because they encouraged the plaintiff to bring the suit and provided him with the necessary funds ... 35

See Original Jurisdiction (15)
See Trust (1)

COURT FEES ACT.

(1) Where in a suit to set aside an adoption, the affidavit filed with a memorandum of appeal in the High Court described the property as being above Rs. 5,000, the High Court ordered the payment of the proper amount of vakeel's fees assessed on the true valuation of the suit ... 338

(2) A plaint for confirmation of possession and for setting aside a forged and invalid will cannot come under the —— Sch. II., Art. 17, cl. 3, but must be stamped according to the value of the subject-matter of the suit ... 438

Sections 10 & 12. *See Stamp* (3)

Page.

COURT OF CHANCERY.
See Contract (6)

CROSS-APPEAL.
The Lower Appellate Court is right in refusing to enter into an objection raised by the respondent under Act VIII. of 1859, s. 348, in the absence of the parties interested in the decision of the first Court ... 314

D.

DAMAGES.
(1) How the Court should estimate —— claimable by a person who has been wrongfully kept out of possession ... 126
(2) An action to recover money collected from a landed estate charged with the payment thereof under an instrument to which defendants had not been parties, is a personal action for —— within the meaning of Act XI. of 1865, s. 6 ... 298
(3) Where plaintiffs having been dispossessed of a tank recovered possession, and in a subsequent suit by defendants for determination of title, were also successful; after which they sued for the recovery of fishes taken by defendants on the day of dispossession; and this suit being compromised, they claim mesne-profits with reference to fishes and grass appropriated by the defendants ... 424
(4) Does a Court exercise a wise discretion in making a decree for —— in addition to a decree for arrears of rent at the same time that it gives a decree for ejectment? ... 512
See Bond (1)
See Contract (3) (7) (9)
See Conveyance (1)
See Ejectment (1) (4) (7)
See Jurisdiction (5)
See Liability (3)
See Mahomedan Custom (1)
See Original Jurisdiction (3)
See Penalty (1)
See Zur-i-peshgee Lease (1)

DAUGHTER-IN-LAW.
See Maintenance (1)

DECLARATORY DECREE.
(1) Plaintiff failing in a suit for partition of revenue-paying land ... cannot as of right claim a —— ... 11
(2) When a certificate under Act XXVII. of 1860 is granted to the personal representative of a shebait of debutter property, and the manager of the property on behalf of the surviving shebait brings a suit against the certificate-holder for a declaration under Act VIII. of 1859, s. 15, the District Judge does right in refusing the declaration ... 312
(3) Where in a suit for partition the main object fails, the plaintiff cannot turn round and ask for a declaration as to the extent of his share ... 333

DECREE.
(1) While none but a Court of appeal can interfere with the —— of a Court of competent jurisdiction, yet if the —— has been obtained by fraud, it shall avail nothing for or against the parties affected by it even in another Court ... 213
(2) On an application for execution, a Moonsiff ought to refrain, in the absence of authority from the attaching Court, from substituting the name of the assignee for that of the original decree-holder, and if he does alter the —— he ought to give reasonable effect to the application of the judgment-debtors for a set-off ... 235
(3) A —— awarding possession with wassilat from the date of suit, awards mesne-profits till the date when delivery of possession is effected, and reserves the question of the amount for adjustment in execution ... 328
(4) A Court decreeing a claim to a certain quantity and description of land, or to adequate and proper value of the same, is bound to declare either what the land is to be or what the compensation . 348
(5) A —— which directs the sale of mortgaged-property is not rendered invalid by the fact of the mortgage not having been registered as required by Act XXVI. of 1864 ... 355
(6) A —— directing that a kubooleut should be given by the defendant at a certain rent, amounts to adjudication that there is between the parties the relation of landlord and tenant, and is evidence on that point in any subsequent suit against the same defendant... 390
(7) The Court whose duty it is to execute a —— is bound to execute it in the shape in which it comes before him, and has no authority to permanently stay the execution of any portion thereof. 460

Page.

DECREE—*(Continued).*

(8) The purchaser of a share of a —— failing to get the Court executing it to put him on the record for the purpose of obtaining the benefit of the ——, has no right to an injunction to prevent the decree-holder from executing the whole —— without regard to the sale, even if the purchase is made on behalf of the judgment-debtor ... 506

(9) Where a —— awarding mesne-profits is silent on the point of interest, interest cannot be given in execution ... 533

See Execution (2) (3) (6)
See Limitation (6)
See Mortgage (8)
See Procedure (2)
See Review (2)

DEED OF SALE.

(1) A —— is not a document of which a certified copy is permitted by law to be given in evidence ... 303

(2) In a suit for possession of land under a kobala, plaintiff must prove not only the writing and signature of the kobala, but also that it was delivered as a complete instrument ... 367

DILUVIATED LAND.

Where, after a village is submerged, the proprietor of the permanently-settled estate of which it was a part continues to pay her full quota of Government revenue, the submergence does not deprive the owner of her property, and the re-appearance of the site as an island does not render it liable to be taken possession of by Government under Regulation XI. of 1825, s. 4, cl. 3, referred in Act IX. of 1847, s. 7. ... 324

DISCREPANCY.

In the case of a statement made by one of plaintiff's witnesses, the question is not whether it quite corresponds with the plaint, but whether it is worthy of credit and substantially agrees with plaintiff's case ... 271

DOCUMENT.

(1) ——s should not be used as evidence where they are at best statements made by a person who is alive, and who may be called as a witness ... 213

(2) A —— acknowledging the receipt of consideration-money for the conveyance of immoveable property cannot be received as evidence unless it is registered ... 309

See Evidence (6)

DOWER.

A widow rightfully in possession of her husband's estate is entitled, under the Mahomedan Law, to hold it until she is paid any —— which may be due to her ... 118

E.

EJECTMENT.

(1) Where D, after giving a kutkina pottah of a village to M, grants another to R who obtains possession, HELD that M's remedy lies in an action for damages, and he cannot claim specific performance unless R raises no objection to giving up possession ... 7

(2) Where a suit for —— having been dismissed on the ground that the defendant was not a trespasser but a tenant, plaintiff sues again on the allegation that defendant is now a trespasser though lately a tenant, HELD that the suit, though not prohibited by Act VIII. of 1859, s. 2, must be dismissed as plaintiff has not terminated the tenancy by giving the defendant reasonable notice to quit ... 115

(3) Where lands encroached upon have been added to the tenure, the tenant, if his tenancy is permanent, or he has a right of occupancy, cannot be ejected while the tenure lasts; but these lands may be brought into the calculation when the rent is re-adjusted ... 246

(4) In a suit by a landlord to recover arrears of rent from tenants forcibly compelled by the superior holders of a tenure over the plaintiff to execute a kubooleut to themselves, HELD that the act of the superior holders is not in law sufficient to constitute an ouster of the plaintiff, but gives the tenant defendants a cause of action against them for damages 337

(5) In a suit for —— as a trespasser, if the defendant establishes possession as a tenant, plaintiff must show that the tenancy has been put an end to ... 368

(6) The question whether a talookdar is liable to —— must be determined by the provisions of his lease ... 376

Page.

EJECTMENT—*(Continued).*

(7) In the spirit of the Rent Law, a decree for —— operates in some decree as an award of damages... 511

See Act VIII. (B.C.) of 1869 (4)
See Cause of Action (2)
See Damages (4)
See Full Bench Rulings (1)
See Jurisdiction (9
See Tenancy (1)
See Tenant (2)

ENCROACHMENT.

A suit for the removal of an —— is maintainable if it can be shown that damage may arise hereafter, when from plaintiff's neglect to interfere for years, the opposite party would possibly have acquired a right which would bar plaintiff's remedy ... 73

See Ejectment (3)
See Presumption (1)

ENHANCEMENT.

(1) The rate of rent payable by a ryot having a right of occupancy can only be enhanced in the way prescribed by law; if he has no such right, his landlord can only claim arrears on the ground of actual agreement. Such claim cannot be enhanced simply because the landlord has settled with Government at a higher rate of revenue ... 10

(2) In a suit for —— of rent, the Court cannot uphold an objection as to the form of the notice or the mode in which the suit has been brought, if prejudice has not thereby been worked to the defendant ... 185

(3) In trying a question of —— upon the first ground mentioned in s. 18 of the Rent Law, it is not allowable to a Court to strike an average on the rates of rent proved before it ... *ib.*

(4) Where the Lower Appellate Court goes on the principle that although the plaintiff has not given evidence as to the rate of rent payable by tenants of the same class as defendants holding adjacent lands of similar quality, yet he has given evidence as to such lands so occupied of a somewhat better quality, and that the rate of rent allowed, regard being had to the difference, is proper to award in conformity with the spirit of the Rent Law, the decision is reasonable and is accordingly affirmed 335

(5) Where plaintiff is unable to establish the grounds upon which he claims ——, he may have a decree for rent according to the ijumma for which defendant admits liability ... 351

(6) In a suit for ——, defendant's not being entitled to plead protection by presumption of holding from the permanent settlement, does not relieve the plaintiff from the necessity of proving a case under Regulation VIII. of 1793, s. 51 383

(7) A suit will not lie to enhance the rent of an undivided fractional share of a tenure of which plaintiff alleges himself to be landlord ... 385

(8) *Quære.*—Is the owner of a fractional share of a superior tenure competent to maintain a suit for —— of rent of a fractional share of an under-tenure subordinate to the former? ... *ib.*

(9) An under-tenant or ryot with a right of occupancy, whose rent is not fixed, is not liable to —— unless there is a ground for it, and he is informed of the same by a notice, so as to have an opportunity of contesting the matter ... 416

(10) If a plaintiff in suing for —— altogether misrepresents the area and boundaries of the holding, the misrepresentation vitates the plaint and renders the suit liable to dismissal ... 426

(11) In notices of —— it is necessary that the statement of grounds should show the landlord's intention to proceed under some particular clause or clauses of s. 18, Act VIII. (B.C.) of 1869. It is not enough that this should be inferred from a schedule appended to the notice ... 429

(12) Where plaintiffs are unable to show that they are entitled to the rent exactly as they claim it, the Court may give them a decree for such enhanced rent as it thinks ought to be paid ... 456

(13) In a suit for rent for 1278 B. S. at an enhanced rate, the presumption of the rent not having varied since the permanent settlement is not rebutted by the mere fact that the defendants acquired the tenure from another person originally in 1226 B. S. ... 475

(14) When the liability of a tenure to —— has been put in issue and fully tried, a decree may be given declaring the tenure liable, even though service of notice to enhance is not proved ... 48?

Page.

ENHANCEMENT—*(Continued).*

(15) Before a landlord can enhance his rent, he is bound to inform his tenant by written notice of the specific grounds on which he claims to enhance ... 485

(16) In a suit for ——, the objection that plaintiff sues without joining his co-sharers with him as parties is not allowed to be taken for the first time in the Lower Appellate Court ... 489

(17) A landlord seeking to obtain an enhanced rate of rent on account of nij-jote land held by a tenant without a right of occupancy has no right to obtain a judicial assessment upon the footing of a notice under Act VIII. (B.C.) of 1869, ss. 14 & 5 ... 548

See Act VIII. (B.C.) of 1869 (1)
See Admission (1)
See Arrears of Rent (1)
See Privy Council Rulings (8)

EQUITY OF REDEMPTION.
See Mortgage (9)

EVIDENCE.

(1) Where a tenant continues to hold land after his term, his pottah will be —— of the rent at which he is holding over, in the absence of —— that the rent was altered subsequently to its expiration ... 31

(2) A road-cess return made by a shareholder under the Schedule of Act X. (B. C.) of 1871, is not admissible as——against another shareholder ... 192

(3) In deciding a suit for the plaintiff a Judge may use —— which the defendant may have given, but which appears to the Court to be favourable to the plaintiff ... 271

(4) New —— adduced in an application for review does not *per se* show that the previous decision is wrong. If there is sufficient ground for receiving the new—— the case is to be heard as if it were being originally heard ... 288

(5) A survey map is a piece of —— like other —— in a case, and can be of no effect in determining the burden of proof ... 296

(6) Secondary —— of the contents of a document is admissible where the Court is satisfied that the document is lost; the Court may in such a case receive oral —— and need not insist on the production of a certified copy ... 303

Page.

EVIDENCE—*(Continued).*

(7) A Court may legally refuse to hear read —— taken by commission, where it does not appear that the defendant was from sickness unable to attend personally at the time of the trial, and the Court declines to dispense with the proof of such circumstance ... 331

(8) Depositions taken by an ameen may be read as —— when the case comes back to the Court again... 350

(9) A Court in which a suit is pending has authority to send for the records from any other Court in which they may be, the ordinary rules of that other Court notwithstanding ... 355

(10) Copies inadmissible under the Law of Evidence are properly rejected when tendered as ——; and it is entirely a matter of discretion with the Court in rejecting a copy to allow the party to file the original ... *ib.*

(11) Where the property of one of the first set of defendants against whom an order has been made for payment of costs is attached in execution of the order against the latter set, the aggrieved defendant may establish what the law requires by any —— sufficient for the purpose ... 392

(12) A finding in a former suit in which the question was tried between all the parties to the present suit, is admissible as —— ... 457

(13) Receipts signed by the landlord's agent, if authentic, are *primâ facie* —— of payment of rent, but not conclusive —— ... 489

(14) Where plaintiff institutes two suits, one of which comes up in regular appeal to the High Court, and the second is heard in appeal by the District Judge, the District Judge is wrong in applying the High Court's judgment as —— against the defendants in the suit before him ... 538

(15) Though not alone sufficient to charge any one with liability, documents admissible as —— under Act I. of 1872, s. 34, are sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant... 549

See Act I. of 1872 (3)
See Decree (6)
See Deed of Sale (1)
See Documents (1)
See Fraud (1)
See Lunacy (1)
See Oaths Act (1)

Page.

EVIDENCE—*(Continued).*

See Special Appeal (12)
See Special Commissioner (1)

EXECUTION.

(1) Where applicants for —— of a decree are not the whole of the decree-holders, they have no right to make application without sufficient cause for such a course ... 77

(2) Where application for —— of an order of Her Majesty in Council has been made elsewhere than in the High Court, the proceedings are invalid ... 102

(3) Where a decree is simply affirmed by the Appellate Court, it is the decree of the Appellate Court which is to be executed ... *ib.*

(4) Where the Privy Council orders execution for mesne-profits to be taken out first against one defendant (J), and only on failure to obtain satisfaction from him against the others, HELD that, before J's assets had been exhausted, attachment could not issue against the property of the others, even as a preliminary and protective step. The inquiry, whether or not J's assets have been exhausted, may be made by the other judgment-creditors being called upon to show cause why —— should not proceed against them. 104

(5) The sale of a jote in —— of a decree against the jotedar does not prove it to be transferable, nor does the purchaser acquire a right of occupancy by his purchase where the right is not dependent on custom, but is a mere creature of the Rent Law ... 169

(6) The sale of the right and interest of one proprietor in —— of a rent-decree does not convey the right and interest of other proprietors, although these may be as much liable as the first for arrears of rent ... 188

(7) Where —— proceedings are carried on in respect of a fractional share of a decree for all that remains of the assets after satisfaction of one party, the Court should take steps to protect the interests of other parties entitled under the decree ... 240

(8) Where a decree-holder, who has attached certain land and a house upon it, causes the land to be sold in ——, and purchases it, and then causes the house to be sold to a third party, HELD that he has purchased the land on which the house stood subject to the right of the person who bought the house to have it continued there ... 209

(9) Where the officers of a Moonsiff's Court were unable to give a decree-holder possession of a house, because the judgment-debtor had bolted and locked the doors, the Moonsiff was held to be bound, under Act VIII. of 1859, s. 223, to remove the locks, and place the decree-holder in possession ... 283

(10) A Court executing a decree may take evidence to ascertain what is the subject upon which the decree operates, and the judgment-creditor should not be referred for that purpose to a regular suit ... 330

(11) Although an application to execute a decree in part is informal, yet, if the proceedings taken thereon are in effect in —— of the decree as a whole, they are good and valid ... 354

(12) Where a zemindar makes a fresh settlement with B C alone, the heir of B B deceased, one of several members of a Hindoo family holding joint possession of a jote, and B C's rights and interests are sold in —— of a decree, and the purchasers claim the whole of the jote, HELD that the zemindar could only settle with B C the rights and interests of B B, which alone were sold to the auction-purchasers ... 382

(13) Where a decree-holder obtains an order for the sale of his judgment-debtor's interest in certain property, and purchases it and receives a sale-certificate going beyond the order, he cannot avail himself of any thing in the certificate beyond the order ... 408

(14) J and N borrow money from P, N pledging landed property. J then pays the whole debt, and sues N for contribution. On obtaining a decree, and attaching the property, Nilkant claims as purchaser from N. J then sues Nilkant, N, and others, and obtains a decree declaring that the mortgage to P has become assigned to her. J then sells the property to R: HELD that R buys the rights and interests of N; and where the result of the special appeal, which was pending at the time of the execution-sale, was to declare that N had no rights in the property, J bought what was worthless ... 452

Page.

EXECUTION—*(Continued).*

(15) Where a Government promissory note, after being long under attachment, is eventually sold, and K K, one of several decree-holders executing various judgments, makes a fresh attachment of it, and gets it sold, and the Court orders payment in full to K K and two others who are acting jointly in ——, and the surplus to be rateably divided among the other —— creditors, one of whom sues to establish a preferential claim, HELD that K K came under the Code of Civil Procedure, s. 270, and was entitled to payment in full, and that the two others had been over-paid, and were liable to repay the surplus to the other decree-holders ... 466

(16) An —— sale properly notified may be adjourned with the consent of the parties ... 481

(17) Where a decree directs wassilat together with interest to be assessed during the —— proceedings, in respect of the period of plaintiff's dispossession, the interest cannot be reckoned to run upon each of the separate sums due in respect of the several years of dispossession ... 484

(18) Under Act IX. of 1871 Government is bound to make an application for —— within the same time as any other person ... 512

(19) The rule as to making up an account of interest in mortgage-cases extends to the —— of ordinary decrees. The balance of interest is never added to the principal so as to produce compound interest ... 525

See Act VIII. of 1859 (28)
See Ancestral Property (1)
See Decree (7)
See Limitation (13)
See Mesne-profits (3) (6)
See Mortgage (7) (8)
See Onus Probandi (1)
See Possessory Suit (2)
See Privy Council Rulings (1)
See Right to Easements (1)

EX-PARTE DECREE.

A Moonsiff's order deciding that an application to set aside an —— is in time does not come under s. 119, Act VIII. of 1859, and such order is not final ... 5

F.

FERRY.

A rival —— cannot be set up so as to interfere with the proprietary rights in an existing ——, that is to say, under circumstances involving direct competition with each —— ... 296

Page.

FERRY—*(Continued).*

FORECLOSURE.

(1) Proceedings in —— are irregular and invalid, unless a copy of the application accompanies the notice as required by Regulation XVII. of 1806 ... 90

(2) A mortgagee by conditional sale has a right of entry immediately after default, and the Regulations do not debar him from the stipulated possession. Limitation runs from the date of such default, no new cause of action arising on —— *ib.*

(3) The only person on whom effectual service of notice of —— can be made is the person really interested in protecting the estate ... 168

(4) Where a mortgagee after obtaining a decree for —— sues for possession and mesne-profits, and the mortgagor does not prove that he has given plaintiff possession, or directed his lessee to pay rent to the plaintiff, HELD that the mortgagor is liable for wassilat from the date of——, so far as it is not barred by limitation ... 539

FRAUD.

Mere speculation and probability will not in law support a finding of ——. It is incumbent on a party, putting forward a charge of collusion with a view to defraud, to support it by evidence to a reasonable extent ... 124

See Cause of Action (4)
See Contract (9)
See Principal and Agent (1)

FULL BENCH RULINGS.

(1) A right of occupancy which a ryot has under Act VIII. (B.C.) of 1869, s. 6, is not transferable. When such ryot sells his holding, his right of occupancy ceases, and it cannot protect the purchaser against ejectment ... 22

(2) A case is not to be decided in special appeal upon a question which was not raised or tried or considered by the lower Courts ... 352

(3) A decree-holder, applying for the execution of a decree, is entitled, under Act IX. of 1871, to have such execution upon his showing that his application is made within three years next following a previous application to the Court to enforce the same decree, or from

Page.

FULL BENCH RULINGS—*(Continued).*

the date of issuing notice under Act VIII. of 1859, s. 216, in the same matter ... 512

G.

GOVERNMENT REVENUE.
See Co-sharer (5)

GRANT FOR MAINTENANCE.
See Original Jurisdiction (1)

GUARDIAN.
See Act XL. of 1858 (1)
See Privy Council Rulings (7)

H.

HEIRS AND REPRESENTATIVES.
See Liability (3)

HEIRSHIP.
See Hindoo Law (2)
See Liability (1)

HIBAH.
A party executing a —— under which no possession has been held, and which is therefore inoperative under the Mahomedan Law, is not precluded from claiming under another and distinct title ... 314

HIGH COURT ACT.
The Court refused to extend assistance, by the exercise of its extraordinary powers under the ——, s. 15, to parties who were chargeable with great and unexplained delay ... 523

HIGH COURT'S POWERS.
See Special Appeal (3)

HINDOO LAW.
(1) The right of an unmarried daughter to inherit her father's property as defined in the Mitakshara and the law of the Bengal School ... 55
(2) A sister's son is a preferential heir to a mother's sister's son, as being capable of conferring greater spiritual benefits upon the soul of the deceased ... 264
(3) The succession of females according to —— is not regular succession, and is not based on the ordinary theory of spiritual benefit. When they relinquish their rights in favour of the reversioner, the case is brought back to the normal

Page.

HINDOO LAW—*(Continued).*

state of succession, the effect being to invest in him a complete title ... 393
(4) Where a custom, according to which the Rajahs of Beerbhoom had granted a right to a share of property described as "Bhabak mehals" appeared to have been always recognized by the Courts, it was maintained notwithstanding that it is in contravention of the ordinary —— ... 397
(5) Property inherited by a Hindoo woman from her father does not, under the Mitakshara Law, descend on her death to her heirs, but reverts to the nearest heirs of her father ... 496
See Adoption (1)
See Onus Probandi (4)

HINDOO WIDOW.
Where persons presumptively next in succession to a —— arrange that she should surrender possession to them, and receive a maintenance, it is a family-arrangement not to be altered by one or other of the reversioners dying during her lifetime ... 307
See Privy Council Rulings (10)

HOLDING.
Where tenants hold land by different agreements, the zemindar has no right, without their consent, to break up existing ——s, and re-distribute the lands so as to alter the extent and nature of the ——s ... 336

HOUSE AND LAND.
See Execution (8)

HOWLADAR.
See Auction-purchaser (2)

I.

IMPARTIBLE ESTATE.
See Original Jurisdiction (1)

INCUMBRANCE.
If the holder of an under-tenure allows his tenant to occupy the land rent-free for more than twelve years, the interest thus created in the latter is an —— upon the under-tenure, as much within the reason of Act VIII. (B.C.) of 1865, s. 16, as if the holder had made a rent-free grant, or given a nominal lease... 413

Page.

INDIAN CONTRACT ACT.
Section 237. *See Original Jurisdiction* (16)

INFANTS.
See Original Jurisdiction (1)

INHERITANCE.
See Hindoo Law (1)

INJUNCTION.
Where a decree-holder agrees, for a good consideration, not to enforce his decree, the Court may legitimately, on the suit of the opposite party, issue an —— against the former not to do what he has agreed not to do, Act VIII. of 1859, s. 206, notwithstanding ... 194
See Decree (8)

INTEREST.
Where a judgment-creditor is taken at a disadvantage by an order for issue of execution with the qualification that as the decree does not give ——, the judgment-creditor cannot have ——, he can apply for a review; but the order cannot be set aside by a miscellaneous appeal after a second application in the same matter ... 534
See Bond (5)
See Decree (9)
See Execution (17) (19)
See Possession (4)

INTERVENORS.
A Lower Appellate Court has no authority to transfer ——, who had been made defendants by the first Court, to the side of the plaintiffs against their will, unless there is such an equity on the part of another as to compel them to be such ... 229
See Measurement (3)

INTESTACY.
See Original Jurisdiction (8)

IRREGULARITY.
See Act VIII. of 1859 (28)

ISSUES.
Where although no —— were framed after the defence was put in, the plaintiff examined witnesses, and was not prejudiced by the omission, the High Court refused to give effect to an objection on the ground of such omission, urged for the first time in special appeal. 448
See Lower Appellate Court (1)
See Plaint (1)
See Reversioner (1)
See Special Appeal (2)

Page.

J.

JOINDER.
See Original Jurisdiction (7)

JOINT HINDOO FAMILY.
Where one member of a —— sues another, who is the manager, for a moiety of two items pertaining to the ancestral estate, which, she says, defendant has misappropriated: HELD that the form of the suit is wrong, and that plaintiff should sue for an account of the joint family-property ... 202
See Ancestral Property (1)
See Mitakshara Law (2)
See Original Jurisdiction (22)
See Privy Council Rulings (5)

JOINT LIABILITY.
(1) Where an obligee sues some of the persons jointly liable to him under a bond, and takes another bond from the rest for what he considers to be their share of the debt, he does not discharge the latter from their liability to contribute according to the shares in which they are liable among themselves, nor does his transaction with them (they not being sureties) destroy the —— ... 193
(2) The fact of some of the joint occupiers of a joint tenure paying portions of the rent due from all, corresponding with the shares for which the joint occupiers are liable, cannot prevent the zemindar from suing them all, or making them all answerable for the joint debt ... 295

JOINT PROPERTY.
See Onus Probandi (1)

JOINT PROPRIETORSHIP.
(1) Where land is held in ——, an action to recover it from a stranger in wrongful possession must be brought in the name of all the proprietors jointly ... 74
(2) An arrangement between joint owners of land, not being a joint Hindoo family, by which some parts of the property were to be exclusively in the possession of one or other of them, bars one of them from suing for the profits derived from any portion allotted to the exclusive possession of any other ... 180

JUDGMENT-DEBTOR.
A —— maintaining that the property specified by the judgment-creditor is not the subject of the decree, is bound to point out the actual property concerned ... 330

Page.

JUMMABUNDEE PAPERS.
See Arrears of Rent (2)

JUNGLE LAND.
Where —— was let by Government to a tenant for the express purpose of being brought into cultivation, and the lease contained no reservation of the rights of the Government in respect of the cutting of timber trees, the Court held that the cutting of such trees would be necessary for carrying out the purposes of the lease ... 523

JURISDICTION.
(1) In respect of a suit for partition of revenue-paying land, or even of lakheraj land ... 11
(2) Where a suit dismissed by a Moonsiff as beyond his —— is, by order of the Judge, tried and dismissed, and subsequently decreed in appeal, objection on the score of —— cannot be taken in special appeal, the defendant not having appealed against the District Judge's order ... 101
(3) Of the Small Cause Court in a suit to enforce a lien created by a mortgage-bond on property sold by the mortgagor ten months later to the defendant ... 349
(4) —— of one Court to declare another Court to have acted without —— ... 361
(5) Of a Small Cause Court where a person claims damages for personal injury where actual pecuniary damages have resulted ... 395
(6) Of a Sub-Judge to try a suit brought to set aside a probate ... 416
(7) Of a District Judge in respect of an appeal from the finding of the first Court on the question of misconduct by arbitrators ... 420
(8) In respect of the institution of a suit cognizable by Small Cause Courts under the operation of Act VIII. of 1859, s. 6 ... 457
(9) In respect of an ejectment-suit on the allegation that defendant had, under colour of an order of the Magistrate, dispossessed the plaintiff of private property ... 461
(10) Of the Collector under Act VI. (B.C.) of 1862, s. 10 ... 476
(11) Of a Civil Court to try a suit for possession, whether it be brought under Act VIII. (B.C.) of 1869 or as a regular civil suit ... 478
(12) Of a Court in respect of an agreement having reference to social and religious customs ... 517

Page.

JURISDICTION—*(Continued).*
See Act VIII. of 1859 (3) (20) (22)
See Act XX. of 1866 (1)
See Pauper Suit (1)
See Resumption-proceedings (1)
See Review (4)
See Special Appeal (5)
See Stamp (3)

K.

KUBOOLEUT.
(1) Where no consideration is shown for which a —— is given, and plaintiff has never been in possession or received rent, the —— is inoperative ... 299
(2) A tenant holding over after the term of his —— has expired continues to hold in the same manner as before ... 394
See Rent (2)

L.

LAKHERAJ.
See Res-judicata (4)

LAND ACQUISITION ACT (X. OF 1870).
In proceedings under the ——, the order of distribution contemplated by s. 39 is not a final order on adjudication of the rights of the parties to the property for which compensation has been assessed and awarded; but the question determined may, under the proviso in s. 40, be re-heard in a regular suit ... 38

LEASE.
See Contract (4) (5)

LEGACY.
See Original Jurisdiction (8)

LEGATEE.
See Act X. of 1865 (2)

LESSEE.
A —— cannot make an under-lease for a longer time than his own lease, nor is he the agent of the landlord so as to bind him by granting leases for any time he may think fit ... 274
See Cause of Action (2)

LESSOR.
A —— failing by remissness to do that which he alone can do to protect his lessee in possession, even independently of any protective pro-

Page.

LESSOR—*(Continued).*

vision in the lease, cannot claim rent from the lessee in respect of the portion of the property from which the latter has been evicted. 542

LIABILITY.

(1) The heirs of a deceased person are liable for papers in their custody for which a claim is established against the estate of the deceased, and also for debts due therefrom to the extent of assets taken by them ... 388

(2) Where a party sells property to others, and it afterwards appears he had not the right to do so, and the purchasers are in consequence dispossessed, the loss should fall on the vendor ... 442

(3) The heirs and representatives of a deceased person are liable, according to equity and good conscience, to pay, not only the actual debts of the deceased, but also the damages arising from his breaches of contract ... 494

See Benamee (1)

LIEN.

See Mortgage (3)

LIMITATION.

(1) A person sued under s. 243, Act VIII. of 1859, is not barred, because of the lapse of a year, from setting up any ground of defence which he may have against the claim ... 36

(2) Where a party has failed in establishing a claim preferred under Act VIII. of 1859, s. 246 ... 39

(3) As applied to a suit for possession and declaration of right, but which substantially seeks to set aside a sale in virtue of which, unless got rid of, the purchaser-defendant's title must prevail over that of the plaintiffs ... 84

(4) How applied under Act IX. of 1871, Sch. III., art. 167, to applications for execution of decree ... 154

(5) In a suit to recover possession of land alleged to have belonged jointly to plaintiff's late husband and his late elder brother, where defendant pleads —— on the ground that neither plaintiff nor her predecessor was in possession within twelve years, and where it is found that the two brothers lived in the same mess, the elder collecting the rents and profits, and therewith managing the family-expenses ... 185

Page.

LIMITATION—*(Continued).*

(6) How applied to an application asking the Court to ascertain and determine how much a judgment-creditor has been overpaid ... 211

(7) As applied to a suit to recover plaintiff's share of wassilat from a co-sharer who has received it from a judgment-debtor with plaintiff's permission, but withholds payment to plaintiff ... 255

(8) As applied to a suit for possession of land where it appears that plaintiff has forcibly turned out the opposite party, and compelled him to seek his remedy under Act XIV. of 1859, s. 15 ... 259

(9) In a suit for the balance of an account ... 263

(10) As applied to a suit for abatement of rent founded on an agreement that, at a certain time, the land should be measured, and if found less than the quantity named in the agreement, the rent should be an abatement, and where it is found that plaintiff never required abatement, but had continued to pay the rent six years. 275

(11) As applied to a suit based on an agreement to grant a lease ... 287

(12) Where a plea of —— has been overruled, and the first Court has adjudicated on the plaintiff's title, the Lower Appellate Court is bound to adjudicate upon the title also ... 292

(13) How applied under Act IX. of 1871, Sch. II., art. 167, to a case in which one of several joint decree-holders made, under Act VIII. of 1859, s. 207, a proper application for execution ... 468

(14) In a suit to enforce the right of pre-emption brought after the period of —— prescribed for such suits where plaintiff alleges that he was not aware of the sale ... 479

(15) As applied to a suit against E and A to recover malikana said to be due as a charge upon land belonging jointly to them, and dismissed by the Lower Appellate Court on the ground that the claim against A was barred by ——, but where it had been found by the first Court that plaintiff had received malikana within twelve years antecedent to his plaint ... 551

See Act VIII. of 1859 (8)
See Execution (18)
See Foreclosure (2)
See Mesne-profits (1)
See Notice (4)

Page.

LIMITATION—*(Continued).*

See Original Jurisdiction (1)
See Privy Council Rulings (3) (4)
See Review (1)
See Waiver (1)

LIS PENDENS.

Possession of property obtained from a defendant while a suit is pending against him in respect of that property, must be taken to be the possession of the defendant himself for the purposes of the suit ... 547

LOWER APPELLATE COURT.

A——ought not to raise a question on a point which has not been put in issue in the first Court, or questioned in the defendant's written statement ... 299

LUNACY.

The bare assertion of witnesses unsupported by any details respecting the malady is not satisfactory proof of insanity ... 33
See Representation (1)
See Right of Suit (5)

M.

MAHOMEDAN CUSTOM.

Where plaintiff, having failed in a suit to establish conjugal rights, sues the father to recover as damages the value of presents made: HELD that if fraud is established and plaintiff can show that the presents are a natural consequence of the negotiations, and in conformity with general custom, he may recover damages to be determined by the circumstances ... 403

MAHOMEDAN LAW.

In a suit to establish the right of pre-emption, where the witnesses said that, on the refusal of the vendor, the pre-emptor had nominated them witnesses, the lower Courts were held to be justified in their inference that he had complied with the exigency of the—— 184
See Hibah (1)
See Onus Probandi (5)
See Pre-emption (3)

MAINTENANCE.

A decree declaring a Hindoo female entitled to——from her father-in-law was held to bind the latter, notwithstanding a later

Page.

MAINTENANCE—*(Continued).*

Full Bench Ruling to the effect that a daughter-in-law was not entitled to such —— ... 293
See Hindoo Widow (1)

MAINTENANCE AND CHAMPERTY.

See Original Jurisdiction (14)

MAINTENANCE GRANT.

(1) Land held as a —— is resumable by the zemindar at the death of the grantees, whether it is in the hands of more immediate or in those of more remote members of the family ... 225
(2) The successors of a maintenance grantee, paying rent to the zemindar, cannot be regarded as holding adversely to him ... *ib.*

MALA FIDES.

Where plaintiff sues to establish her right under a kobala to land attached in execution of a decree against her husband, and the question arises whether she is the real purchaser or only a benamee for her husband, the Judge commits an error of law in resting its decision on a suspicion of —— ... 402

MALICIOUS PROSECUTION.

See Original Jurisdiction (13)

MALIKANA.

Where —— is in deposit with the Collector on behalf of proprietors who have refused settlement, the proprietors lose their right to recover it if they do not claim it for more than twelve years ... 520
See Limitation (15)

MALIKEE RIGHT.

The purchaser at an execution-sale of the——of a judgment-debtor is entitled to possession where such right has not been pledged or mortgaged, notwithstanding a deed of assignment by the previous owner directing the annual payment of interest due under a bond ... 445

MANAGER.

Where a —— has not filed accounts, and the Judge finds that the management cannot be continued with any prospect of the debt being paid within three years, he does right to remove the——and order the property to be sold ... 220

MARRIAGE-SETTLEMENT.

See Original Jurisdiction (17)

Page.

MEASUREMENT.

(1) *Semble.*—The circumstance that the plaintiff's vendor has paid the rent of land without insisting on the right to measure provided in the agreement, might be a ground for saying that the agreement was abandoned by the parties ... 275

(2) Where an application is made to a Collector under Act VIII. (B.C.) of 1869, s. 38, for the —— of certain lands, without any special application to determine the rates of rent, any proceedings regarding the rates of rent are inadmissible ... 480

(3) The fact of a —— and jummabundee having been effected under the provisions of Act VI. (B.C.) of 1862, s. 10, cannot deprive an intermediate tenant of the right of intervening under Act X. of 1859, s. 77, nor is the intervenor deprived of that protection even though Act X. no longer exists... 508

MESNE-PROFITS.

(1) Where an auction-purchaser at a revenue-sale sued to recover——, whereupon defendants plead limitation as to any wassilat not accruing within six years prior to the institution of the suit, and the pottahs contained no specification of instalments or any provision for interest on arrears falling due within the year, it was held that to determine limitation, the rent must be taken to be one falling due annually 126

(2) Where a decree is silent as to—— subsequent to the institution of the suit, they cannot be given by the Court executing the decree 160

(3) Where a suit is for —— alone, the Court executing the decree is not competent to fix the amount in the course of execution ... *ib.*

(4) The adjustment in execution of —— is not an execution of the decree, but a continuance of the suit, and the steps towards assessing them cannot be taken till possession is obtained; but they should be instituted promptly and diligently ... 328

(5) Where an auction-purchaser praying for possession and —— obtains a decree for possession, which says nothing about——, and no reason appears why —— should be refused, the High Court allows —— in execution ... 406

(6) Where D obtaining a decree for an undivided share of certain property seizes in execution a part of the share of one of the defendants, who having on appeal recovered possession, now sues for ——for the period of D's possession: HELD that the damages should be sought in the execution-proceedings when the possession itself is recovered ... 435

(7) The High Court in directing payment by way of damages of the proceeds of a specified share of certain property, leaves the lower Court nothing to determine except to assess the rents and profits of the share from which plaintiffs were wrongfully kept out of possession ... 461

See Damages (3)
See Decree (3)
See Foreclosure (4)
See Limitation (7)
See Set-off (1)

MINOR.

Where a suit on behalf of——s is decreed, the mere fact of the formal order under Act XL. of 1858 granting permission to their representative to appear for them not having been drawn up is not ground sufficient to dismiss the suit ... 525

See Act XL. of 1858 (1)
See Alienation (1)
See Onus Probandi (2)

MISJOINDER.

(1) Where in a suit for rent from defendants with whom separate engagements were made, plaintiff obtains a decree making each of them liable for the whole sum claimed: HELD that there is a——of the defendants, and that the decree is wrong in law, but that the objection would not have prevailed if the first Court had made each defendant liable in proportion to the rent he had engaged to pay... 133

(2) The mere fact of non-registration as separate holdings is no answer to the objection to a single suit on the ground of——. The Court should inquire whether the tenants have not in fact been dealt with as holders of separate tenures ... 334

See Mortgage (12)

MITAKSHARA LAW.

(1) In the absence of evidence to the contrary, a Hindoo must be considered to be governed by the ——where it prevails ... 341

Page.

MITAKSHARA LAW—*(Continued)*.

(2) As long as a Hindoo family under the —— is living in the joint enjoyment of family-property, such property can only be alienated by the joint consent of all the members, or in the event of such necessity as will, in the eye of the law, give the *kurta* power to alien as the agent of all, then by the *kurta* alone ... 552

See Hindoo Law (1)

See Original Jurisdiction (1)

MOKURRUREEDAR.

A —— of a village is entitled to possession of every beegha in it, unless the party cultivating can show a good title against him. A party setting up a khas tenure against a —— is bound to prove such tenure ... 447

MORTGAGE.

(1) Where a complete title as mortgagee is acquired before the Registration Act of 1864, the mortgage, though not registered, is good against a registered deed of sale executed after Act XX. of 1866 came into operation ... 3

(2) Where a mortgage-deed gives the mortgagee an option, in the event of a sale of the interests of the mortgagors, to throw up a lease held from them for the mortgaged jote, and claim immediate payment from the surplus sale proceeds, HELD that, before the mortgagors can withdraw the surplus proceeds, they must give notice of their intention to the mortgagee ... 47

(3) Where plaintiff in execution sold a property mortgaged to him under a bond, and the Court ordered the proceeds to be paid to defendant by whom the property had been previously attached, HELD that, on the sale of the whole interest of the debtor, plaintiff's lien was transferred from the property to the purchase-money, and he was entitled to the sale-proceeds ... 98

(4) Where a certain quantity of land is the subject of one zur-i-peshgee ——, the mortgagees taking possession in moieties, the mortgagor cannot recover any portion of the land till he has paid up all the money due upon the —— ... 262

(5) Where, in a suit for possession of mortgaged property the lower Courts did not give the plaintiff a decree conditioned upon the payment within a reasonable time of what was found due, the High Court, in special appeal, confined its decree to a declaration that the sum found due by the plaintiff was due on a given date ... 269

(6) Where a mortgagee agrees with three out of five mortgagors to take as payment a money-decree against three of them, the amount of the decree must be considered as a sum paid in reduction of the liability of the five ... 310

(7) A sale effected by the decree-holders in execution of a decree on a mortgage-bond is subject to all valid liens of prior date subsisting on the same property at the time of sale; but later liens must be postponed to that of the earlier decree-holders ... 322

(8) The decree on a —— bond should be satisfied out of the mortgaged property, and not out of the right, title, and interest which remain in the mortgagor. The purchaser at the execution-sale acquires all the interest which passed by the —— to the mortgagee, and any interest which remained in the mortgagor ... 360

(9) All that a second —— can pass from a mortgagor is his equity of redemption, and the decree in a suit on such —— can only authorize the sale of the equity of redemption, unless the first mortgagee is made a party, and his mortgage shown to be invalid, and the second —— to have priority ... *ib.*

(10) Where D, obtaining a decree against J, P, and others, attaches property pledged by them, and brings part of it to sale exempting P's share (which he purchased without notice to the other tenants), J paying the amount of the debt to save the property. J then sues P for contribution, and obtains a decree making her share liable, which he attaches and puts up for sale. D objects under Act VIII. of 1859, s. 246, but his objection is disallowed. He then pays up P's contribution, and sues to recover the amount ... 430

(11) A second mortgagee, under a —— bond, is entitled to notice of foreclosure under Reg. XVII. of 1806. 475

(12) Where a mortgagee sues for —— of the mortgaged property on the allegation that some of the defend-

Page.

MORTGAGE—*(Continued).*

ants under subsequent ——s and purchases had opposed him in obtaining possession, and to have it declared that the said ——s and purchases were inoperative, HELD that the plaintiff has but one cause of action upon his mortgage-deed, and is right in joining all the defendants in this suit ... 532

(13) The transaction of —— effected by a bye-bil-wafa is, under the regulations, essentially the same in regard to the relation between the mortgagor and the mortgagee as an English —— ... 543

(14) A mortgagee, on the occurrence of the default named in the deed, has a cause of action to recover possession if withheld from him adversely, but he has no cause of suit if possession by the mortgagor is from that time held and continued with his permission. As long as the relation created by the bye-bil-wafa can be said to subsist, it will probably be right to infer that the possession of the mortgaged property by the mortgagor was had with the permission of the mortgagee ... *ib.*

See Decree (5)
See Foreclosure (1) (2)
See Jurisdiction (3)
See Onus Probandi (3)
See Privy Council Rulings (10)
See Right of Suit (4)
See Zur-i-peshgee Lease (2)

MULTIFARIOUSNESS.

Where, in a suit for khas possession by a landlord, plaintiff claims a declaration that defendants had not a right to occupy the land at a fixed rent, HELD that such a declaration can rightfully be asked for only in a separate suit against each separate occupant. 221

N.

NON-JOINDER OF PARTIES.

The objection of —— cannot be made a ground of special appeal unless the want of parties has caused a wrong decision to be given ... 288

NOTICE.

(1) A —— under s. 216, Act VIII. of 1859, stands on a different footing from a summons or other —— which a party is bound to serve, and it must be presumed until the contrary is proved, that a Court has duly issued such —— when required by law to do so ... 5

(2) The issue of a —— of sale after the death of the original decree-holder and before any person has applied to be registered as the substituted decree-holder is not an irregularity warranting the setting-aside of a sale under Act VIII. of 1859, s. 256 ... 481

(3) Substituted service of —— is good only where the person who is to be served personally is keeping out of the way ... 482

(4) A —— issued within time under Act VIII. of 1859, s. 216, and actually served upon the judgment-debtor, constitutes a starting point for the commencement of a new period of limitation under Act IX. of 1871, Sch. II., art. 167, any question as to its *bona fides* notwithstanding ... 484

See Ejectment (2)
See Enhancement (14) (15)
See Foreclosure (3)
See Mortgage (2) (11)
See Resumption-proceedings (2)

O.

OATHS ACT (X. of 1873).

Section 11 of the —— is not applicable to the evidence of a defendant who has been examined under the usual form of oath, and not under any oath or form of affirmation under s. 8 ... 387

OBJECTION.

An —— against the decision of the lower Court ought not to have effect in special appeal, unless it indicates probable failure of justice ... 99

See Enhancement (16)
See Review (6)

OBLIGEE.

See Joint Liability (1)

ONUS PROBANDI.

(1) Where the auction-purchaser at an execution-sale of the property of a member of a joint Hindoo family under the Mitakshara Law sues to obtain possession of his purchase ... 116

(2) Where a party seeks to justify a title against a minor to property obtained during the minority of the owner ... 119

(3) In a suit by a Hindoo widow to recover a share of property alleged to have been inherited

Page.

ONUS PROBANDI—*(Continued).*

from her husband (J), and which had been mortgaged by her husband's brother (B), and sold under a decree obtained on the mortgage, where the question is raised whether the money for which the property was mortgaged had been borrowed by (B), for his own private use, or for the benefit of the family ... 171

(4) Where a party seeks to exclude one of the heirs to property from a share of the inheritance ... 348

(5) In a suit for an undivided share of property claimed by plaintiffs as heirs of the deceased owner, where defendants plead possession under a wuseutnama ... 400

(6) Where, in a suit to recover possession of land of which plaintiffs had been forcibly dispossessed, defendants admit the ownership to be with the plaintiffs, and pray to be allowed to hold possession under the jote tenancy ... 417

(7) Where a party alleges that no summons has been served upon him; and where he starts a *primâ-facie* case in support of the allegation by his oath ... 423

(8) In a suit by a landlord to obtain khas possession, where plaintiff's case is that defendant is holding under a lease the term of which has expired ... 510

See Ejectment (5)
See Evidence (5)
See Limitation (14)
See Mokurrureedar (1)
See Original Jurisdiction (3)
See Possessory Suit (4)
See Purdanasheen Women (1)

ORIGIN OF RIGHT.

A complainant is bound to bring forward in his suit all the grounds of origin of his right. A difference in the origin does not make a different cause of action ... 464

ORIGINAL JURISDICTION.

(1) Where the property of a rebel, subsequently sentenced to death and executed, is forfeited to the Government, and a suit is instituted, on behalf of his infant son, for the restoration of the estate, *first*, because it had been granted towards maintaining the title and dignity of the Thakoor, and was inalienable; and, *secondly*, because it was, subject to the Mitakshara Law, modified by the family-custom

Page.

ORIGINAL JURISDICTION—*(Continued).*

of primogeniture, and the plaintiff became, on his birth, a co-sharer with his father ... 17

(2) A ship-master, undertaking to deliver goods, subject to the exceptions and conditions mentioned in the bill of lading, takes on himself the consequences and contingencies other than the exceptions expressed in the bill of lading, or which are implied by law ... 40

(3) In an action for damages to goods by defendant's negligence as a common carrier, plaintiff need not give evidence of such negligence, unless the defendant shows the cause of injury to be within the exceptions ... *ib.*

(4) Where a person who has made a voluntary gift or settlement of an estate sells the same to another for value, how the conveyance operates ... 60

(5) Where a document is executed by one of two parties on behalf of himself and the other, only the person executing it need appear before the registering officer ... 68

(6) An agreement to let premises may be made by an agent; there is no law that it shall be signed by the principal ... *ib.*

(7) Where K leaves two widows, M and C, and a will providing that each should receive Rs. 5,000 for expenses, and that any unexpended balance, at the death of each, should go to his heirs, and the plaintiff, who was co-heir with his two cousins at the time of M's death, sues the heirs and representatives of N for his share of the balance of money placed by M with a firm of which N was a partner to be invested in N's own name, HELD that defendants have a right to have joined in the suit against them all the persons claiming any debt due, after M's death, to the heirs of the deceased husband: HELD that they must sue upon a liability arising from the contract between M and the defendant ... 71

(8) Act IX. of 1850, s. 32, applies, in the case of intestacy, to a suit against the administrator, and in the case of a legacy, to a suit against the executor or other persons liable to pay the legacy ... *ib.*

(9) The holder of a Government promissory note cannot arbitrarily insist on its being renewed, but is entitled to a renewal when the

Page.

ORIGINAL JURISDICTION—*(Continued).*

back of the note is so covered with endorsements that there is not room to write an endorsement distinctly ... 106

(10) Where the legal holder of a Government promissory note transfers a note, the Government is bound to act in accordance with such transfer, unless it has notice of an order of Court restraining the holder from parting with the note ... *ib.*

(11) An allonge defined ... *ib.*

(12) An action may be maintained against a person for procuring a suit to be instituted, if he did so maliciously and without reasonable or probable cause ... 138

(13) Maintenance and champerty are not offences in India, and the ground on which such agreements are considered void here is that they are contrary to public policy. Hence, in this country, no action lies against a person for maintenance ... *ib.*

(14) If a person, who has an interest in having a question decided, puts forward another to have it tried in a suit in that other's name, the Court has power to require the real plaintiff, though not appearing as such, to give security for the costs ... *ib.*

(15) The sending of a man to bid at an auction cannot be considered as conduct calculated (in the language of the Indian Contract Act, s. 237) to induce third persons to believe he had generally authority to buy ... 156

(16) Act X. of 1865, s. 4, cannot prevent the operation of a marriage-settlement, restraining a wife from anticipating or alienating property settled to her separate use; such restraint being created, not by the marriage, but by the settlement... 175

(17) The words "absolute owner" in the preamble of Act III. of 1874 explained ... *ib.*

(18) Act III. of 1874 has not retrospective effect, and is not intended to affect contracts made before, and to alter the rights of persons or the obligations arising out of them. *ib.*

(19) *Obiter dictum.*—Where a contract is made after Act III. of 1874 came into operation, there will be a remedy against the separate property of the wife, although there is a clause against alienation or anticipation in the marriage-settlement. *ib.*

Page.

ORIGINAL JURISDICTION—*(Continued).*

(20) A person having notice that another has, or claims, an interest in property for which he is dealing is bound to inquire what that interest is, otherwise he will be bound, although the notice was inaccurate as to the particulars or the extent of such interest ... 248

(21) Every Hindoo family is presumed to be joint in food, worship, and estate; but the evidence may rebut the presumption, and throw upon the person, asserting that the family is joint, the necessity of proof ... *ib.*

OUSTER.

See Act VIII. of 1859 (5)

OWNERSHIP.

Where the question as to possession is doubtful, a Civil Court is held to have committed no error of law in presuming —— from the fact of enjoyment of the fruits of trees growing on the disputed land ... 405

P.

PARTIES TO A SUIT.

(1) Parties refusing to be put on the record cannot, at the appellate stage, be made parties, and all that the Court is competent to do is to dismiss the suit for want of parties ... 35

(2) In a suit to set aside an order of a Commissioner of Revenue to obtain a settlement of a chur, and to have a declaration of title with possession, it was held that the Collector ought to have been made a party ... 52

See Costs (1)

PARTITION.

(1) The Collector need not be made a party in a suit by a shareholder of a joint estate to establish a right to ——, unless the public revenue is jeopardized by the contemplated —— ... 245

(2) A suit for —— of a family-dwelling-house may be brought, either by one of the members of the family, or by a purchaser from such member ... 294

(3) A shareholder in a joint estate cannot sue to separate from the estate a small portion which he desires to occupy for his own convenience ... 333

Page.

PARTITION—*(Continued).*

(4) Evidence of disputes or pecuniary loss or gain between the joint owners of a property is not necessary to enable a Court to make a ——; nor is the circumstance, that it is a right to perform the worship of an idol, one which deprives a joint owner of the right to —— ... 437

(5) Where a —— of the jumma is made of a revenue-paying mehal under Act XI. of 1859, s. 10, in the Collector's books, but no corresponding butwara under s. 11, though there was a private ——, HELD that the sale by the Collector passes to an auction-purchaser the share of the defaulters as it was registered in the Collector's books, that is, an undivided share in the entire estate ... 450

See Act VIII. of 1859 (26)
See Declaratory Decree (1) (3)
See Joint Proprietorship (2)
See Jurisdiction (1)

PAUPER SUIT.

Where a pauper application to sue, after being opposed in a Subordinate Judge's Court, is renewed successfully in the Moonsiff's Court, and a decree obtained, the defendant, at whose opposition the original application was rejected, cannot in appeal object to the Moonsiff's jurisdiction ... 120

PENALTY.

Even where a stipulation is intended to operate as a ——, it is incumbent on the Court to consider what amount of money would properly measure the damages consequent on the default ... 223

PLAINT.

Where a plaintiff seeks to introduce any change in his ——, he must show that the view he now puts forward was in the contemplation of the parties, so that they had an opportunity of bringing forward evidence on the point, and that the evidence on the record was directed to the substantial case set up. 347

PLEA.

See Special Appeal (4)

POSSESSION.

(1) The —— of the Collector is on account of all the parties interested in the talook, and in a suit in respect of it brought by one of them against the others, the cause of action arises after the attachment is withdrawn ... 265

(2) A person who has been in possession of land for 30 years cannot be treated as a trespasser ... 355

(3) The —— of waste and unoccupied land goes with the right, and the right is *primâ facie* in the zemindar of the estate to which the waste land belongs ... 419

(4) It would be reasonable to infer from the payment of interest that the mortgagor's possession was permissive; but such —— ought not to be treated as adverse, so long as the mortgagor asserts a title to redeem, and advances no other title inconsistent with it ... 543

See Act VIII. of 1859 (25)
See Construction (2)
See Onus Probandi (6) (8)
See Title (2)

POSSESSORY SUIT.

(1) Plaintiff, proving a wrong done him, though not to the extent of which he complains, is entitled to relief, though not to the extent or on the ground on which he asks it. Case in 12 W. R. 248 explained ... 2

(2) Where plaintiffs sue for possession by declaration of right to certain churlands as accretions to a putnee talook and for damages, alleging that they held possession under a mokurruree lease granted by defendant No. 3, but were ejected by defendant No. 1, who had purchased at a sale in execution of an *ex-parte* decree for arrears of rent obtained by defendant No. 2 against defendant No. 4 (the heir of defendant No. 3's vendor), HELD that plaintiff's cause of action accrued from the date of ejectment, and that what was sold to defendant No. 1 was the tenure itself, and not the rights and interests of defendant No. 4, who was the defaulter in the rent-suit. 196

(3) Plaintiff holding under a pottah from the zemindar is entitled to recover land unless defendant can show that he holds under a grant derived directly or immediately from the zemindar ... 326

(4) In a suit for khas possession of plots of land alleged by plaintiff to have fallen to her share under a butwara of a talook originally ijmalee, where defendants plead

Page.

POSSESSORY SUIT—*(Continued)*.

long possession under a shikmee right, HELD that plaintiff is not entitled to eject the defendants unless she can show that she has been in khas possession within 12 years previous to suit ... 351

(5) In a suit by an auction-purchaser for possession of certain rights and interests in joint property, the question whether plaintiff's predecessor was in separate possession ought not to be raised by the Court where the parties, who have a right to contest it, are not before the Court ... 406

See Cause of Action (3)
See Limitation (3) (8)
See Zur-i-peshgee Lease (1)

POTTAH.

See Construction (2)
See Evidence (1).

PRE-EMPTION.

(1) As soon as a contract is ratified by acceptance, and the vendor cannot legally draw back, it is time for the pre-emptor to step in ... 4

(2) A pre-emptor is not required to tender any price at the time of making his demand; and so long as a party claiming a right of shuffa pays the amount the Court considers proper, he brings himself in Court within a reasonable time ... *ib.*

(3) On a question of ——, the Court must act in strict accordance with the provisions of Mahomedan Law ... *ib.*

See Limitation (14)
See Mahomedan Law (1)

PRESUMPTION.

What the —— is of English Law as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord ... 246

See Original Jurisdiction (22)
See Ownership (1)

PRINCIPAL AND AGENT.

In a suit by a zemindar against a gomashta, where fraud is not alleged, the Court cannot assume it merely on the ground that the accounts were not filed till the close of the year of the determination of the agency ... 398

See Cause of Action (5)

Page.

PRIVY COUNCIL RULINGS.

(1) Ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his debts, because a son is born to him, unless the debt is illegal or has been contracted for an immoral purpose, in which case the son may not be under any pious obligation to pay it. A purchaser of joint ancestral property under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale in execution ... 56

(2) In consonance with the principles laid down by the High Court of Calcutta in several decisions, the Lords of the Privy Council held that, although the law of champerty was not applicable to the mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family-affairs, by an agreement between him and the real heirs that, if he should establish their claim, he should be entitled to a share of their estate; and that such an agreement could not be enforced, being something against good policy and justice, something tending to promote unnecessary litigation, and something that in legal sense is immoral ... 148

(3) Reg. II. of 1805, s. 3, which provides that the limitation of 12 years shall not be considered applicable to any private claims of right to immoveable property, if the party in possession shall have acquired possession by violence, fraud, or other unjust or dishonest means, must be considered with some strictness, otherwise the door would be opened widely to a large class of claims which ought properly to be barred; and the alleged fraudulent or forcible dispossession must be clearly established ... 165

(4) In a suit to recover possession of certain villages belonging to a talook which had been sold by Government for arrears of revenue where plaintiff alleged that they ought not to have been sold as they were not subject to revenue, the second defendant, who was the purchaser and in actual possession, pleaded limitation as a bar.

Page.

PRIVY COUNCIL RULINGS—*(Continued)*.

Plaintiff urged that a fresh cause of action arose in consequence of some proceedings of the Government by which they made a new grant of the villages to the second defendant, at an increased revenue:

HELD that such grant would not give a new cause of action, and cannot affect the time when the only cause of action arose to plaintiff ... 187

(5) Notwithstanding any thing contained in Act I. of 1845, s. 21, the members of a joint Hindoo family may sue to enforce rights acquired by them under a purchase, at a sale for arrears of revenue, made by the managing member in his own name, but on behalf of the family, though he is the sole certified purchaser ... 199

(6) In a suit in which damages were claimed for injuries occasioned to plaintiffs' railway and works by the bursting of two tanks upon defendant's land, defendant pleaded that the injuries were the result of influences beyond his control. The first Court held that defendant was not liable in the absence of negligence, and that he had not been negligent. This judgment was upheld by the High Court on appeal. Before the Privy Council it was contended that, by storing up water on his land, defendant rendered himself liable in damages in the event of its escaping to the injury of others, even though he might not have been guilty of negligence.

As the principle that a man, in exercising a right, may be liable, without negligence, for injury done to another, is inapplicable to rights conferred by statute, the Privy Council held that it was inapplicable to the case of defendant, which was analogous to that of persons on whom statutory rights had been conferred, and statutory duties imposed, for the tanks were ancient, and a part of a national system of irrigation recognized by law, and their maintenance was a duty in many instances devolving on zemindars (of whom defendant is one), who have no power to do away with the tanks in which large numbers of people are interested ... 279

(7) F, having purchased an estate on behalf of his minor daughter M, paid a part of the price, and gave a mortgage-bond for the rest. Upon this bond the vendor sued F personally, and as the guardian of his daughter, for the amount due, and obtained a decree declaring him alone liable. F then appealed to the Sudder Court on the ground that his daughter ought to have been joined in the decree, and then proposed a compromise, which was acquiesced in, and on which judgment was given to the effect that the decree should be allowed to declare the liability of the half share of the putnee which had been specially pledged as security, and the decree-holder be permitted to proceed against F only for such balance as might not be satisfied by the sale of the said property. Upon the daughter obtaining her majority, she and her husband applied for a review of this decision. The High Court held that the appeal to the Sudder Court had been by F alone, who had obtained an alteration of the decree in his own favour to the prejudice of his daughter, and that they had not materials to determine what were the rights between F and his daughter. The High Court accordingly reversed the decree of the Sudder Court:

HELD that they were not wrong, and that the vice of the compromise on which the Sudder Court's judgment had been based was that it was made without the party which was principally affected by it (*viz.*, the daughter) being sufficiently represented ... 290

(8) Defendant representing the grantees of a talook under a sunnud made in 1775 when the rent reserved was Samvat Azeemabadee Rs. 2,599, was sued by the auction-purchaser for enhancement of rent to Company's Rs. 8,465-2. The High Court held that under Act X. of 1859, he was not entitled to enhance, as from the time of the permanent settlement (1802) down to 1835, when sicca rupees were converted into Company's rupees, defendant and his predecessor had paid sicca Rs. 2,107 in lieu of Azeemabadee Rs. 2,599; but they allowed the Azeemabadee rupees to be converted into Company's rupees according to a fresh calculation, *i. e.*, at a higher

Page.

PRIVY COUNCIL RULINGS—*(Continued).*

rate than Rs. 2,248, at which the conversion had been made when sicca rupees ceased to be a legal tender: HELD that, as the case was before the High Court in special appeal, they had nothing to do with the evidence. There was no evidence upon which it could be found that Azeemabadee rupees 2,599 was of a higher value than Company's rupees 2,248; but, even if the High Court had the power of finding, and had found, such fact, yet, as the parties had agreed, from a period antecedent to the permanent settlement, that the Azeemabadee Rs. 2,599 should be converted into siccas at the rate which had been paid down to 1836, and which had then been converted into Company's rupees, the High Court was wrong in overruling the decision of the Judge who had tried the issues, and had dismissed the plaintiff's suit ... 317

(9) A testator having declared that his son should take nothing under his will devised his property to four trustees who were directed, as soon as certain legacies and annuities were paid and had fallen in, to convey the real estate to the persons entitled to the beneficial interest therein. The will was contested, and the final decision was that, upon the expiration of the first life-interest, which was vested in J, the testator's son was entitled as heir to the estate. The son subsequently brought this suit to have it declared that the interest of J had ceased by reason of his non-compliance with a clause relating to residence in the testator's boitakanah, and that the son, as heir, was entitled to the estate. J pleaded that there had been no breach of the condition:

HELD that J's delay in commencing residence was justified by his inability to get possession of the entire house from the trustees whom he had to sue, and by the unfit state of the house for residence owing to want of repairs:

HELD that, having regard to the nature of a boitakanah house and to Hindoo usages, the following acts amounted to the use of the house as a residence—*viz.*, J's going frequently, if not daily, to the house and usually spending several hours there, transacting all affairs of business there, and on some occasions receiving visitors in rooms properly furnished; besides keeping the house constantly open, adding new furniture, taking care of the library, and causing durwans and menial servants to live there ... 377

(10) A Hindoo widow (a Ranee) having conveyed to a *bonâ-fide* purchaser for full value an ancestral estate beyond her own life, a reversioner brought a suit for a declaration that she had only the power to grant a life-estate, and that after her death he was entitled to an estate in remainder. The Courts below in India were of opinion that he should only be entitled to recover the property after the Ranee's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property which was existing at the time of the conveyance:

HELD that a Hindoo widow might sell such an estate absolutely if it could be shown that the conveyance was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. There was no proof of such being the state of things in this case:

HELD that the judgment of the High Court was right, and that the mortgage having been paid by the purchaser, it was equitable that, when the plaintiff re-claimed the estate, credit should be given to the purchaser for such payment, which otherwise the plaintiff himself would have to meet ... 409

PROBATE.

The mere fact of an attesting witness to a will repudiating his signature does not invalidate a will, if it can be proved by the evidence of other witnesses of a reliable character that he has given false evidence ... 189

See Act X. of 1865 (2)

PROCEDURE.

(1) In a suit against a gomashta to obtain accounts of moneys which had come into his hands, it is not enough for the lower Courts to make a decree ordering the defendant to render *nikash* papers to

Page.

PROCEDURE—*(Continued).*

the plaintiff; but the Court should have these papers brought before it and examined, and determine whether they are correct and fair accounts between the parties. 191

(2) To set aside a decree obtained by fraud, the proper course is to apply to the Court which passed it, either within the time specified in Act VIII. of 1859, or at any time (so that it be done with due diligence), for a review and alteration of the judgment ... 213

(3) Circumstances under which it is competent to a Judge to determine a case on the day when the issues are settled ... 426

See Act VIII. (B. C.) of 1869 (6)
See Execution (4)
See Mortgage (5)

PUBLIC POLICY.

An agreement between members of different somajes to have social intercourse with each other, and to inter-marry, is not opposed to ——, but rather in accordance with it ... 517

PUBLIC ROAD.

See Right of Suit (6)

PURCHASER.

(1) Where the ——, in execution-sale of the rights and interests of a judgment-debtor, takes property held benamee by that judgment-debtor without any beneficial interest therein, he has no defence against the claim of the real owner who was in possession up to the date of the sale ... 189

(2) Where a decree-holder, purchasing his judgment-debtor's interest in certain property at an execution-sale, obtains possession according to the certificate, and sells to a *bonâ-fide* —— without notice of the difference between the certificate and the order of sale, the latter has a good title ... 408

See Benamee (1)
See Original Jurisdiction (21)

PURDANASHEEN WOMEN.

A Hindoo purda woman is entitled to receive, in the Courts of this country, that protection which the Court of Chancery in England always extends to the weak, ignorant, and infirm, and to those likely to be imposed upon by the exertion of undue influence ... 443

Page.

PUTNEE LEASE.

The fact of a putneedar having made separate payments of rents, of having registered his name with each of the sharers, and of being prepared to enter into a fresh engagement with one of them, does not amount to a cancellation of the original lease and substitution of a new lease ... 50

PUTNEE TALOOK.

Act VIII. (B. C.) of 1869 applies to putnee talookdars; the term "under-tenant" being wide enough to include them ... 431

PUTNEEDAR.

The status of a —— or dur-putneedar does not depend upon registration or the consent of the zemindar ... 299

R.

RECEIPT.

See Evidence (13)

REDEMPTION.

See Mortgage (4)

RE-FORMATION.

See Certificate (1)
See Regulation XI. of 1825 (1) (2) (3) (4) (5)

REGISTRATION.

(1) The —— of a document under Act XX. of 1866 is complete, where all the requirements stated in ss. 66 69 have been fulfilled; and the certificate mentioned in s. 68 is *primâ-facie* evidence of such completeness ... 319

(2) Where a kobala bears the certificate mentioned in s. 68, Act XX. of 1866, a memorandum from the Sub-Registrar that he is not satisfied that the heirship of the party conveying has been established in no way affects the ——. *ib.*

See Act XX. of 1866 (2)
See Cause of Action (1)
See Decree (5)
See Document (2)
See Original Jurisdiction (5)
See Putneedar (1)

REGISTRATION ACT (VIII. OF 1871).

The new ——, s. 48, does not apply to a case where there is no transfer or making-over of possession ... 273

See Mortgage (1)
See Original Jurisdiction (5)
See Unregistered Title (1)

Page.

REGULATION VIII. OF 1793.
See Enhancement (6)

REGULATION II. OF 1805.
See Privy Council Rulings (3)

REGULATION XVII. OF 1806.
See Foreclosure (1)

REGULATION V. OF 1812.
Where a Judge has made an order in the terms of ——, s. 26, as modified by Reg. V. of 1827, he is *functus officio*, and the Collector as manager and holder takes, at his own proper risk, every thing that he finds to be part of the joint estate ... 212

REGULATION XI. OF 1825.
(1) If the re-formation of diluviated soil can be identified with the original site, and the owner of such site is known, —— does not deprive him of his property in the re-formed land ... 238
(2) Whether the re-formed land begins in the middle of the stream or from either bank, and whether the re-formation is by accretion to other land or not, makes no difference in the principle of the law that, if the site can be identified, the land shall belong to the owner of the site ... *ib.*
(3) Land which has become the property of a party by the operation of the first clause of s. 4, ——, cannot be taken away from him by the operation of the second clause. But the second cannot give him property not acquired by accretion. *ib.*
(4) The term "original owner" in cl. 2, s. 4, ——, explained ... *ib.*
(5) A party failing to prove a title to re-formed land by original ownership of site cannot fall back upon a title by ownership for twelve years ... *ib.*
Section 4, clause 3. *See Diluviated Land* (1)

REGULATION V. OF 1827.
See Regulation V. of 1812 (1)

RELIGIOUS ENDOWMENT.
(1) Plaintiffs, who are the wives of R, appointed shebait under his father's will, have no right as shebaits against R, and cannot maintain a suit for declaration of the rights of the idols in certain property, and for possession by setting aside an execution-sale; and they having omitted to make R a defendant, the Court cannot make him a party under Act VIII. of 1859, s. 73, without a material variation of the plaint ... 97
(2) A suit for the removal of the present mohunt of a —— and for the appointment of petitioner in his place is not of such a nature as is contemplated by Act XX. of 1863 ... 364

REMAND.
(1) Where an order of —— passed by the High Court on review was twice repeated on the District Judge having neglected to carry it out, the High Court declined in special appeal to go behind the ——order, or hold that the District Judge had done wrong in finally carrying it out ... 205
(2) Where the Moonsiff dismisses a suit as barred after taking all the evidence offered on the merits, the Lower Appellate Court is not competent to —— the case for re-trial. 224
See Act VIII. of 1859 (10)
See Special Appeal (8)

RENT.
(1) In a suit for —— against one of two co-lessees under a joint kubooleut, it does not avail the defendant to plead that plaintiff had been content to receive from him as his half share half only of the ——, and that this conduct amounted to an agreement that defendant was not liable for more than half ... 285
(2) In a suit for —— where the kubooleut stipulates for payment in monthly kists, the ryot is bound by its terms, notwithstanding that the landlord had not strictly enforced them previously ... 428
(3) In a suit for —— where a third party intervenes, the Court does not err in law in going into the question of title, where this is necessary in order to decide who has been in the enjoyment of ——. 440
See Appeal (2)
See Cess (1)
See Evidence (1)
See Review (2)
See Settlement-proceedings (2)

REPRESENTATION.
A person appointed manager of a lunatic's affairs by consent obtained while she was in sound mind, and who is capable of making a defence on her behalf, may represent her in a suit, although not

Page.

REPRESENTATION—*(Continued)*.

appointed under the law as representative ... 33

See Right of Suit (5)

RES ADJUDICATA.

(1) In a suit to recover possession of a julkur in which defendant raised the plea of *res adjudicata*, basing it upon a judicial decision against a predecessor of the plaintiff of which decision defendant filed a copy of a copy, HELD that, as plaintiff did not object to the admission of the document as evidence at the proper time, it was too late to raise the objection in the Appellate Court ... 216

(2) Plaintiff cannot, for the first time, in the appellate stage, found his title on adverse possession for a long time, where such a case was not set forth in the pleadings, and is inconsistent therewith ... *ib.*

(3) Where the cause of action is the same in substance in both suits, and where the former suit was so constituted that the parties to the present suit were in direct contest with each other, and had full opportunity of asserting their rights, the decision in the former suit is —— ... 282

(4) Where a suit for rent is brought by the zemindar of a revenue-paying estate against an under-tenant, and the defendant pleads that the land is lakhiraj, the decision makes the issue a ——. 362

(5) A suit for declaration of plaintiff's right to an accretion to mouzah L is barred by a judgment in a former suit in which he claimed the same land as an accretion to mouzah R ... 464

See Act VIII. of 1859 (8)

See Special Appeal (10)

RESUMPTION.

See Maintenance-grant (1) (2)

RESUMPTION-PROCEEDINGS.

(1) The decree of the Resumption Court as to the liability of a resumed mehal to be assessed with the Government demand is final, and the decision in a resumption-suit as to proprietary rights and claims to land mentioned in the resumption-decree is not open to the jurisdiction of the Civil Court. 48

(2) In —— it is not necessary to give notice to a party not in possession, or to make him a formal party to the suit ... *ib.*

Page.

REVENUE SETTLEMENT.

See Enhancement (1)

REVERSIONER.

(1) A person claiming as a —— is bound, before he can succeed against a minor in possession, to pledge himself to a specific case, and to prove it; and the lower Court does wrong in raising an issue not based on some specific affirmative allegation made as part of plaintiff's case ... 469

(2) Decision in a suit by an alleged —— to set aside a zur-i-peshgee deed and ikrarnamah executed in favour of defendant No. 2 by A K, the widow of one F S, the defence being that the first defendant K M was the daughter of A K and F S, and she being alive, plaintiff had no right ... 472

See Privy Council Rulings (10)

REVIEW.

(1) An application for ——, if made within reasonable time and with due diligence, is a sufficient cause for delay in preferring an appeal if the appeal is preferred as speedily as may be after the other proceedings ... 79

(2) Where claims for rent were decreed by a Deputy Collector on the basis of a decree for a kubooleut, and the latter decree was subsequently set aside in appeal, the remedy open to the judgment-debtors under the former decree is to petition the Deputy Collector for a review of his decisions ... 161

(3) The Full Bench Rulings (20 W. R., p. 84) held to apply to cases in which a regular appeal is preferred on the ground that the admission of the —— was not justified by the evidence ... 183

(4) Where a —— is admitted without sufficient legal reason, the judgment passed on —— is passed without jurisdiction, and may be reversed in appeal ... 268

(5) Where a lower Court with materials before it grants an application for a ——, the order admitting the —— is not open to be questioned in special appeal ... 288

(6) Where, owing to the conduct of the opposite party, an applicant for —— had no opportunity of showing that a new piece of evidence which he adduced was not within his knowledge, or could not be adduced by her when the decree was passed, such opposite party

Page.

REVIEW—*(Continued).*

cannot afterwards be allowed to object on the ground of the Full Bench Ruling in 20 W. R., p. 84. 399

(7) Where, during the pendency of a suit for rent, plaintiff applies for a postponement on the ground of being unable to obtain a copy of a document applied for from the Collectorate, and the Moonsiff refuses and gives him a modified decree, HELD that a —— is properly admitted under Act VIII. of 1859, s. 276 ... 446

See Evidence (4)
See Interest (1)

RIGHT OF GOVERNMENT.

See Jungle Land (1)

RIGHT OF OCCUPANCY.

(1) The continuous possession for 12 years must be a possession under one and the same right. This right may be in its inception joint with other persons, and, by the death of co-sharers, ultimately become a sole right without its continuous nature being affected. 51

(2) A tenant's —— is not avoided by the operation of Act VIII. (B. C.) of 1865, s. 16 ... 133

(3) A —— under the Rent Law not being transferable, tenants, who have such a right, by quitting the land, sever all connection between themselves and it, and the landlord is entitled to re-enter ... 200

(4) Land held as one tenure is either subject to a —— as a whole, or it is not subject to any —— as to any part of it ... 228

(5) The conduct and acts of a zemindar may be such as to take a case out of the purview of the F. B. Rulings in 22 W. R., p. 22 ... 493

See Execution (5)
See Full Bench Rulings (1)
See Tenancy (1)

RIGHT OF PASSAGE.

See Riparian Proprietorship (1)

RIGHT OF SUIT.

(1) Ryots interfered with in the occupation of their land have a right to sue for an injunction restraining the trespasser; but, when they are ousted, the zemindar has a —— against the trespasser to recover possession ... 47

(2) Conveyance of property by a person who had been in possession

Page.

RIGHT OF SUIT—*(Continued).*

and enjoyment for years before she was wrongfully ousted gives a —— for immediate possession... 99

(3) A proprietor of land has no —— to compel his neighbours to agree to a particular line of boundary being marked out between his lands and theirs, where he does not venture to say that they have, by any overt act, transgressed that boundary ... 134

(4) Where plaintiffs, having sued for possession of property mortgaged under a zur-i-peshgee lease, and obtained a decree for possession on their depositing the sum found to be due on the mortgage, delay to apply for execution till four years after, when they allege the money has been paid off by the usufruct of the land; and their application being refused, they sue for possession, alleging that the debt has been discharged by the usufruct, HELD that the present cause of action within the meaning of Act VIII. of 1859, s. 2, is a fresh cause of action as compared with the former one, which was for an adjudication of the state of the accounts between the parties up to a certain date, whereas the latter has reference to the accounts since that date ... 172

(5) A suit for compensation in respect of rents due according to the terms of a bond may be brought in the name of a lunatic, while he is yet alive, by the manager of his estate acting as his next friend, or for arrears accruing after his death by the successor of the lunatic ... 200

(6) In respect of the obstruction of a public road ... 462

See Act VIII. (B. C.) of 1869 (6)
See Encroachment (1)
See Partition (2)
See Religious Endowment (1)

RIGHT OF USER.

(1) A plaintiff's —— of a pathway to certain premises cannot be affected by the existence of another path by which he may obtain access to the same premises ... 302

(2) A —— over a pathway may be established, notwithstanding that the path passes over waste land ... 340

(3) A temporary interruption, such as during the rainy season, cannot affect a —— ... *ib.*

Page.

RIGHT TO EASEMENTS.

The rule that the —— goes with the property when sold by the owner himself, applies also when the property is sold by the Court in execution of a decree against him ... 522

RIPARIAN PROPRIETORSHIP.

The bank of a river is not regarded by the law as public property. It may be, and constantly is, private property, though there may be public rights of passage over it for the purposes of navigation 276

ROAD-CESS RETURN.

See Evidence (2)

S.

SALE.

See Attachment (1)

SALE CERTIFICATE.

The Court refuses to go to facts lying behind a —— for the purpose of contradicting its terms ... 181

SEPARATE PAYMENTS.

See Putnee Lease (1)

SET-OFF.

(1) An indefinite claim for damages in the nature of unascertained mesne-profits cannot be pleaded as a ——against a specific claim for rent of later years: such damages must be sued for separately ... 1

(2) In a suit for rent, money in deposit with plaintiff is no——against plaintiff's claim, unless it was due to defendant at the time the suit was brought ... *ib.*

(3) A claim under Act VIII. of 1859, s. 121, —— against a plaintiff's money-claim, must be of the nature of a debt, and not a claim based upon principles of equity, *e.g.*, a claim to contribution ... 15

(4) To admit of a ——, the claim and counter-claim must be so connected that the truth and completeness of the one cannot be judged of without reference to the other *ib.*

(5) Where a debtor sells goods to his creditor, and requests that a portion only of the price should be appropriated to part-payment of existing debts, and the remainder held against the price of goods to be afterwards purchased by the debtor from the creditor, such request is not binding on the creditor without his consent ... 209

See Decree (2)

Page.

SETTLEMENT PROCEEDINGS.

(1) A land-owner seeking to bind his tenants by the —— should show that they were parties to the inquiry held by the Collector into the nature and extent of their holdings ... 455

(2) Where increased rent is imposed in the course of ——, the Collector's jummabundee must show the consent of all the ryots before they can be held to be bound by it ... 540

SHEBAIT.

See Religious Endowment (1)

SIGNATURE.

See Special Appeal (7)

SMALL CAUSE COURT.

A suit to recover a quantity of rice, or its value, in return for some paddy taken by defendant under contract, is cognizable by the —— within the meaning of Act XXIII. of 1861, s. 27 ... 259

See Contract Act (2) (3)

See Damages (3)

See Jurisdiction (3) (5) (8)

SOCIAL AND RELIGIOUS CUSTOMS.

See Jurisdiction (12)

SPECIAL APPEAL.

(1) A judgment showing on the face of it want of due consideration of evidence and the introduction of foreign matters, may be brought up to the High Court in —— ... 9

(2) A case is remanded in —— for re-trial on the merits when the Lower Appellate Court omitted to frame issues between the parties 31

(3) Where the Lower Appellate Court's decision is fundamentally wrong, and the liability of the defendants in the essential matter of suit has not been properly tried, the High Court, though not warranted to interfere in ——, is justified in interfering under their general powers of supervision ... 44

(4) A plea may be taken in ——, though not set out in the plaint, if the plaint did set out all the facts necessary to support the plea, and there was no omission calculated to mislead the Court ... 73

(5) Where a Moonsiff's decision as to whether the value of a suit exceeds the limits of his jurisdiction is not appealed against in the Lower Appellate Court, the question cannot be entertained anew by the High Court in —— ... 124

Page.

SPECIAL APPEAL—*(Continued)*.

(6) Where the Courts below have without evidence found against the plaintiff on the question whether certain land is protected from enhancement, the High Court in ——, seeing that documents have been received in proof of payment of rent without any evidence of authenticity, sets aside the finding, and declares that it shall not operate as a bar to the issue being raised in any future suit ... 170

(7) The High Court in ——, finding that the lower Court was led into error in the comparison on which it relied between the signature in a mortgage-bond and that in a vakalutnama, reversed its decision and remanded the case for re-trial ... 272

(8) The High Court remands a case for re-trial where the misapprehension of the state of the evidence and the omission to consider the testimony of witnesses renders the trial imperfect and incomplete ... 278

(9) A mistake of accounts not being an error in law or procedure is not a ground for ——. The remedy is in an application for review ... 310

(10) When a plea of *res judicata* ought to have been taken up by the Lower Appellate Court, the High Court in —— ought not to refuse to allow it ... 362

(11) The High Court is entitled in —— to examine the evidence of a witness summoned by the Lower Appellate Court under Act VIII. of 1859, s. 355, which was not before the first Court ... 369

(12) Where there is a conflict of opinion between the Court of first instance and the Lower Appellate Court as to the character and sufficiency of the evidence, the High Court in —— decides the question of evidence ... 487

(13) Where a Lower Appellate Court misconstrues the evidence of witnesses, acts contrary to s. 83, Act I. of 1872, in not presuming the accuracy of a thakbust map, and passes no opinion on an Ameen's inquiry on which the first Court has laid stress, its decision is reversed in —— ... 519

(14) Parties are not entitled in —— to set up a new case involving an argument entirely different from that raised in the Courts below, and a state of facts inconsistent with their statements there ... 552

See Ameen (1)
See Full Bench Rulings (2)
See Issues (1)
See Jurisdiction (2)
See Objection (1)
See Remand (1)
See Review (5)

SPECIAL COMMISSIONER.

The report of a —— is inadmissible as evidence ... 231

SPECIFIC PERFORMANCE.

Where a purchaser of a right to sue for possession sues for ——, and it is not shown that he has left undone any thing necessary to entitle him to what he claims, he is entitled to insist on —— of his contract with his vendor ... 188

See Assignee (2)
See Conveyance (1)
See Ejectment (1)

STAMP.

(1) A plaintiff seeking to set aside a solehnama, and thereby arriving at the possession of immovable property, ought not to be allowed to bring his suit on a —— of Rs. 10, and to frame it as if it were to set aside an adoption ... 338

(2) A suit brought according to the provision at the end of Act VIII. of 1859, s. 246, to establish the right of the person bringing it, must bear a —— according to the value of the property ... 422

(3) Where no question of valuation for the purpose of determining the amount of institution fee payable on a suit has been raised either in the Court of first instance or in the grounds of appeal, the Appellate Court is not competent to raise such a question... 433

See Court Fees Act (2)

STATUTORY RIGHT.

See Privy Council Rulings (6)

SUB-LEASE.

Where a —— specifies no term of tenancy, it cannot be construed to have effect beyond the interest of the grantor ... 274

See Lessee (1)

SUCCESSION.

Where a party claims as representing a particular person, and the defendant succeeds in showing

Page.

SUCCESSION—*(Continued).*

that there is another person in existence who is a preferable heir, that is an answer to the plaintiff's suit, which ought accordingly to be dismissed ... 358
See Hindoo Law (3) (5)

SURETY.

The fact of a ——, for the payment of the price of goods purchased, signing a voucher for them, cannot make him primarily responsible... 209
See Act XX. of 1866 (1)
See Joint Liability (1)

SURVEY MAP.

See Evidence (5)

T.

TALOOK.

What is meant by a "talook" ... 326

TALOOKDAR.

See Act VIII. (B.C.) of 1869 (4)
See Ejectment (6)

TANKS.

See Privy Council Rulings (6)

TENANCY.

(1) A tenant rightfully occupying land under some one representing the landlord cannot be ejected before his —— has terminated, even though he has no right of occupancy under Act VIII. (B. C.) of 1869, s. 6 ... 195
(2) Parties in possession make themselves tenants by use and occupation, and may be sued for rent, even though not registered by the zemindar ... 334

TENANT.

(1) The word *projah* does not define the status of a —— ... 398
(2) A —— holding at a particular rent, and being unlawfully evicted, does not necessarily cease to hold at that rent; and, if he is restored to possession, he is restored to his original holding ... 487
See Tenancy.

THIRD PARTIES.

See Act VIII. of 1859 (19)
See Arrears of Rent (4)

TIMBER TREES.

See Jungle Land (1)

Page.

TITLE.

(1) A suit may be maintained for a declaration of —— which may be used as a means for the withdrawal of a certificate under Act XXVII. of 1860 ... 301
(2) Plaintiff failing to prove specific ——, but showing a clear *bonâ-fide* possession, is not shut out in consequence of the mere form of his plaint ... 391
See Appeal (2)
See Limitation (12)
See Rent (3)

TRANSFER.

See Act XI. of 1859 (1)
See Full Bench Rulings (1)
See Registration Act (1)
See Right of Occupancy (5)

TRESPASS.

See Right of Suit (1)

TRESPASSER.

Trespassers in occupation of land cannot enter into engagements binding on the person lawfully entitled, especially where the latter is a purchaser at a sale for arrears of revenue ... 126

TRUST.

Where a suit under Act XX. of 1863 is for the benefit of a ——, and no party to the suit is in fault, the Court may order the costs to be paid out of the estate; but, when a person is in fault, no such order ought to be made ... 21

U.

UNDER-TENURE.

If a decree is given in favour of a sharer in a joint undivided estate for his share of the rent of an —— situate in such estate, he is not allowed by law to put up for sale a portion of the —— ... 421
See Act VIII. (B.C.) of 1865 (2)
See Act VIII. (B.C.) of 1869 (8)

UNIFORM PAYMENT OF RENT.

How to support a finding of —— for 20 years [Act VIII. (B.C.) of 1869, s. 4] ... 487

UNREGISTERED TITLE.

An —— set up against a registered one must be shown to be genuine and complete, and to have been followed by peaceful possession before the passing of the Registration Act ... 12

Page.

V.

VENDOR.
See Liability (2)

W.

WAIVER.
The doctrine of acquiescence does not apply in this country to cases in which the period within which a suit can be brought is laid down by statute ... 267

WASTE LAND.
See Possession (3)
See Right of User (2)

WILL.
See Privy Council Rulings (9)
See Probate (1)

WITNESS.
If a defendant's case is not closed, he has a right to have his ——es summoned, and to get an opportunity of producing them. Where this right is refused by the first Court, and defendant's objection is not noticed by the Lower Appellate Court, the High Court, in special appeal, remands the case for a fresh hearing ... 296

WRITTEN STATEMENT.
(1) The admissibility of a —— how determined ... 231
(2) Where a —— subsequently put in by the plaintiff only explains his plaint, and the defendant is in no way prejudiced, and the evidence of both parties is taken, there is no objection to its admission ... 377

Z.

ZEMINDAREE RIGHTS.
—— are only in abeyance during periods of temporary settlement; and possession under a permanent settlement is adverse from the date on which the permanent settlement is made ... 520

ZUR-I-PESHGEE DEED.
See Reversioner (2)

ZUR-I-PESHGEE LEASE.
(1) Where plaintiff, who was in possession of a house under a ——, is ejected by defendants other than defendant No. 5, under color of their having bought the right, title, and interest of No. 5 at an auction-sale, and sues to recover from the defendants jointly the principal secured by the lease with interest, HELD that the defendants other than No. 5, not being privy to the contract, are not liable to be called on to satisfy its terms, and the suit should have been for recovery either of possession or damages ... 44
(2) Where land has been for many years in continuous possession under a ——, it cannot be mortgaged to a third party to the prejudice of the lessee's interest; such mortgage can only be given subject to the zur-i-peshgeedar's right ... 199

TABLE OF CASES

(CIVIL RULINGS).

Page.

A.

Abdool Gunnee *v.* Bhuttoo Sheikh ... 350
Abdool Luteef *v.* Mahomed Kamil ... 369
Abelak Roy *v.* Guggun Bhuggut ... 268
Aguilar, Mrs. *v.* Woomesh Chunder Shaw 209
Ahfutoonnissa *v.* Goluck Chunder Sen ... 77
Ajoodhya Pershad *v.* Jowahir Lall ... 484
Ajoodhya Pershad Singh *v.* Hur Buksh Singh ... 170
Amanoollah *v.* Mahomed Nasir ... 442
Amar Chand Lahattah *v.* Bukshee Pyeka 228
Ameen Buksh *v.* Bhyro Mundul ... 493
Ameer Buksh *v.* Yusoof Ali ... 489
Ameeroonissa Begum *v.* Gopal Sahoo ... 134
Anund Kristo Bose *v.* Mr. Verner ... 305
Anund Mohun Ghuttuck *v.* Soorjo Kant Acharjee Chowdhry ... 538
Asgur Ali Chowdhry *v.* Muhubbut Ali ... 403
Ashrufoonissa Begum *v.* Shaikh Tosudduck Hossein ... 260
Audh Beharee Singh *v.* Dost Mahomed... 185
Aukhil Chunder *v.* Tripoora Soonduree... 525
Aukhil Chunder Mookerjee *v.* Chunder Coomar Mitter ... 414
Auseemoonissa Khatoon *v.* Ameeroonissa Khatoon ... 204

B.

Baboo Lall Jha *v.* Shaikh Juma Buksh ... 116
Bal Kishen Mohapattur *v.* Bistoo Churn 532
Bama Soonduree Dabee *v.* Kashee Kishore Roy Chowdhry ... 245
Bama Soonduree Dabee *v.* W. Verner ... 136
Bama Soonduree Dossee *v.* Soorjo Coomar Roy ... 338
Banee Madhub Bukshee *v.* Radha Madhub Mojoomdar ... 196
Banee Madhub Dutt *v.* Nund Lall Mojoomdar ... 123
Beer Chunder Manicko Bahadoor *v.* Abjul Goonin ... 355
Beharee Lall Doss *v.* Radha Nath Doss ... 229
Belaet Khan *v.* Rash Baharee Mookerjee 549
Bheem Chunder Howlee *v.* Nirtomoye Dossee ... 368
Bhoobun Joy Acharjea *v.* Anund Lall Chowdhry ... 47
Bhoobunessur Roy Chowdhry *v.* Juggessuree Chowdhrain ... 413
Bhoobunessuree Chowdhrain *v.* Manson... 160
Bhubo Soonduree Chowdhrain *v.* Kasheenath Acharjee ... 351
Bhugeeruth Doss Koiburto *v.* Chundee Churn Koiburto ... 462
Bhuggobutty Churn Bajpaye *v.* Sharoda Pershad Sookul ... 298
Bhugobat Singh *v.* Ram Adhin Singh ... 330
Bhugwan Chunder Roy Chowdhry *v.* Jegur Khan ... 456
Bibee Rukhun *v.* Shaikh Ahmed Hossein 443
Bibee Tajim *v.* Syed Wahed Ali ... 118
Biddia Soonduree Dossee *v.* Doorganund Chatterjee ... 97
Bikan Singh *v.* Parbutty Kooer ... 99
Bimola Soonduree Dossee *v.* Kaleekissen Mojoomdar ... 5
Binode Lall Pakrashee *v.* Gireedhur Chuckerbutty ... 392
Bishno Chunder Bhuttacharjee *v.* Shoshee Mohun Pal Chowdhry ... 277
Bishnoo Persad Bunnick *v.* Ram Coomar Deb ... 2
Bissambhur Shaha *v.* Shib Chunder Shaha 286
Bissendoyal *v.* Schaeffer ... 68
Bissonath Sircar *v.* Tara Prosonno Mozoomdar ... 482
Bolakee Lall *v.* Radha Singh ... 223
Boodhun Singh *v.* Mussamut Luteefun ... 535
Brohmo Moyee Dassia *v.* Anund Chunder Chatterjee ... 120
Brohmo Moyee Dossee *v.* Mudhoo Soodun Ghose ... 278
Brojo Nath Mookhopadhya *v.* Protab Chunder Thakoor ... 296
Brojonath Tewaree *v.* Grant ... 13
Bujrungee Dutt Pattuck *v.* Shaikh Morad Ali ... 7
Buldeb Surmah *v.* Tara Nath Surmah ... 416
Bunsee Singh *v.* Nuzuf Ali Beg ... 328
Bunsee Singh *v.* Shaikh Aoladh Ahsan... 552
Buzrung Sahoy Singh *v.* Mantora Chowdhrain ... 119
Bykunt Kyburto Doss *v.* Shushee Mohun Paul Chowdhry ... 526
Bykunt Nath Mookerjee *v.* Prionath Ghose 447

C.

Chedambara Chetty *v.* Runga Krishna Mathu Vira Pucharya Naickar ... 148
Chotay Lall *v.* Chumroo Lall ... 496
Chumun Lall *v.* Soorujmun Jha ... 263

Page.

Chumutkar Mohinee Dossee v. Raj Rakhal Mitter ... 479
Chunder Cant Mookerjee v. Ram Coomar Coondoo ... 138
Chundermonee Dabia v. Mcharjan Bibee . 185
Chunder Nath Bhuttacharjee v. Juggut Chunder Bhuttacharjee ... 337
Chundoo Vistee v. Sodagur Vistee ... 457
Collector of Beerbhoom v. Sreehurry Chuckerbutty ... 512
Collector of Hooghly v. Raj Kristo Mookerjee ... 234
Collector of Rajshahye v. Shama Soonduree Debia ... 324
Coombe v. Caw ... 257
Court of Wards v. Radha Pershad Singh 238
Crowdy, G. W. v. Goburdhun Roy ... 491
Crowdy, L. G. v. Omrao Singh ... 476
Crowdy, W. S. v. Poorun Singh ... 480

D.

Deb Chunder Doss v. Joy Chunder Pal... 461
Delauny, J. P. v. Mussamut Bibee Jan 494
Dhunput Singh Bahadur v. A. J. Forbes 104
Dhurm Lall Roy v. Dusruth Singh ... 322
Dinonath Gangooly v. Nursingh Pershad Doss ... 90
Dole Gobind Goopto v. Batoo ... 405
Dom Kumar v. Soorjo Dutt Surmah ... 259
Doolal Chunder Deb v. Goluck Monee Debia ... 360
Dowlut Kooer v. Burma Deo Sahoy ... 54
Duljeet Gorain v. Rewul Gorain ... 435
Dwarka Lall Mundur v. Nirunder Narain Singh ... 461
Dwarkanath Dutt v. Bhathu Hawoldar... 457
Dwarka Singh v. Solano ... 38

E.

Emam Ali Mestory v. Ator Ali Khan ... 133
Enayet Ali v. Mahomed Zuhoorul Huq... 534
Eshan Chunder Bose v. Prannath Nag ... 512

F.

Forbes v. Ram Lall Biswas ... 51
Futtick Chunder Chatterjee v. Juggut Mohinee Dabee ... 348
Fyezoonissa v. Sadutoollah ... 3

G.

Ganendro Mohun Tagore v. Juttendro Mohun Tagore ... 377
Gindharee Lall v. Kantoo Lall ... 56
Gobind Chunder Aooch v. Bamun Doss Mookerjee ... 481
Gobind Chunder Mookerjee v. Doorgapersaud Baboo ... 248
Gobind Chunder Purkaisto v. Ameenuzzumah Chowdhry ... 292
Gobind Chunder Roy Chowdhry v. Ram Chunder Chowdhry ... 421
Gobind Mahtoon v. Ram Khelawun Singh 478
Gocool Coomar v. Bhichook Singh ... 1

Page.

Goor Dyal Roy v. Deka Noonya ... 446
Gooroo Doss Dutt v. Ooma Churn Roy ... 525
Gooroo Doss Roy v. Issur Chunder Bose ... 246
Gopee Kisto Gossamee v. Nilcomul Banerjee ... 79
Gossain Dowlut Geer v. Bissessur Geer ... 207
Gour Churn Soor v. Jugobundhoo Sen ... 437
Gour Gobind Sircar v. Huree Mohun Banerjee ... 204
Gour Kishore Chunder v. Bonomalee Chowdhry ... 117
Gour Kishore Dutt v. Shaikh Akbur ... 489
Gour Mohun Roy v. Anund Mundul ... 295
Gouree Byjnath Pershad v. Lochun Kooer 102
Gouree Kumul Bhuttacharjee v. Surut Chunder Doss Biswas ... 408
Gowhur Ali v. Hurpal Bhugut ... 445
Grish Chunder Mookerjee v. Ramessuree Dabee ... 308
Gunesh Chunder Roy v. Nil Komul Roy ... 264
Gunesh Chunder Shah v. Ram Dhunee Dossee ... 283
Gunesh Chunder Shaha v. Khetoo Meah... 265
Gunesh Pattro v. Ram Nidhee Koondoo ... 361
Gunga Pershad Kur v. Shumboonath Burmun ... 393
Gungadeen Misser v. Kheeroo Mundul ... 449
Guttee Koiburto v. Bhukut Koiburto ... 457

H.

Hakeem Meah v. Beejoy Patnee ... 8
Harran Chunder Mookerjee v. Nundo Gopaul Mutty Lall ... 71
Heera Lall Chowdhry v. Bisto Lall Chowdhry ... 288
Heeramun Roy v. Jhuboo Singh ... 511
Heera Rawut v. Racha Rawut ... 115
Hoorul Mundul v. Hurruck Dutt Khowas 429
Hossena Bebee v. Smith ... 15
Hurdoyal v. Schlaepfer ... 68
Hureehur Mojoomdar v. Churn Majhee ... 355
Hurce Madhub Lahoree v. Hem Chunder Gossamee ... 522
Huree Mohun Poddar v. Gureeboollah Mullick ... 417
Huree Sunker Mookerjee v. Jogendro Coomar Mookerjee ... 220
Hurish Chunder Chowdhry v. Sree Kalee Mookerjee ... 274
Hurish Chunder Mullick v. Prosunno Coomar Banerjee ... 303
Huronath Pattur v. Nitto Paramanick ... 517
Hurreenath Doss v. Kalee Pershad Roy ... 474
Hurro Kristo Doss v. Rama Nundo Doss 274
Hurruck Roy v. Zuhooree Mull ... 468

I.

Issur Chunder Santra v. Bellilios ... 271

J.

Janokee Nath Dutt v. Mahomed Israil ... 285
Janoo Numdur v. Brijo Singh ... 548
Jeeatoollah Paramanick v. Jugodindro Narain Roy ... 12

Page.

Jeebunessuree Dabee v. Kisto Monee Dabee ... 265
Jeetram Dutt v. Doorga Doss Chatterjee. 430
Jewbundhun Sing v. Radha Madho Pershad ... 196
Jhoomuck Lall v. Mussamut Shurfoon ... 285
Jhubboo Lall Sahoo v. Khoob Lall ... 294
Jodoonath Mullick v. Kalee Kristo Tagore. 73
Joodhesty Merdha v. Taruck Chunder Chuckerbutty ... 299
Joy Kishen Mookerjee v. Parbutty Churn Ghossal ... 183
Joy Narain Giree v. Goluck Chunder Mytee ... 102
Joy Narain Giree v. Grish Chunder Mytee. 438
Judah v. Mirza Abdool Kurreem ... 60
Judoonath Roy v. Buroda Kant Roy ... 220
Jugdeep Narain Sahee v. The Court of Wards ... 469
Juggut Chunder Bhadoory v. Shib Chunder Bhadoory ... 255
Jugjeebun Goopto v. Goluck Monee Debia. 354
Jugo Bundhoo Tewaree v. Kurum Singh. 341

K.

Kala Chand Ghose v. Shoolochuna Dassia. 33
Kala Chand Sen v. Anund Kristo Bose ... 433
Kalee Kant Chowdhry v. Bhoobunessuree Chowdhrain ... 416
Kalee Koomar Dutt v. Pran Kishoree Chowdhrain ... 168
Kaleenath Doss v. Rajah Meah ... 406
Kalee Pudo Banerjee v. Choitun Pandah. 214
Kaminee Debia v. Issur Chunder Roy Chowdhry ... 39
Kartick Pramanick v. Kishen Mohun Mitter ... 329
Kashee Kishore Roy Chowdhry v. Kristo Chunder Sandyal Chowdhry ... 464
Kasheenath Shaha v. Jogendro Nath Baboo ... 68
Kashee Ram Dobay v. Dheera Ooraon ... 528
Kedar Nath Mitter v. Sookoomaree Debia. 398
Khajah Abdool Gunnee v. Bhutto Sheikh. 350
Kirtee Chunder Haldar v. Raj Chunder Haldar ... 273
Kishore Bon Mohunt v. Kalee Churn Giree. 364
Kooldeep Narain Singh v. Rummon Singh. 278
Koonj Beharee Lall v. Girdharee Lall ... 484
Koonjo Lall Mundul v. Dabee Persad Tewaree ... 398
Kotun Ram Doss v. The Collector of Sylhet ... 523
Koylash Chunder Dutt v. Jubur Ali ... 29
Koylash Chunder Ghose v. Ashruf Ali ... 101
Kripa Nath Chakee v. Doyal Chand Pal. 169
Krishno Chunder Goopto v. Meer Sufdur Ali ... 326
Krishno Lall Nag v. Bhyrub Chunder Deb. 52
Kristo Chunder Goopto v. Brojo Mohun Dey Chowdhry ... 183
Kristo Chunder Sandyal Chowdhry v. Shama Soonduree Debia Chowdhrain ... 520
Kuller Singh v. Jewan Singh ... 79
Kylash Kaminee Dossia v. Judoo Bashinee Dossia ... 390

Page.

L.

Lall Jha v. Juma Buksh ... 116
Lall Mohomed v. Dholee Ram Dass ... 377
Lalla Bissessur Dyal v. Doolar Chand Sahoo ... 181
Lalla Jugdeo Sahoy v. Digambur Roy (*foot-note case*) ... 304
Lalla Kundee Lall v. Lalla Kalee Pershad. 307
Lalla Ram Sahoy Lall v. Bibee Chowbain. 287
Lalla Sabil Chand v. Goodur Khan ... 187
Lalun Monee v. Sona Monee Dabee ... 334
Lellanund Singh v. Lakhputtee Thakoorain. 231
Love v. Ainsworth ... 336
Luchmeeput Doss v. Shaikh Enaet Ali ... 346
Luchmeeput Singh Bahadoor v. Nund Coomar Goopto ... 388
Luchmun Ramonooj Doss Mohunt v. Ram Huree Roy ... 67
Lukhee Dossee v. Rhedoy Nath Surmah. 351
Lutafut Hossein v. Mahomed Moneem ... 269

M.

Mackenzie, Lyall, & Co. v. E. O. Moses ... 156
Madhub Chunder Poramanick v. Raj Coomar Doss ... 370
Madras Railway Company (The) v. The Zemindar of Carvetinagarum ... 279
Mahomed Askur v. Mahomed Wasuck ... 413
Mahomed Bisiroollah Bhoonia v. Ahmed Ali ... 448
Mahomed Gazee Chowdhry v. Shumbhoonath Misser ... 389
Mahomed Shumsool Hooda v. Shewukram. 409
Mahomed Yakoob v. Mahomed Zuhoorul Huq ... 533
Mansing Lalung v. Theram Doloye ... 395
Massim Meah v. Sham Doss ... 189
Meer Gowhur Ali v. Hurpat Bhugut ... 445
Meer Mahomed Hossein v. Forbes ... 316
Mewa Lall Thakoor v. Bhujhun Jha ... 213
Mitta Kant Audhikaree v. Nirunjun Audhikaree ... 437
Mohesh Chunder Banerjee v. Joy Kishen Mookerjee ... 362
Mohiooddeen Mahomed v. Ram Kishore Koondoo ... 311
Mohunt Jumoona Doss v. Pookhur Singh. 133
Moizzunissa v. Moraree Dhur Dey ... 314
Mokoondonath Bhadoory v. Shib Chunder Bhadoory ... 302
Monmohinee Dabee v. The Secretary of State for India ... 106
Mookta Soonduree Chowdhrain v. Muthooranath Ghose ... 209
Mooraree Mobajim v. Mahomed Akmal. 161
Muddun Thakoor v. Kantoo Lall ... 56
Mudhoo Soodun Bose v. Bidhoo Bhoosun Haldar ... 384
Mudhoo Soodun Shaha v. Gopal Shaikh. 508
Muftee Jelalooddeen Mahomed v. Sharaoollah ... 422
Mullick Amamut Ali v. Mullick Fuzul Hossein ... 205
Mumtaz Bibee v. Grish Chunder Chowdhry. 376
Mun Mohun Ghosal v. Purashnath Roy. 174
Munsoor Ali v. Woomed Ali ... 12

Page.

Mussamut Jhutoo Kooer v. Lulita Kooer. 423
Mussamut Lukputty Thakoorain v. Rajah Leelanund Singh (*foot-note case*) ... 231
Mussamut Maher Banoo v. Keramut Ali. 402
Mussamut Munkee Kooer v. Shaikh Munnoo ... 548
Mussamut Nowlaso Kooeree v. Laljee Modi ... 202
Mussamut Nusseerun v. Gouree Sunker Singh ... 192
Mussamut Rajeebun v. Mullick Amanut Ali. 205
Mussamut Rambutty Kooer v. Kamessur Pershad ... 36
Mussamut Ram Kooer v. Lalla Bhugwan Lall ... 224
Mussamut Rohimoonissa v. Shaikh Abdoollah Khan ... 319
Mussamut Ruhimunissa v. Nowab Leakut Ali Khan ... 506
Mussamut Shuruf Jan v. Futteh Ali ... 389
Mussamut Tripoora Soonduree, *Petitioner*. 45
Muthoora Pershad Singh v. Mohunt Shumboo Geer ... 211

N.

Nankoo Kooeree v. Nund Coomar Paurey. 326
Narain Singh Roy v. Nurendro Narain Roy ... 296
Neamut Ali v. Gooroo Doss ... 365
Nem Roy v. Bharut Roy ... 129
Niamutoollah Khadim v. Himmut Ali Khadim ... 519
Nil Madhub Gossamee v. Chunder Mookhee Gossamee ... 397
Nobin Chunder Sen Chowdhry v. Nobin Chunder Chuckerbutty ... 46
Nobin Kristo Ghose v. Thakoor Doss Roy Chowdhry ... 126
Nubee Buksh v. Kaloo Lushker ... 4
Nubokishen Mookerjee v. Debnath Roy Chowdhry ... 194
Nubokishore Doss v. Joy Doorga Dossee. 189
Nudyar Chand Chuckerbutty v. Roop Dass Banerjee ... 475
Nujeem Mullick v. Erfan Mollah ... 298
Nund Kishore Lall v. Mohun Lall ... 164
Nund Lall Mookerjee v. Khurgessur Banerjee ... 44
Nund Mohun Chatterjee v. Rohinee Debia. 493
Nundun Lall v. Lloyd ... 74
Nurendro Narain Roy v. Ishan Chunder Sen ... 22
Nurendro Narain Roy v. Narain Singh Roy ... 296
Nursingh Narain Singh v. Mussamut Ameerun ... 551
Nutun Singh v. Mogdhun Singh ... 479
Nyna Kooer v. Doolee Chund ... 77

O.

Obhoy Churn Mookerjee v. Pearee Dossia. 270
Obhoya Churn Dey v. Rajendro Coomar Ghose ... 406
Okhoy Coomar Chatterjee v. The Maharajah of Burdwan ... 299
Oodoy Tara Chowdhranee v. Khaja Assanoollah ... 180

Page.

Ooma Dutt Chowdhry v. Hunooman Chowdhry ... 253

P.

Pearee Mohun Ghose v. Jardine, Skinner, & Co. ... 338
Pearee Mohun Mookerjee v. Brojo Mohun Bose ... 428
Peters v. Manuk ... 175
Phoodee Bibee v. Gobind Chunder Roy ... 272
Pogose v. Rajoo Dhopee ... 511
Pholi Mullick v. Fukeer Chunder Patnaik. 349
Poornoo Chunder Chatterjee v. The Chairman of the Municipal Commissioners, Hooghly ... 254
Poornoo Chunder Ghose v. Gobind Chunder Mookerjee ... 28
Pooroosottum Chunder v. Nitye Soonder Pandey ... 105
Prem Chand Kybutta v. Huree Doss Kybutta ... 259
Prithee Bullubh Pal Sreechundun Mari Sultan v. Haradhun Shome ... 331
Prosunno Moyee Dossee v. Doya Moyee Dossee ... 275
Protap Chunder Borooah Bahadoor v. The Collector of Gowalparah ... 216
Puna Bibee v. Khoda Buksh Beparee ... 396
Pundit Bhugwan Dutt Jha v. Sheo Mungul Singh ... 256

R.

Radha Mohun Roy v. Raj Chunder Shah 522
Radhamonee v. Ram Narain Dey ... 440
Radhika Mohun Roy v. Gunga Narain Chowdhry ... 230
Raj Chunder Mojoomdar v. Rajaram Gope. 385
Raj Chunder Shaha v. Hur Mohun Roy ... 98
Raj Dinkur Doyal v. Sheo Golam Singh ... 172
Raj Narain v. Rowshun Mull ... 124
Rajah Sri Chaitanya Chandra Haris Chandanar Jagadevu Bahadoor v. The Collector of Ganjam ... 187
Rajender Kishore Singh v. Saheb Perhlad Sein ... 165
Rajputtra Sanji Lall Ram Narain Singh Deo Bahadoor v. Nudea Pundah ... 475
Rakhal Doss Singh v. Heera Motee Dossee. 282
Ram Byrun Singh v. Jankee Sahoo ... 473
Ram Chunder Roy Chowdhry v. Bholanath Lushkur ... 200
Ram Chunder Shaha v. The Collector of Mymensingh and Pubna ... 48
Ramgut Panday v. Radha Pershad Singh. 195
Ram Guttee Mundul v. Thakoor Doss Mundul ... 418
Ram Joy Gooptoo v. Sreemutty Jugodessuree 399
Ram Kant Chowdhry v. Kalee Mohun Mookerjee ... 84
Ram Kanth Roy Chowdhry v. Kalee Mohun Mookerjee ... 310
Ram Kishen v. Doolee Chand ... 547
Ram Nirajun Bhut v. Ram Nath Singh ... 447
Ram Runginee Dossee v. Gooroo Doss Roy. 212
Ram Sebuk Dey v. Chundee Churn Dey 510

Page.

Ram Soondur Singh v. Surbanee Dossee... 121
Ram Suhai Singh v. Chutter Kooer ... 452
Ram Yad Singh v. Nirunjun Kooer ... 420
Rashbehary Ghose v. Ram Coomar Ghose 487
Reazooddeen Mahomed v. R. McAlpine... 540
Reedoynath Dooripa v. Puddo Lochun Chuckerbutty ... 205
Rewal Mahton v. Penum Mundar ... 9
Rohinee Nundun Mitter v. Bhugwan Chunder Roy ... 154
Roop Lall Doss v. The Chairman of the Municipal Committee of Dacca ... 276
Roopun Roy v. Purdeep Singh ... 10
Rughoo Nundun Ram v. Somessur Panday 235
Rughoobar Dyal Singh v. Bhekaree Singh 472
Rughoobur Dyal Singh v. Ram Narain Kolya ... 312
Rughoonath Pershad v. Surjoo Pershad Singh ... 162
Ruheemuddy Akun v. Poorno Chunder Chowdhry ... 336
Russick Chunder Mohunt v. Ram Lall Shaha ... 301
Ruttoo Singh v. L. G. Crowdy (*foot-note case*) ... 477
Ruttun Kooer v. Syud Tussuduck Hossein 103
Ruttun Monee Dutt v. Brojo Mohun Dutt 11, 333

S.

Saem Sirdar v. Kamaluddy Sirdar ... 424
Saheb Roy v. Gujadhur Pershad Narain Singh ... 221
Sahebjan Bibee v. Syud Sufdur Ali ... 288
Shahjan Bibee v. Shib Chunder Shaha ... 314
Shah Lutafut Hossein v. Mahomed Moneem 269
Shaikh Ameen Buksh v. Bhyro Mundul... 493
Shaikh Ameer Buksh v. Yusoof Ali ... 489
Shaikh Mahomed Ansur v. Shaikh Sefatoollah ... 340
Shaikh Mahomed Chaman v. Ram Persad Bhukhut (*foot-note case*) ... 52
Shaikh Omed Ali v. Nidhee Ram ... 367
Shaikh Shamdanee v. Bhojoo Ram ... 44
Sham Chand Mitter v. Juggut Chunder Sircar 50, 541
Sham Lall Sahoo v. Bibee Afsuroonnissa 184
Sheo Prokash Misser v. Hurdai Narain. 550
Sheo Sahoy Singh v. Bechun Singh ... 31
Shetliff v. Scott ... 59
Shib Narain Ghose v. Aukhil Chunder Mookerjee ... 485
Shib Narain Pal v. Koonjo Kaminee Dabee ... 467
Shib Suhaye Singh v. Nursing Lall ... 352
Shumshere Narain Singh v. Baboo Rajkishore ... 213
Shushee Mohun Pal Chowdhry v. Ram Coomar Koondoo ... 193
Shushee Shekur Audhikaree v. Suleem Biswas ... 191
Sookoorunnissa Khatoon v. Nuddiar Chand Ghose ... 358
Sookram Doss Mohunt v. Nund Kishore Doss Mohunt ... 21

Page.

Sooraj Kant Acharje v. Khoodee Narain Manna ... 9
Soorendro Pershad Dobey v. Jugobundhoo Panday ... 426
Sreemunt Ram Totadar v. Ram Kishen Sen 387
Sreemutty Fyezoonnissa v. Sadutoollah... 3
Sreemutty Sreemutty v. Lukhee Narain Dutt ... 171
Sreenath Churn Soor v. Nil Kanto Dey 309
Sreeram Mitter v. Nobin Kristo Mookerjee 200
Srish Chunder Chowdhry v. Shib Narain Pal 467
Sukomut Bibee v. Shaikh Warris Ali ... 400
Sunkur Singh v. Huree Mohun Thakoor 460
Surbanund Doss v. Bistoo Prea Dossee 382
Suroop Chunder Roy v. Mohender Chunder Roy ... 539
Surut Soonduree Debia v. Sumeerooddeen Talookdar ... 530
Sustee Churn Dey v. Ishan Chunder ... 383
Syud Enayet Hossein v. Muddun Mooree Shahoon ... 411
Syud Fuzzul Hossein v. Enayet Ali Khan 268
Syud Hyder Reza v. The Collector of Purneah ... 490
Syud Mahomed Abdool Hye v. Lungut Singh ... 200
Syud Shah Ali Ahmed v. Doorga Roy ... 455
Syud Shah Asudoollah v. Monohur Doss 531
Syud Talleb Hossein v. Shaikh Ameer Buksh ... 529
Syud Wassel Ruhman v. Shaikh Golam Russool ... 270

T.

Tara Chand Biswas v. Ram Jeebun Moostafee ... 202
Tara Chunder Banerjee v. Ameer Mundul 394
Tarinee Churn Sandyal v. Mohima Chunder Shah ... 426
Taruck Chunder Bhuttacharjee v. Huro Sunker Sandyal ... 267
Thakoor Doss Gossain v. Pearee Mohun Mookerjee ... 431
Thakoor Doss Roy Chowdhry v. Nobin Kristo Ghose ... 126
Thakur Kopilnauth Sahi Deo. v. The Government ... 17
Tikaram Singh v. Mrs. Sandes ... 335
Toondun Singh v. Pokhnarain Singh ... 199

U.

Unnoda Dabee v. Mrs. Stevenson ... 290

W.

Wajed Ali v. Mussamut Chundrabutty Kooeree ... 542
Watson & Co. v. Hurgobind Sookul ... 35
Woodoy Aditto Deb v. Mukoond Narain Aditto ... 225
Woodwant Mahtoon v. Hunooman Pershad Singh ... 419

Z.

Zimutunnissa Bibee v. Muddun Mohun Pal 537

INDEX

(CRIMINAL RULINGS).

Page.

A.

ABKAREE.
See Act XXI. of 1856.

ACCUSED.
See Prisoner (1) (2)
See Procedure (6)

ACQUITTAL.
See Compensation.
See Discharge.
See Kidnapping (2)

ACT VIII. OF 1851.
See Tolls.

ACT XXI. OF 1856.
To warrant a conviction under s. 4, ——, the accused must have manufactured some country spirit made by the native process of distillation, as described in s. 90 of the Act, or they must have sold spirituous or fermented liquors or intoxicating drugs ... 8
See Opium.

ACT XLV. OF 1860.
Section 83. *See Incapacity to commit Offence.*
Section 100. *See Right of Private Defence.*
Section 103. *See Right of Private Defence.*
Section 193. *See Civil Court.*
Section 228. *See Judicial Proceedings.*
Section 415. *See Cheating.*
Section 420. *See Cheating.*
Section 422. *See Compromise.*
Section 447. *See Rioting.*
Section 453. *See Rioting.*
Section 465. *See Civil Court.*
Section 471. *See Civil Court.*
Section 498. *See Married Woman.*

ACT VII. OF 1864.
See Contraband Salt (1) (2) (3)

ACT X. OF 1871.
See Opium.

Page.

ACT I. OF 1872.
Section 33. *See Procedure* (8)
Section 80. *See Prisoner* (1)
Section 118. *See Evidence* (1)
Section 318. *See Evidence* (2)

ACT X. OF 1872.
Section 34. *See Procedure* (12)
Section 64. *See Preliminary Investigation* (1)
Section 69. *See Preliminary Investigation* (1)
Section 90. *See Charge* (2)
Section 125. *See Recognisances* (1)
Section 146. *See Procedure* (19)
Section 148. *See Procedure* (10)
Section 186. *See Dumb and Deaf Person* (1) (2)
Section 188. *See Kidnapping* (2)
Section 203. *See Procedure* (10)
Section 208. *See Procedure* (11)
Section 209. *See Compensation.*
Section 211. *See Compensation.*
Section 220. *See Compensation.*
See Discharge.
Section 222. *See Jurisdiction* (7)
See Procedure (5)
Section 255. *See Procedure* (7)
Section 261. *See Procedure* (7)
Section 267. *See Appeal.*
Section 280. *See High Court* (1)
Section 283. *See Procedure* (3) (18)
Section 286. *See Appeal.*
Section 296. *See Procedure* (13)
Section 297. *See High Court* (5)
Section 315. *See Discharge.*
Section 327. *See Procedure* (6)
Section 396. *See Recognisances* (1)
Section 397. *See Recognisances* (1)
Section 435. *See Judicial Proceedings* (2) (3)
Section 436. *See Judicial Proceedings* (2) (3)
Section 439. *See Charge* (1)
Section 468. *See High Court* (2)
Section 469. *See High Court* (3)
Section 471. *See Jurisdiction* (3) (4)
Section 473. *See False Evidence.*
See Jurisdiction (3)
Section 491. *See Procedure* (8) (16) (17)
See Security (3) (4)
Section 492. *See Procedure* (14)

Page.

ACT X. OF 1872—*(Continued).*

Section 493. *See Recognizances* (2)
Section 505. *See Security* (1)
Section 516. *See Security* (2)
Section 518. *See Public Health* (1)
Section 521. *See Nuisance* (1) (2) (3)
Section 523. *See Jury.*
Section 526. *See Jury.*
Section 530. *See Procedure* (18)
Section 532. *See Jurisdiction* (2)
Section 536. *See Maintenance* (1) (2)
Chapter XVIII. *See Procedure* (4) (5) (12)
See Tolls (1)
Chapter XXXII. *See Judicial Proceedings* (2) (3)
See Jurisdiction (5) (6)

ACT X. OF 1873.
Section 13. *See Evidence* (1) (2)

ALTERNATIVE CHARGE.
See Married Woman.
See Perjury.

ALTERNATIVE FINDING.
See Married Woman.

AMENDS.
See Compensation.

APPEAL.
Under ss. 267 and 286, Illustration (*d*), Act X. of 1872, there is no —— to the High Court from an order passed by a Magistrate of the District requiring a person to give security for good behaviour ... 68
See Procedure (15)

ASSESSORS.
See Procedure (7)

B.

BAD LIVELIHOOD.
See Appeal.

BREACH OF THE PEACE.
See Procedure (1) (8) (14) (18)
See Recognizances (1) (2)
See Security (1) (2) (3) (4)

C.

CANTONMENTS.
See Public Health.

CHARGE.
(1) Under s. 439, Code of Criminal Procedure, a charge of having committed the offence after a previous conviction therefor should contain an allegation that the offence has been committed after a previous conviction. A statement in a —— that, at the time when the prisoner committed the offence (no offence being mentioned specifically in the count), he had been previously convicted of offences punishable under Chapter XVII. of the Indian Penal Code, is not a sufficient compliance with the provisions of s. 439 ... 39
(2) In a case in which the accused are charged with having omitted to give information which they were legally bound to give under s. 90 of the Code of Criminal Procedure, it should appear in the —— what the offence is as to the commission of which the accused wilfully omitted to give information; that the specified offence was in fact committed by some one; and that the accused knew of its having been committed ... 42
See Compensation (1)

CHARTER ACT.
See High Court (4)

CHEATING.
A person who purchased rice from a famine-relief officer at a certain rate (16 seers to the rupee), on condition that he should sell it at a seer the rupee less, was convicted of —— under s. 420 of the Penal Code, because he did not sell it at the rate agreed on, but at 12 seers to the rupee:
HELD that, as within the meaning of ss. 23 and 24 of the Penal Code, there had been no wrongful gain or wrongful loss to any one, no offence had been committed under s. 415 of the Penal Code... 82

CHILD.
See Evidence (1) (2)

CIVIL COURT.
A —— has no power to order the commitment of persons for offences under ss. 471, 465, and 193 of the Penal Code without holding the preliminary inquiry required by s. 474 of the Criminal Procedure Code ... 52

COMMITMENT.
See Civil Court.
See Procedure (13) (19)

COMMON OBJECT.
See Rioting.

Page.

COMPENSATION.

Where a formal charge has been drawn up and the accused tried and acquitted, the acquittal should be one under s. 220, Code of Criminal Procedure, and not under s. 211; and therefore no —— can be awarded to the accused under s. 209 in such a case ... 12

COMPLAINANT.

A conviction on the evidence of a —— is lawful ... 32

See Procedure (10) (11).

COMPOUNDING.

See Kidnapping (1).

COMPROMISE.

Where A entered into an agreement with B not to —— a case with C, because he had assigned the benefit of the suit to B as a security for the due payment of some monthly instalment of money, and A notwithstanding did afterwards —— the suit with C, it was held that A could not be convicted under s. 422 of the Penal Code, unless the —— with C was made dishonestly or fraudulently towards B ... 46

CONTEMPT OF COURT.

See Judicial Proceedings (1) (2) (3).

CONTRABAND SALT.

(1) In a case of conviction under Act VII. of 1864 of having in possession ——, the penalty cannot be inflicted on the owner of the salt, and also on the servant or gomashta of the owner who has the salt in his possession, as the possession of the latter is the possession of the former ... 9

(2) Where a person who had taken a quantity of salt under a rowannah for transit from Calcutta to his golah, part of the journey to be performed by water and part by land, conveyed a portion of it to his golah where the rowannah was, and was conveying the rest in two separate batches by land, it was held that he could not be convicted under Act VII. of 1864, s. 16 71

(3) In a case of a conviction under s. 16, Act VII. of 1864, for having in possession ——, the Sessions Judge recommended that it should be set aside on the ground that the salt had already reached its destination and was not *en route*; s. 18 consequently not applying. The High Court set aside the conviction accordingly 82

Page.

CONVICTION.

See Charge (1).
See Complainant.

COUNTRY SPIRITS.

See Act XXI. of 1856.

COURT.

See Judicial Proceedings (1) (2) (3).

CREDITOR.

See Compromise.

CRIMINAL BREACH OF TRUST.

See Preliminary Investigation.

CRIMINAL OFFENCE.

See Incapacity to commit Offence.

CRIMINAL TRESPASS.

See Procedure (14) (18).

CROSS-EXAMINATION.

See Prisoner (1) (2).
See Procedure (3).

CULPABLE HOMICIDE.

See High Court (1).

D.

DEBT.

See Compromise.

DEPOSITION.

See Prisoner (1).

DISCHARGE.

Under s. 315, Act X. of 1872, an order of —— cannot be passed unless the evidence of all the witnesses for the prosecution has been taken; and under s. 220 of the same Act, no judgment of acquittal can be recorded unless a charge has been drawn up ... 25

See Procedure (13).

DISHONESTLY.

See Compromise.

DUMB AND DEAF PERSON.

(1) The High Court, under the circumstances of this case, which came before it under the last clause of s. 186 of the Code of Criminal Procedure, set aside the conviction of the prisoner, who was deaf and dumb, and directed that he be admonished and discharged 35

(2) The High Court may, under s. 186, Code of Criminal Procedure, in the trial of a person who is deaf and dumb, and who cannot understand the proceedings against him

Page.

DUMB AND DEAF PERSON—*(Continued).*

or plead to the charge, treat the proceedings as amounting to a sufficient trial and pass sentence upon the prisoner according to the facts which seem to be established in the course, and as the result, of those proceedings ... 35

(3) In this case the Court had no doubt that the prisoner was guilty, but before passing final orders it gave the prisoner a further opportunity of being heard, and accordingly directed the Magistrate to give him notice ... 35

(4) Under the circumstances of this case, in which a prisoner, who was deaf and dumb, had a further opportunity given him of being heard in defence, the High Court, under s. 186 of the Code of Criminal Procedure, confirmed the conviction of the Magistrate ... 72

E.

ENTICING AWAY.
See Married Woman.

EUROPEAN BRITISH SUBJECTS.
See Jurisdiction (5).

EVIDENCE.

(1) The Court in this case declined to act on the —— of a child nine years old, who had been examined without oath, although she was a competent witness under s. 118 of the Evidence Act, I. of 1872, inclining to the opinion that s. 13 of the Oaths Act, by which the —— of a witness may be received in —— although no oath was administered, did not render the deposition of a child of nine years, whose deposition had been taken advisedly, and not by omission, without oath or solemn affirmation, admissible as —— ... 1

(2) The —— of a child of immature age (who the Sessions Judge considered understood the questions which were put to her, and who was therefore a competent witness under s. 118 of the Evidence Act), taken by the Sessions Judge on a simple affirmation because she was not aware of the responsibility of an oath, was held to be admissible as —— under s. 13 of the Oaths Act, X. of 1873 14

See Complainant.
See Procedure (2) (8) (16) (17).

EXTORTIONATELY.
See Tolls (3).

Page.

EXTRA-JUDICIAL KNOWLEDGE.
See Procedure (17).

F.

FALSE EVIDENCE.

A Joint-Magistrate, having directed a recusant witness in a trial before him to be put on his trial for giving ——, subsequently, on the 9th May, on hearing the statement of the witness confessing that what he had stated was false, and that he had wilfully withheld what he knew, recorded a proceeding stating that the case would not be proceeded with, and directing the discharge of the accused witness: HELD that as the Joint-Magistrate could not himself try the case by virtue of s. 473 of the Code of Criminal Procedure, his proceeding of the 9th May was either a part of an inquiry into a case triable by a Court of Session or of some proceeding before a Magistrate other than such inquiry in respect of an offence which the inquiring Magistrate was not competent to try, and that, in either case, the Joint-Magistrate had no authority to discharge the accused ... 83

See Civil Court (1).
See High Court (2).
See Jurisdiction (3) (4).
See Perjury (1).

FINDING.
See Married Woman.

FORGERY.
See Civil Court.

FORMER TRIAL.
See Procedure (2).

FRAUDULENTLY.
See Compromise.

G.

GOOD BEHAVIOUR.
See Appeal.

H.

HIGH COURT.

(1) The——in exercise of the powers conferred on it by s. 280 of the Code of Criminal Procedure, altered the conviction in this case by the Sessions Judge from grievous hurt into one for murder, and enhanced the punishment accordingly ... 5

Page.

HIGH COURT—*(Continued).*

(2) In a case in which the ——was asked, under s. 468, Code of Criminal Procedure, to sanction a prosecution, for giving false evidence, of a plaintiff in a suit before a Small Cause Court, which Court had refused such leave to defendant, it was held that the——would not be justified in exercising the discretion vested in them by s. 468, unless it appeared very clearly that there were strong grounds for granting the sanction ... 11

(3) The——declined in this case to say under s. 469 of the Code of Criminal Procedure, that a conviction was bad because the Judge who tried the case and the Judge who sanctioned the criminal proceedings was the same person ... 16

(4) Case in which the—— in exercise of the jurisdiction given to it by s. 15 of the Charter Act, issued a rule at the instance of the party aggrieved, calling upon the opposite party to show cause why an order made by a Magistrate which was complained of should not be set aside for want of jurisdiction, although the matter had already been brought to the notice of the Court on a reference made by the Sessions Judge. Two previous cases on the point discussed ... 24

(5) The fact that an order of the Magistrate is not a judicial proceeding, and therefore not one which the —— can revise under s. 297 of the Code of Criminal Procedure, does not have the effect of removing the Magistrate from the general superintendence of that Court under s. 15 of its Charter Act ... 78

See Preliminary Investigation.
See Public Health (1).

HIGH COURTS ACT.

See Jurisdiction (5) (6).

I.

ILLICIT MANUFACTURE.

See Act XXI. of 1856.

IMMATURE INTELLECT.

See Incapacity to commit Offence.

INCAPACITY TO COMMIT OFFENCE.

(1) An objection that the accused is of such an age as not to have attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, is not one of a preliminary character, but rather a matter of defence to be considered with the other issues arising in the case 27

(2) Where the accused was over seven years of age and under twelve, the incapacity to commit an offence only arises where the child has not attained sufficient maturity, &c.: such non-attainment would have apparently to be specially pleaded and proved 27

(3) The "consequences of his conduct," mentioned in s. 83, Penal Code, are not the penal consequences to the offender, but the natural consequences which flow from a voluntary act ... 27

INDIAN COUNCILS ACT, 1861.

See Jurisdiction (5) (6).

INFORMATION.

See Charge (2).

IRREGULARITY.

See Evidence (1) (2).
See Procedure (3) (18).

J.

JUDICIAL PROCEEDINGS.

(1) A Sub-Registrar is a public Officer; his proceedings are——within the meaning of s. 228 of the Penal Code; and his Court is a Court within the meaning of that word in the Evidence Act ... 10

(2) In cases under s. 228 of the Penal Code, the Court in which the offence is committed is to try the offence, but the procedure is to be restricted by the provisions of Chapter XXXII. of the Code 10

(3) Where, in a case under the s. 228, the Sub-Registrar before whom the offence was committed, did not proceed under s. 435 or s. 436, it was held that a Magistrate had no jurisdiction ... 10

JURISDICTION.

(1) Where the law empowers Magistrates of a particular grade to do a particular act or make a certain order, it should always appear upon the proceedings that the Magistrate making the order or doing the act is a Magistrate who had —— to do it ... 30

(2) In order to found the —— of a Magistrate to take action under s. 532 of the Code of Criminal Procedure, it is necessary that a

Page.

JURISDICTION—*(Continued).*

dispute exists between two persons concerning the right to the use of any land or water, or any right of way: the —— is intended for the purpose of preserving the public peace ... 48

(3) A witness charged with having given false evidence in a criminal proceeding before a Magistrate of the first class was tried and convicted of that charge by that Magistrate, and the conviction was confirmed on appeal by the Sessions Judge:

HELD that the——of the Magistrate was not barred by the operation of s. 473, Act X. of 1872, the giving of false evidence in the presence of a Court not being an offence committed in contempt of the authority of the Court within the meaning of that section ... 49

(4) The Magistrate's —— in such a case was, however, held barred by s. 471 of the Code, the Magistrate being bound, under that section, either to commit or send the case for enquiry to another Magistrate 49

(5) The provisions in the new Criminal Procedure Code (Act X. of 1872) giving —— to Magistrates over European British subjects do not come within the words in the 24 & 25 Vict., c. 47, s. 22, "affecting the provisions of any Act," which mean provisions of the Act itself, and not of Letters Patent issued under the Act ... 54

(6) The —— given by the Letters Patent, issued under the 24 & 25 Vict., c. 104, to the High Court, beyond the local limits of its ordinary original civil ——, is subject to the legislative powers of the Governor General in Council ... 54

(7) In a case in which the accused was charged with theft of a box containing Rs. 50 in cash and of the box worth 8 annas 6 pie, the Magistrate considered the box to be of no value and struck out the 8 annas 6 pie, and thereupon tried the case summarily under s. 222 of the Code of Criminal Procedure:

HELD, that the Magistrate was not at liberty, upon his own authority and without taking evidence, to throw the box entirely out of consideration, as upon that depended his——to dispose of the case summarily. Such evidence should have been taken precisely in the same way as evidence upon the merits of the case; and as it was not taken the Court held that the Magistrate had no——in this case ... 65

See False Evidence.
See High Court (4).
See Judicial Proceedings (3).
See Maintenance (2).
See Regulation XX. of 1825.

JURY.

A Magistrate who, on the application of the party called on, refers a matter as to whether a pathway is a thoroughfare or not for the consideration of a——under s. 523 of the Code of Criminal Procedure, is bound to make an order upon the report of the——, and in accordance with their decision, as required by s. 526 of the Code 86

See Nuisance (3).

K.

KIDNAPPING.

(1) The offence of——can be lawfully compounded ... 26

(2) Where a charge of —— was withdrawn by the complainant, it was held that under s. 188 of the Code of Criminal Procedure it had the effect of an acquittal ... 26

M.

MAGISTRATE.

See Nuisance (1) (2).
See Procedure (15).
See Regulation XX. of 1825.

MAINTENANCE.

(1) In a case in which a Magistrate made an order under s. 536, Code of Criminal Procedure, directing the husband to pay a monthly sum for the —— of his wife, the High Court set aside the order on the ground that it appeared that the husband had not been called upon to maintain the wife, who had up to that time lived with her father, and that the father had refused to let the wife live with her husband without receiving money from him ... 30

(2) An order under the s. 536 cannot be made by a Magistrate of the second class ... 30

Page.

MARRIED WOMAN.

A finding exactly in the words of s. 498 of the Penal Code, that the prisoner took or enticed away a—— from her husband or some person having the care of her on his behalf, with intent that she may have illicit intercourse with any person, or concealed or detained such woman with a like intent, though not actually illegal when it is doubtful which of the several offences has been committed, is a finding which ought not to be resorted to if it can be avoided and it can be determined under which part of the section the prisoner is guilty ... 72

MEMORANDUM OF EVIDENCE.

See Prisoner (1).

MILITARY AUTHORITIES.

See Regulation XX. of 1825.

MURDER.

See High Court (1).

N.

NUISANCE.

(1) A Magistrate's powers, under s. 521, Code of Criminal Procedure, are confined to the instances specifically mentioned in that section, which does not confer general powers upon a Magistrate to pass any order he may consider necessary for the protection of the public health ... 19

(2) It is only from a thoroughfare or public place that under that section a Magistrate is at liberty to direct a——to be removed ... 19

(3) In a case in which a party, on whom an order had been made for abatement of a —— applied under s. 523, Code of Criminal Procedure, for the appointment of a Jury, the Magistrate appointed the complainant and two of his witnesses to be (the former the foreman, and the latter two of the members of) the Jury:

HELD that the Jury so constituted by the Magistrate was not a proper tribunal under s. 523, Code of Criminal Procedure, and the proceedings, &c., were accordingly set aside, and the Magistrate directed to appoint a fresh Jury ... 47

See Jurisdiction (2).

See Public Health.

Page.

O.

OATH.

See Evidence (1) (2).

OBSTRUCTION.

See Jurisdiction (2).

See Nuisance.

OMISSION TO GIVE INFORMATION.

See Charge (2).

OPIUM.

Act XXI. of 1856 (the Opium Act) has not been repealed so far as it relates to the Lower Provinces of Bengal by Act X. of 1871 ... 31

P.

PERJURY.

To support a finding upon an alternative charge of —— there must be legal evidence of the truth of each branch of the charge ... 2

See Civil Court (1).

PRELIMINARY INVESTIGATION.

The High Court, under ss. 64 and 69 of the Code of Criminal Procedure, directed the —— in this case, in which the accused was charged with criminal breach of trust, to be held in Calcutta, the place where the offence charged was (if not wholly, at all events partly) committed ... 6

See Civil Court.

PREVIOUS CONVICTION.

See Charge (1).

PRISONER.

(1) The deposition of the——given in Hindoostanee, but taken in English by the Magistrate, and the memorandum at the foot of the deposition that it was read to the witness, and was by him acknowledged to be correct, though held not to be quite satisfactory (as the person who took down in English what the —— had said in Hindoostanee was not examined as a witness, and the —— had no opportunity of cross-examining him), was admitted as a proper deposition within the provisions of the Code of Criminal Procedure, and the memorandum was taken under s. 80 of the Evidence Act (I. of 1872) as evidence of the facts stated in it, and as affording some evidence that the translation was correct ... 2

Page.

PRISONER—*(Continued)*.

(2) As a rule, the proper and convenient time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence; but it is in the discretion of the Criminal Court to allow the accused to recall and cross-examine the witnesses for the prosecution at any period of the defence when the Court may think such a step right and proper ... 44
See Procedure (3).

PROCEDURE.

(1) In a case in which the accused were charged with unlawful assembly and trespass, the Magistrate acquitted the accused, but eventually ordered the parties to execute bonds and furnish security, refusing to take further evidence and relying on the evidence which had been given before him in the original case in the presence of the accused:
HELD that the proceedings were irregular: the order was accordingly set aside ... 9

(2) Case of Dwarkanath Dutt (7 W. R. 15), which ruled that a Court before which a second trial is held has nothing to do with the evidence given in the former trial except for the purpose of ascertaining whether the offence in the two trials is the same, followed... 14

(3) A prisoner originally charged with an offence under one section (302) and acquitted of that charge, was committed, the day following that on which she was acquitted, for trial under another section (307) without any witnesses being examined on the charge under s. 307, and without having any opportunity of cross-examining the witnesses on the first charge with respect to the second charge:
HELD, that the irregularity was not one which was covered by s. 283, Code of Criminal Procedure, and that the prisoner had been prejudiced thereby in her defence. The trial under s. 307 was accordingly quashed and a new trial ordered ... 14

(4) In summary cases under Chapter XVIII. of the Code of Criminal Procedure, the formalities provided by that chapter should be most strictly observed ... 28

(5) The powers conferred upon Magistrates under the 18th Chapter of the Code of Criminal Procedure were not intended to give them the power of altering a charge brought against an accused person so as to bring his case within the provisions of that chapter; but when a charge of a serious offence, one which the Magistrate is not competent to enquire into summarily, is preferred, it is the plain duty of the Magistrate to apply the procedure prescribed for such cases, and either to convict or acquit or commit for trial the person implicated. The procedure under Chapter XVIII. is to be followed when a charge is plainly and directly one of those specified in s. 222 ... 29

(6) Under s. 327, Code of Criminal Procedure, the witnesses for the prosecution should be examined in the presence of the accused, when practicable, notwithstanding that their statements have been previously recorded in his absence 33

(7) The intention of the Legislature in ss. 255 and 265 of the Code of Criminal Procedure, in a case in which the accused was tried on two charges, was that the assessors should give a definite opinion whether the prisoner is guilty of either of the offences charged, and, if so, of which of the charges preferred against him, and the Judge on delivering judgment should give it with advertence to the opinion of the assessors ... 33

(8) Section 33 of the Evidence Act (I. of 1872) does not justify a Magistrate, when proceeding under s. 491 of the Code of Criminal Procedure, in using evidence taken in a previous criminal trial in supersession of evidence given in the presence of the accused ... 36

(9) A prisoner whose trial is supplemental to that of others is entitled to as full and complete an investigation of all the facts of the occurrences upon which the charge depends as if no previous trial of other persons for participation in these occurrences had ever taken place ... 38

(10) Under s. 203, Code of Criminal Procedure, a Magistrate may convict the accused person, who has been summoned before him on the footing of a complaint, of any offence which is the subject of the definition in s. 148, if he thinks that the facts established by the complainant and his evidence only

Page.

PROCEDURE—*(Continued)*.

amount to an offence within that section ... 40

(11) Where the Magistrate treats the complaint throughout as substantially a summons case, and follows the procedure which is applicable to such a case, he is at liberty, under s. 208, Code of Criminal Procedure, if he adjourns the case to a future day, to dismiss the complaint if the complainant does not appear on the day on which the hearing has been duly postponed 40

(12) A Magistrate having adopted the summary procedure prescribed by Chapter XVIII., Code of Criminal Procedure, in the case of an offence which he had no power to try summarily, the High Court set aside the proceedings as void under s. 34, cl. 4, of that Code... 43

(13) The Sessions Judge under s. 296, Criminal Procedure Code, made an order upon the Deputy Magistrate for the commitment of the accused who had previously been discharged by the Deputy Magistrate, but it was alleged that such order of the Sessions Judge was made without calling upon the petitioners to show cause in the matter:

HELD that, although there is nothing in the s. 296 with regard to summoning or giving notice to the accused person, no person should be affected in his personal liberty without having opportunity given him to answer the charge for which he is arrested and put into prison. The Court accordingly were of opinion that, if the accused had no opportunity given them of meeting the charge, the commitment was not a good commitment 67

(14) On a complaint being lodged of criminal trespass and assault, the Magistrate recorded that, after interrogating the witnesses, he found that a breach of the peace was likely to ensue, and proceeded to examine the complainant and two of his witnesses and the accused, and thereupon ordered that the parties should furnish recognizances to keep the peace:

HELD that the parties had not had opportunity afforded them under s. 492, Code of Criminal Procedure, to show cause why they should not be bound ... 68

(15) Where a Magistrate took an active part in the prosecution of the prisoners, and recorded the evidence of the material witnesses preliminary to deciding whether the case should go to trial or not, and by whom it should be tried, it was held that he was not a proper Court to hear the appeal from the conviction come to in the case ... 75

(16) It is only evidence of specific conduct on the part of the accused from which the reasonable and immediate inference is that they are likely to commit a breach of the peace, which will justify a Magistrate in adjudicating under s. 491 of the Code of Criminal Procedure ... 79

(17) Where a Magistrate, instead of proceeding upon evidence judicially taken before him sufficient to show that the accused were contemplating acts which could amount to a breach of the peace, acted upon his extra-judicial knowledge, the High Court set aside his order under s. 491, Code of Criminal Procedure, requiring the accused to furnish recognizance 79

(18) When a person summoned to answer to a charge of criminal trespass, appeared and filed a written statement, and the Magistrate proceeded accordingly, without recording a proceeding under section 530 of the Code of Criminal Procedure, it was held that the irregularity was covered by section 283 of the Code, the rule therein laid down being intended to extend to all proceedings before Magistrates ... 81

(19) When once a complaint of an offence which cannot be legally compounded is before a Magistrate, he is bound (unless proceeding under section 146) to make a complete inquiry and to see that the accused, if guilty, is brought to punishment ... 83

See False Evidence.
See High Court (4).
See Incapacity to commit Offence (1) (2).
See Jurisdiction (3) (4) (7).
See Jury.

PROSECUTION.

See Procedure (15).

PUBLIC HEALTH.

Where a Cantonment Joint-Magistrate acting on the advice of the Station Staff Surgeon, ordered a person to desist storing hides in the station, and directed him to remove the

Page.

PUBLIC HEALTH—*(Continued)*.

hides to a place distant from the town, the High Court held that the order appeared to be one under s. 518, Code of Criminal Procedure, and therefore it could not interfere with it under the law ... 52

PUBLIC OFFICER.

See Judicial Proceedings (1) (2).

PUBLIC THOROUGHFARE.

See Nuisance (2).

PUNISHMENT.

See High Court.

R.

RECOGNIZANCES.

(1) The powers contained in ss. 396 and 397 of the Code of Criminal Procedure extend not only to—— taken by a Magistrate for the appearance of an accused person by a surety under s. 125, but also to such —— when taken by a Police-officer ... 74

(2) The High Court reduced the amount of —— required in this case as it was very much in excess of, and out of proportion to, the means of the party accused, s. 493 of the Code of Criminal Procedure requiring that the Magistrate should look to the means of the party ordered to find sureties ... 74

See Procedure (14)

REGULATION XX. OF 1825.

(1) —— has no force in Hazareebaugh ... 20

(2) Under —— the Military authorities can require a Magistrate to hand over to them any prisoner who may be apprehended and brought before him for an offence committed at a place more than 120 miles from the presidency town; but the proceedings before a Magistrate, when taken at the request of, and assented to by, the Military authorities, are not absolutely void, and a commitment so made is not an invalid commitment ... 20

RIGHT OF PRIVATE DEFENCE.

Under the facts of this case, a person was held to have rightly exercised the —— as contemplated in cl. 2, s. 100, and cl. 4, s. 103, Penal Code, though in the exercise of such right he killed one of his aggressors ... 51

Page.

RIOTING.

It is necessary before persons can be convicted of——,&c., under s. 147 or 149, Penal Code, to ascertain clearly that they have taken such a share in the transaction as will bring them within the criminal charge; and it must appear on the evidence that they had a common object, which common object they were going to carry out by unlawful means ... 17

ROWANNAH.

See Contraband Salt (2).

RULE NISI.

See High Court (4).

S.

SALT.

See Contraband Salt (1) (2).

SANCTION TO PROSECUTE.

See High Court (2) (3).

SANITATION.

See Public Health.

SECURITY.

(1) In making an order for —— to keep the peace under s. 505, Code of Criminal Procedure, a Magistrate has no right to impose an arbitrary condition not essential to restrain a party from the infringement of the law, *e. g.*, a condition requiring the accused to furnish two sureties being persons of respectability and substance not related to him, and residing within one mile of his house 37

(2) The ground on which a Magistrate has power to refuse to accept any surety under s. 516 must be a valid and reasonable ground 37

(3) When parties required, on the 1st July, to show cause on the 9th, under s. 491, Code of Criminal Procedure, why they should not furnish —— for breach of the peace, were served on the 5th and 7th idem, it was held that they had not had sufficient time allowed them for the purpose, and the order requiring —— was accordingly set aside 70

(4) A Magistrate is bound to assist both parties in a case under s. 491, Code of Criminal Procedure, in bringing in their witnesses by issuing summonses to attend 70

See Appeal (1).

See Procedure (1) (14).

See Recognizances (1) (2).

SOLDIER.

See Regulation XX. of 1825.

Page.

SUB-REGISTRAR.
See Judicial Proceedings (1) (3)

SUBSEQUENT TRIAL.
See Procedure (9)

SUMMARY CASES.
See Jurisdiction (7)
See Procedure (4) (5) (12)
See Tolls (1)

SUMMONS CASE.
See Procedure (10) (11)

T.

THEFT.
See Jurisdiction (7)

THOROUGHFARE.
See Nuisance (2)
See Fury.

TOLLS.
(1) The power of levying ——, under Act VIII. of 1851, is vested in the Lieutenant-Governor of Bengal, and is restricted to levying —— only at the toll bar; the establishment of a toll must be by some distinct resolution of the Government notified in some way or other by the Government ... 76
(2) The word "extortionately" in s. 6, Act VIII. of 1851, is not used in the same sense as it is used in the Penal Code, but as meaning an unlawful demand of toll accompanied by pressure; the pressure in this case being the exercise of the powers indicated in s. 3 of the Act by

Page.

TOLLS—*(Continued).*
seizing the complainants' horses and carts, and detaining them until the toll was paid ... 76
(3) A charge of an illegal demand of toll under Act VIII. of 1851, s. 6, ought not to be dealt with summarily under Chapter XVIII. of the Code of Criminal Procedure. *ib.*

TRANSLATION.
See Prisoner (1)

TRIAL.
See Procedure (9) (15)

V.

VERDICT.
See Procedure (7)

W.

WITNESS OF TENDER YEARS.
See Evidence (1).

WITNESSES.
It is incumbent upon a Court, when it discharges a witness from the duty of attendance before the trial is ended, to ascertain from the accused whether he has, or is likely to have, any need of the witness's testimony; and if he has such need, then to take such steps for insuring the presence of the witness at the required time as may be necessary ... 44
See Discharge.
See False Evidence.
See Procedure (6) (14)
See Security (4)

TABLE OF CASES

(CRIMINAL RULINGS).

Page.

A.

Afzoo ... 52
Ahmed Ali ... 42
Anunto Chuckerbutty ... 1

B.

Baboo Futteh Bahadoor *v.* Gibbon ... 74
Bocha Chowkeedar ... 33
Bowka Hari 35, 72
Brindabun Dutt *v.* Dwarka Nath Sein ... 47
Bundhoo ... 67
Buzleh Ali ... 65

C.

Cheyt Singh ... 70
Chundee Churn Dass ... 71
Chunder Coomar Roy *v.* Omesh Chunder Mojoomdar ... 78
Chunder Shekhur Thakoor *v.* Nitaloo ... 29
Chundro Mohun Bhooya ... 82

D.

Dilloo Singh *v.* Ootim Singh ... 9
Dudraj Dosadh ... 83
Dwarka Nath Haldar *v.* Noder Chand Kamte ... 35

F.

Futteh Bahadoor *v.* Gibbon ... 74

G.

Gholam Mahomed ... 17
Gonowri ... 2
Gopee Mohun Mitter ... 26
Gour Mohun Majee *v.* Doollubh Majee... 81
Gungadhur Sahoo ... 9

H.

Het Lall Roy ... 75

J.

Jackson ... 20
Jafit Ahir ... 25
Johrie Singh ... 28

K.

Kali Narain Roy Chowdhry *v.* Abdool Guffoor Khan ... 24
Khetter Mohun Choorunghee ... 43
Khetter Nath Shaha ... 31

Page.

Khumuckdharee Singh *v.* Pershadee Mundul ... 44
Koylash Boona ... 8
Kristo Prosad Mundle ... 74
Kulum Mundul *v.* Bhowaniprosad ... 32

L.

Lal Mahomed ... 82
Lall Mahomed *v.* Gibbon ... 74
Lukhini Agradanini ... 27

M.

Macdonald ... 6
Matam Mal ... 34
Meares, G. ... 54
Mohun Baufor ... 38
Money Mohun Dey *v.* Dinonath Mullick. 11
Mudoosoodun Sha *v.* Hari Dass Dass ... 40
Mussamut Itwarya ... 14
Mussamut Somree *v.* Jitun Sonar ... 30
Muthoora Nath Roy ... 72

N.

Narain Sooboodhee ... 37
Nobin Chunder Mudduck ... 46
Nujnah ... 68
Nyan *v.* Sher Ali ... 86

P.

Prosunno Chunder Gossami ... 36

R.

Radhanath Panja *v.* Wooma Churn Chowdhry ... 12
Ram Lall Singh ... 51
Rosik Lall Nundi *v.* Kartik Shant ... 48
Run Bahadoor Singh *v.* Tilessuree Koer (*2 cases*) ... 79
Rungatoonee ... 52

S.

Saffiruddi Palwan ... 5
Sardharee Lal ... 10
Shah Soojaut Hossein ... 19
Shaikh Jakir ... 39
Shukur Mahomed ... 68
Subbal Chunder Gangooly ... 16
Sufatoollah ... 49

U.

Uttom Chunder Gangooly *v.* Issur Chunder Mookerjee ... 76

RULES AND ORDERS OF THE HIGH COURT.

	Page.
Criminal C. Memo. No. 2.—There being no reformatory at present in Bengal, suggests that sentences of confinement in a reformatory under section 318, Act X. of 1872, should not be passed ...	1
Criminal C. Memo. No. 3.—Circulates letter showing how Columns 2 and 3, Part II. of Quarterly Statement D, should be filled up ...	ib.
Criminal C. O. No. 2.—In supersession of previous Circular, draws attention to provisions in the Criminal Procedure Code regarding the submission of Criminal Appeals from prisoners ...	2
Civil C. O. No. 14.—Prescribes three special returns in addition to the regular annual statements ...	ib.
Civil C. Memo. No. 14 —Circulates letter regarding the forms of Registers of Receipts and Disbursements on account of Civil Court Ameens prescribed by Circular Order No. 11, dated 14th March 1874 ...	3
Civil C. O. No. 15.—Forwards copy of letter to Judge of the 24-Pergunnahs on the subject of Sheriff's fees ...	4
Criminal C. O. No. 3.—Cancels Circular Order No. 17 of 17th June 1873 ...	ib.
Civil C. Memo. No. 15.—Forwards copy of letter to Judge of Bhaugulpore, stating that the return called for in Circular Memo. No. 9, dated 4th May last, should show the costs incurred in contested cases only ...	5
Criminal C. Memo. No. 4.—Forwards copy of letter to Officiating Sessions Judge of Chittagong as to the language in which the evidence of witnesses should be recorded in warrant cases ...	ib.
Civil C. O. No. 16.—Directs Small Cause Court Judges and Moonsiffs to examine certificates of Pleaders during the last week of every quarter, and to submit report thereon to the District Judge...	6
Civil C. O. No. 17.—District Judges, when reporting the renewal of Pleader's and Mookhtear's certificates, to state the name of Pleader's or Mookhtear's father ...	6
Civil C. O. No. 18.—Draws attention to provisions of Rent Law regarding execution of decrees in rent-suits for amounts not exceeding Rs. 500 ...	7
Civil C. Memo. No. 16.—Calls for a statement of suits and appeals of the Small Cause Court type not exceeding Rs. 20 in value decided in 1873 ...	ib.
Civil C. Memo. No. 17.—Forwards copy of letter to Superintendent of Stationery regarding alteration in last column of Quarterly Statements A, B, and C...	8
Criminal C. O. No. 4.—Sessions Judges no longer to insert in Statement No. III. any observations, in cases of acquittal, regarding the propriety of the commitment ...	ib.
Civil C. O. No. 19.—Explains Circular Order No. 25, dated 25th July 1872	ib.
Civil C. O. No. 20.—In continuation of previous Circular draws attention to alterations, &c., in Rules drawn up under Clause 2, section 20, and section 22 of the Court Fees Act ...	9
Civil C. Memo. No. 18.—Subordinate Judges and Moonsiffs to be allowed opportunities of making observations on the correctness or otherwise of the returns as to costs called for by Circular Memo. of 4th May 1874 ...	ib.
Civil and Criminal Memo. No. 19.—Calls for statement showing the number of days given to Civil and Criminal work and the number of Sessions trials and appeals heard by the Judge and Additional Judge in 1873 ...	10
Rules drawn up in accordance with section 4, Act XX. of 1865, for the qualification, admission, and enrolment of Pleaders and Mookhtears in Mofussil Courts ..	ib

REVENUE CIRCULARS.

Page.

June 1874.

Erratum.—*For* "Act X. of 1870," in line 7 of Circular No. 4 of June 1874, *read* "Act VII. of 1870." 1

No. 7.—Alteration in the Bengalee translation of Form No. 20, page 302, Board's Rules ... *ib.*

July 1874.

No. 1.—Circulates copy of correspondence laying down that the limitations governing the travelling allowances of Deputy Collectors apply also to Sub-Deputy Collectors ... 1

No. 2.—Alterations made in Return No. XXXV. ... 2

August 1874.

No. 1.—Alterations in Board's Rules regarding settlements, consequent on Government of Bengal Resolution, cited ... 3

No. 2.—In supersession of previous Circulars, promulgates new rules regarding payment of discount on stamps... *ib.*

No. 3.—Additional rule to para. 36 of the Directions under the Land Acquisition Act, showing how the amount of costs in cases referred to a Court under that Act should be set out in Appendix A *ib.*

No. 4.—Draws attention to Rules regarding the weighment of gunja ... 5

No. 5.—Lays down orders regarding the refund of judicial stamps when the applications for refund are unsupported by certificates ... *ib.*

No. 6.—Communicates orders of Government in a case of embezzlement of stamps at a sub-divisional treasury... *ib.*

September 1874.

No. 1.—Substitutes new Rule for Rule 32A at page 8 of the Salt Manual ... 6

No. 2.—Circulates Reprint of Chapter XVIII. of Board's Rules relating to "Returns" ... 7

No. 3—Prescribes Monthly Return in substitution of Form B, page 46 of Board's Rules, and makes alterations in Rules in consequence thereof ... *ib.*

No. 4.—Adds Rule (32B, page 8) to the Salt Manual ... 8

Page.

October 1874.

No. 1.—Substitutes new Rule regarding allowance to Sub-Division Officers for urgent contingent expenses ... 8

No. 2.—Cancels Circular No. 2 of May 1874 on the mode of dealing with the surplus profits of wards' estates, and circulates an order of Government on the subject *ib.*

No. 3.—Amends Salt Manual consequent on the introduction into Backergunge of the sub-charchittee system ... 9

November 1874.

No. 1.—Explains Circular Order No. 2 of March 1873 as to how receipts from "forest tracts" are to be entered ... 10

No. 2.—Adds 3 clauses to Chapter XXV., section 1, p. 341, Board's Rules, regarding expenses contingent on filing appeals in wards' cases ... *ib.*

No. 3.—Requests District Officers to intimate to proprietors, &c., whenever their estate has been transferred from the towjih of one district to that of another *ib.*

No. 4.—Rule as to travelling and halting allowances to officers, &c., employed by managers of Court of Wards' Estates *ib.*

No. 5.—Draws attention to Financial Department Resolutions of 5th December 1873 and 19th June 1874, which require Commissioners to inspect periodically all revenue treasuries, and points out how those Circulars are to be carried out ... *ib.*

No. 6.—Addition to para. 17A of Land Acquisition Instructions promulgated with Circular Order No. 4 of January 1873 ... 13

No. 7.—Addition to Circular Order No. 11 of November 1872 ... *ib.*

No. 8.—With reference to recent Government orders, authorizing the Board to confirm permanent settlements in certain cases, substitutes new clause for clause 1, and makes an addition to clause 3, section 9, Chapter VIII. of Board's Rules ... *ib.*

No. 9.—Adds a 4th column to Register No. 69, section 4, Chapter XIV., p. 225 of Board's Rules ... 14

No. 10.—Modifies List of Pass Stations consequent on the removal of the Salt Pass Station from Sealdah to Chitpore ... *ib.*

The Weekly Reporter.

CIVIL RULINGS.

The 22nd April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mesne-profits—Set-off.

Case No. 1267 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th March 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 1st October 1872.

Gocool Coomar (Defendant), *Appellant,*

versus

Baboo Bhichook Singh (Plaintiff), *Respondent.*

Baboo Taruck Nath Dutt for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

An indefinite claim for damages, in the nature of unascertained mesne-profits, cannot be pleaded as a set-off against a specific claim for rent of later years. Such damages must be sued for separately.

In a suit for rent, a defendant has no right to set off against the plaintiff's claim money in deposit with the plaintiff, unless such money was due and payable to the defendant at the time the suit was brought.

Phear, J.—On this special appeal various objections have been made to the decision of the lower Court, and we think they may be conveniently stated in the following way:—

The defendant first objects that the plaintiff has not made out his right to receive rent in varying shares for the three years as alleged in the plaint, or indeed any share at all.

And, secondly, he objects that he has not been allowed to set off against the plaintiff's claim the amount of profit which he would have received if he had been let into possession of the property during the first eight months of his lease as he was entitled to.

And, thirdly, he complains that the lower Courts have wrongly refused to credit him, as against the claim of the plaintiff, with a certain sum of money which was deposited with the plaintiff under the terms of the agreement of tenancy or pottah.

And, fourthly, he objects that the plaintiff has not made out by any evidence his right to recover interest upon the kists of the arrears of rent within the year, and therefore the lower Courts are wrong in awarding him this interest.

We think that the three first of these objections fail. The defendant, in his written statement, set up a very specific defence to the plaintiff's claim, but he never said "You are not entitled to the share of the rent to which you say you are." And it seems to us that there is nothing in the written statement, as it has been represented to us, from which we ought to infer that the defendant disputed the plaintiff's right to the share of the rent which he sued for, or in any way put him to the proof of it. The parties went to trial without any issue being raised upon this point; and we are told that, on the appeal to the Lower Appellate Court, it was not made a subject of appeal that such an issue had not been framed. Under these circumstances, we think it is too late now for the defendant to put forward this objection for the first time.

Then, as to the second objection, it seems to be very clear that under cover of it the defendant sought to set off against the plaintiff's claim for rent money which is due to him, if at all, in the shape of unascertained damages. The substance of this objection is that, if he had been allowed, as he ought

to have been, to enter upon possession and enjoyment of the land, which is the subject of lease, eight months before he was let into it, he would have put into his pocket a certain margin of rents and profits, namely, the difference between the net receipts which he would have got from the land and the payments which he would have had to make to the lessors in the shape of rent. Plainly this claim is of the nature of a claim for damages, and it can only be ascertained by a trial what the amount of the loss sustained by the defendant in this way actually was. We think that an indefinite claim of the nature of damages of this sort cannot be set up as a set-off against the specific claim of the plaintiff for rent of later years which is made in this present suit. It must be made the subject of a separate suit if the defendant has really any ground whatever to make a claim for substantial damages.

Again, with regard to the third objection, the defendant has manifestly no right to ask that the deposit-money should be set off against the plaintiff's claim, unless it is money which is, at the present time, or rather was, at the time when the suit was brought, due from the plaintiff, and payable to the defendant. But it seems that there is no evidence before the Court upon which this could be established. It is admitted that the money was deposited under the terms of the lease, whatever those were, to meet the requirements of certain provisions in the lease. But the lease is not in evidence in this case; and we have no means of knowing whether this sum of money was, at the time when the suit was brought, money in the hands of the plaintiff due and payable to the defendant. And, unless it was so, the defendant had no right to claim that it should be set off against the plaintiff's claim; or, in other words, that he should be credited with it as against the plaintiff.

But, while we think that the three first objections put forward by the special appellant fail, we are also of opinion that the fourth and the last is good. The plaintiff claims to be paid interest, not only in respect of his share of the annual rent which, the defendant admits, is due from him to the lessors as from the date when it became due, but he also asks for interest upon the kists of this rent which, he says, became due during the currency of the different years from the dates in each year at which they so became due. The defendant's admission, however, did not extend to this length; and, in the absence of the kubooleut or pottah, we are unable to say whether the plaintiff in entitled, on the terms of the lease, to interest for default of payment of the different kists in the manner alleged by him. We have already said that the kubooleut upon which the plaintiff sues was not admissible, and was not admitted in evidence. We are thus without the means of knowing whether the plaintiff's claim could be rightly established in this respect or not. Of course this objection does not in any way affect the lawfulness of the arrear of interest from the end of the year, when, undoubtedly, the annual rent became due according to the admission of the defendant. Consequently, the allowing of this objection will have only the effect of diminishing the amount which has been awarded by way of interest by the lower Courts to the extent of the interest on the different kists within the year. The decree of the Lower Appellate Court must be modified to this extent. Substantially, however, we think that the appeal has failed, and that the respondent ought to have his costs of this Court.

The 22nd April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Possessory Suit—Wrongs and Remedies—Right to Relief.

Case No. 621 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 21st December 1872, reversing a decision of the Moonsiff of Lushkerpore, dated the 21st June 1872.

Bishnoo Pershad Bunnick (Plaintiff), *Appellant,*

versus

Ram Coomar Deb and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Bykunt Nath Doss* for Appellant.

Baboo Debendro Narain Bose for Respondents.

A plaintiff, proving a wrong done to him, though not exactly to the extent of which he complains, is entitled to relief though not to the extent or on the ground on which he asks it.

Case in 12 W. R. 248 explained.

Markby, J.—It appears that in this case the plaintiff turned the defendant out of

possession on the 3rd Bysack 1277. The defendant immediately recovered possession by a summary proceeding under section 15 of Act XIV. of 1859, whereupon the plaintiff brought this suit.

Both parties claim the land as their separate property.

The first Court gave the plaintiff a decree for possession of an undivided 12-annas and 15-gundas share.

The second Court set aside that decree, and dismissed the suit *in toto*.

We are now satisfied that the view taken by the Moonsiff as to the nature of the plaintiff's interest was right; the question turns entirely on the construction of one document, and it is clear that upon that document the plaintiff is entitled to a 12-annas 15-gundas share.

The only doubt is whether the plaintiff having sued to recover exclusive possession of the whole property can recover an undivided share. But we think he can. In right of his share, the plaintiff could claim to be admitted to a joint possession of the property, and the defendant was guilty of a wrong in keeping him out. The plaintiff has a right, as against the defendant, to be restored to possession, although not to possession exactly of that nature to which he laid claim. We think it would be useless and unnecessary to put the plaintiff to a fresh suit. But, both parties having been in the wrong, we are not disposed to give any costs in this Court or the Courts below.

The case in 12 Weekly Reporter 248 has, we think, been misunderstood. We believe that decision to be in accordance with the prevailing opinion in this Court that a party, asking to have a right declared of a specific nature, must prove the right which he claims (see 6 Weekly Reporter 311). The case is quite different when the plaintiff proves a wrong done to him, though not exactly to the extent of which he complains, or that he is entitled to relief, though not exactly to the extent or on the very ground which he asks it. The stricter rule applied to declaratory decrees does not apply to all other cases. Possibly it escaped the attention of the Court in the case reported in 19 Weekly Reporter 195 that the decision in 12 Weekly Reporter dealt only with a suit for a declaratory decree.

The decision of the Subordinate Judge will be set aside, and that of the Moonsiff restored and affirmed. And each party will pay their own costs in this Court and the lower Courts.

The 23rd April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Mortgage prior to Registration Act.

Case No. 1438 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 8th April 1873, affirming a decision of the Additional Moonsiff of that District, dated the 4th January 1873.

Sreemutty Fyezoonnissa (one of the Defendants), *Appellant*,

versus

Moulvie Sadutoollah (Plaintiff), *Respondent*.

Baboo Bama Churn Banerjee for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where a complete title as mortgagee was acquired before the Registration Act of 1864, the mortgage, though not registered, was held to be good against a registered deed of sale executed after Act XX. of 1866 came into operation.

Couch, C.J.—In this case the mortgage was in 1861, and it has been found that the money was advanced, and the mortgage completed by possession. The mortgagee, therefore, even before the Registration Act of 1864, acquired a complete title as mortgagee. We agree with the learned Judges who decided the case reported in Volume X., Weekly Reporter, page 65, in the reasons which they give for holding that section 50 of Act XX. of 1866 would not operate to invalidate that title. The mortgage, although not registered, would be good against the defendant's deed of sale, which was executed after Act XX. of 1866 came into operation, and which *was* registered.

The appeal must be dismissed with costs.

The 23rd April 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Pre-emption—Mahomedan Law.

Case No. 2063 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of the 24-Pergunnahs, dated the 4th August 1873, reversing a decision of the Moonsiff of Alipore, dated the 8th November 1872.

Nubee Buksh *alias* Golam Nubee and others (three of the Defendants), *Appellants,*

versus

Kaloo Lushker and others (Plaintiffs), *Respondents.*

Mr. Ameer Ali and *Baboo Anund Gopal Paleet* for Appellants.

Moonshees Mahomed Yusuf and *Abdool Baree* for Respondents.

As soon as a contract is ratified by acceptance, and the vendor has gone so far that he cannot legally draw back, it is time for the pre-emptor to step in.

A pre-emptor is not required to tender the purchaser's price or any price at the time of making his demand, and, so long as a party claiming a right of shuffa pays the amount which the Court considers to be the proper price, he brings himself in Court within a reasonable time.

On the question of pre-emption, the Court must act in strict accordance with the provisions of the Mahomedan Law, rather than on what it thinks just and equitable.

Jackson, J.—THIS was a case of asserted pre-emption on the part of the plaintiff, who sought to enforce that right under the Mahomedan Law. His suit was dismissed by the Moonsiff, who not only considered that the forms required by the Mahomedan Law on that subject had not been complied with, but entirely disbelieved the witnesses called by the plaintiff, and we are bound to say he assigned some very good reasons for disbelieving them. The decision was appealed against, and the Subordinate Judge, Baboo Kedaressur Roy, who heard the appeal, reversed the judgment of the Moonsiff, holding that the requisite forms had in substance been complied with, and that there was no ground for rejecting the testimony of the plaintiff's witnesses. He consequently gave the plaintiff a decree. Several objections have been taken to that decision: The learned Counsel for the appellant contended, in the first place, that the plaintiff's claim had not been made at the proper time, because the contract had not then been reduced to writing, and he showed that the kobala executed by the defendant bore a later date than that mentioned by the plaintiff as the date of purchase. On behalf of the respondent it is contended that a contract under the Mahomedan Law may be complete without being reduced to writing and engrossed on stamps, although the exigencies of the law of British India require that in certain cases a contract should not only be a written one, but must be engrossed on stamp, and also registered. It seems to us that, as soon as a contract between two parties is ratified by acceptance, and the vendor has gone so far that he could not legally draw back, and the purchaser might compel him specifically to perform his part of the contract, the sale is made so far as makes it time for the pre-emptor to step in. That, it is not denied, has taken place in the present instance.

A further question was as to the difference in price, for it appeared that the plaintiff wanted to take the property at a price less than what the purchaser had offered. On this point it seems to us that a pre-emptor is not required to tender the purchaser's price or any price at the time of making his demand, and, so long as a party claiming a right of *shuffa* pays the amount which the Court considers to be the proper price, we think he brings himself in Court within a reasonable time.

Another point was the alleged equal or superior right of the defendant. On this point it seems to us that the Subordinate Judge, although he does not come to a very clear finding on this question, has virtually found that the claim of the plaintiff is superior to that of the defendant.

There is one point, however, on which the judgment of the Lower Appellate Court is, we think, not sufficient, that is, as to the complete and strict observance of the forms required by the Mahomedan Law. This right

of *shuffa*, as has been repeatedly observed in this Court, is a very peculiar right, weak in its nature, and one which requires for the comfort of the community to be enforced by proper observance of all its essentials. One of those essentials is the performance of the ceremony called *tullubeh ist shehad*. Now, it seems to us that, on this part of the case, and we think also to some extent as to the respective rights of the plaintiff and the defendant on the question of pre-emption, the Subordinate Judge has looked rather in the light of what he thought just and equitable than in strict accordance with the express provisions of the Mahomedan Law. There is, it seems, at least in so far as is shown to us, only one witness, *viz.*, Jonab Ali, who has deposed to the express terms in which the ceremony called *tullubeh ist shehad* is made. We are willing to concede, if that witness could be entirely and absolutely believed, that the words to which he deposes may be accepted as a compliance with the terms of the law, regard being had to the parties claiming the right in this instance, who are persons of an inferior class, and not acquainted with the Arabic language, and for whom some allowance must be made; but it seems to us to be a very serious question whether this witness is to be believed. The Moonsiff, as we have already said, expresses himself in very strong terms as to the credibility of the plaintiff's witnesses, and the Subordinate Judge, before he overrules that conclusion, ought to give the very fullest weight to the opinion of the Judge who heard the witnesses. It is not competent to us, sitting here in special appeal, to determine finally whether this witness or that witness is to be believed. We think, therefore, that the case must go back to the Lower Appellate Court in order to determine carefully whether the witness, Jonab Ali, is to be believed in the statements that he makes, and whether the words, which he describes as having been used by the purchaser on this occasion, were words really intended to meet the requirements of the Mahomedan Law, or only ordinary expressions of a disappointed Bengalee purchaser. As the case is going back to the Lower Appellate Court, we think there ought to be a further direction to the Lower Appellate Court to consider and determine the question whether, under the Mahomedan Law, the plaintiff was entitled to a right of pre-emption over all, or at least over one, of the defendants.

The costs of this appeal will follow the result.

The 23rd April 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges*.

Ex-parte Decree—Act VIII. of 1859, s. 119—Appeal—Notice under s. 216.

Case No. 2060 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 11th June 1873, reversing a decision of the Moonsiff of Magoorah, dated the 16th July 1872.

Bimola Soonduree Dassee and another (two of the Defendants), *Appellants*,

versus

Kalee Kishen Mojoomdar (Plaintiff), *Respondent*.

Baboo Grija Sunkur Mojoomdar for Appellants.

Baboo Bungshee Dhur Sen for Respondent.

An *ex-parte* decree of June 1865 kept alive by successive applications for execution was subsequently set aside on an application of 14th August 1871 (within 30 days after attachment in execution) made under Act VIII. of 1859, s. 119, and a judgment was passed on the merits. The Lower Appellate Court reversed the order setting aside the *ex-parte* decree:

HELD that, in so far as the Moonsiff had decided that the application was in time, he did not come under s. 119, and therefore his order was not final, and the Lower Appellate Court had jurisdiction to inquire into his proceedings.

A notice under s. 216 stands upon a different footing from a summons or other notice which a party is bound to serve, and it must be presumed that a Court, until the contrary is proved, has duly issued such notice where required by law to do so.

Jackson, J.—THIS is a special appeal from the decision of the Additional Judge of Jessore, who reversed the decision of the Moonsiff of Magoorah, by which decision a suit by the plaintiff, Kalee Kishen Mojoomdar, commenced in or before the year 1865, was dismissed by a final order of the 16th July 1872. The plaintiff, it seems, got an *ex-parte* decree against the defendant on the 12th June 1865. An application was made, on the 27th May 1868, for execution of that decree, but the proceedings on that occasion did not go beyond notice to the debtor. A further application was made on the 14th June 1871. Notice was issued, and some property was attached on the 29th July, and, about 16 days afterwards, that is, on the 14th August 1871, the defendant made an application, under

section 119 of the Code of Civil Procedure, to set aside the *ex-parte* judgment. The judgment of the Moonsiff, which is before us, is one upon the merits of the case, but it was preceded by a decision in favour of the defendant, by which he set aside the *ex-parte* judgment. The case coming on regular appeal before the Additional Judge, he entered into a consideration of the correctness of the Moonsiff's order setting aside the *ex-parte* judgment, and he held that the order of the Moonsiff in that respect was open to appeal, and that, on the grounds which he states, the order was improper. He therefore decreed the appeal, and reversed the decision of the Moonsiff.

It is contended before us in the first place that the Lower Appellate Court had no jurisdiction to reverse the order of the Moonsiff, it being declared by section 119 that, in all cases in which the Court shall pass an order under that section for setting aside a judgment, the order shall be final; and, secondly, if the propriety of the order under section 119 is to be considered, the defendant was in time, inasmuch as he applied to the Court within 30 days of the process attaching his property in execution. With regard to the first of these objections, it appears to us that the Lower Appellate Court was competent to go into the question of the regularity of the Moonsiff's proceedings. The section says: "In all cases in which the Court "shall pass an order under this section for "setting aside a judgment, the order shall "be final." Therefore, if it appears that the Court had passed an order otherwise than under this section, there would be no finality, and it has been held in a matter very much analogous to this, *viz.*, where an application to review a judgment has been admitted, and where a decision afterwards takes place on re-hearing, and that decision comes to the Lower Appellate Court on appeal, that the Lower Appellate Court is competent to look into the question whether the admission of the review has been in accordance with the restrictions imposed by the law. Now, in so far as the Moonsiff appears to have decided that the defendant was in time, when he applied within 30 days of the date of attachment, we consider the Moonsiff did not come under section 119, and so far the Judge was right in setting his order aside, that is, assuming that the previous process for enforcing the judgment had been executed. The previous process of course would be the notice, and upon that matter it does not seem that the Moonsiff has come to a proper decision. He says that the service of notice is not proved by the decree-holder. In saying this, the Moonsiff appears to have lost sight of the law. A notice under section 216 stands upon quite a different footing from the summons or other notice which a party is bound to serve, because, under that section, where an interval of more than one year has elapsed between the date of the decree and the application for its execution, "the Court *shall* issue" a notice to the party against whom execution may be applied for. Now, in such a matter as this, the well-known maxim, that all things must be presumed to have been done in accordance with rule, will, we think, apply, especially when a Court is dealing with its own process, as the Moonsiff did in the present instance. We are entitled to presume that the Court had issued notice, and it clearly lay upon the defendant to prove, to the satisfaction of the Court, that the notice did not, in fact, issue. It is a very serious matter that a plaintiff should be called upon, after the lapse of six or seven years from the date when he obtained a decree, not only to prove all those matters which it is the business of the Court to look to, but also to prove *de novo* the case originally set up. The witnesses might all be dead, the documents might all disappear, and one might feel the utmost difficulty in proving a matter which he might very easily have done seven years before. We think, therefore, that the Court ought to be very cautious after the lapse of a considerable time in making any assumption in favour of the judgment-debtor, which he was not entitled to at the time when judgment was passed against him. The case therefore must go back to the Lower Appellate Court for a distinct finding whether or not any notice issued first in 1868, and afterwards in 1871. In finding upon that question, the Lower Appellate Court must give proper weight and consideration to the maxim *Omnia presumuntur rite esse acta*, by which all acts done by the Court must be presumed to have been done in accordance with law and practice.

We may add that the Judge, in dealing with the question of the service of notice in 1868, has left the case in a position which, we think, he was not justified in doing. He says that the defendants are in a dilemma in respect of that notice, because, if the notice was served, then the defendants were barred; if it was not served, then the decree was dead by lapse of time, and there would be no need for setting it aside. That may be true,

but then the result of the Judge's order setting aside the decision of the Moonsiff, who dismissed the plaintiff's suit, will be to restore the first *ex-parte* judgment of the Moonsiff. The Judge ought not to have left the question of the service of notice undetermined in that way. He was bound to come to a definite finding on that point.

The 23rd April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Ejectment—Damages—Specific Performance.

Case No. 1327 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 25th March 1873, reversing a decision of the Moonsiff of Begoosurai, dated the 28th August 1872.

Bujrungee Dutt Pattuck (one of the Defendants), *Appellant,*

versus

Shaikh Moorad Ali and another (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Moonshees Abdool Baree and *Serajul Islam* for Respondents.

D, after having given a kutkina pottah of a certain village to M, granted another kutkina pottah of the same land to R, who obtained possession under his pottah. M then sued D and K for ejectment, and to recover possession:

HELD that M's remedy lay in an action for damages, and that he could not claim specific performance unless R raised no objection to giving up possession.

Phear, J.—HAVING regard to the peculiar way in which this case has come before us, we think there is not sufficient ground for our interfering with the decision of the Lower Appellate Court upon special appeal.

The plaintiff says that the first-named defendant, Bujrungee Dutt, granted him a kutkina pottah of a certain village on the 26th May 1871, and that the defendant afterwards granted another kutkina pottah of the same property to Mr. Rainey on the 21st July 1871. And he says that Mr. Rainey obtained possession under his pottah, and that he, the plaintiff, has not been able to get possession. He states the reason which led to the delay in his getting possession; and he seeks in this suit to eject Mr. Rainey, and to recover possession of the property himself.

Now, it appears to us, on the facts stated by the plaintiff, that the suit is, to a considerable degree, misconceived. If the first defendant, after executing a kutkina pottah to the plaintiff, but before giving the plaintiff possession of the property according to its terms, had granted another pottah to Mr. Rainey, and given Mr. Rainey actual enjoyment of the property thereunder, it would then no longer be in the power of the first defendant to carry out the contract which was involved in the pottah which he first granted to the plaintiff. And the plaintiff's remedy, if he was entitled to a remedy under the circumstances of the case, would be in the shape of damages. He could not get specific performance of his contract, but he would have a right to be compensated for the loss of the benefit which he would have derived from the contract, had the contract been duly carried into effect. However, this defence is, strictly speaking, not set up either by the first-named defendant, the lessor Bujrungee Dutt, or by Mr. Rainey. Indeed, Mr. Rainey does not appeal at all, and therefore we must take it that he has no objection to the decree which the plaintiff has obtained in the Court below. The only person who appears against the decree of the Lower Appellate Court to this Court is Bujrungee Dutt, the lessor; and he could make no answer to the plaintiff's claim other than that which we have suggested, if it is founded in fact, namely, that he has put some one else into the possession of the property, and is unable to carry out the contract with the plaintiff. But, as long as Mr. Rainey declines to defend this suit, it is difficult to see how Bujrungee Dutt can take up this line of defence. Under these circumstances, we understand that Mr. Rainey raises no objection to giving up possession of the property to the plaintiff, and, therefore, there is no reason in law why the first-named defendant, Bujrungee Dutt, should not specifically perform the contract which he made with the plaintiff.

On the whole, then, it seems to us that, on the facts as they now appear, the decree of the Lower Appellate Court is substantially right, and that this appeal fails. Accordingly we dismiss the appeal with costs.

In the view we have taken it is not necessary for us to express any opinion as to the merits of the case. The merits seem to depend entirely upon questions of fact, and those have been determined by the Lower Appellate Court in favour of the plaintiff.

The 27th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Benameedar—Beneficiary Owner—Purchaser's Liabilities.

Case No. 1599 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 4th April 1873, affirming a decision of the Moonsiff of Parkul, dated the 16th December 1872.

Hakeem Meah (Plaintiff), *Appellant,*

versus

Beejoy Patnee and others (Defendants), *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Baboo Bharut Chunder Dutt for Respondents.

Where there is a person in possession of an estate other than the nominal owner, *i. e.*, the person in whose name the title-deed is, a purchaser, although he may be a purchaser for value, is bound to inquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession.

Couch, C.J.—THE plaintiff's case was that the lands, the subject of the suit, were included in the pottah which was in the name of Rajah Rajendro Singh, and that the Rajah sold the lands of Mattare Roy and Dumai Roy, and that subsequently they sold to the plaintiffs.

The defendants' case was that they were the real owners, and that these two persons were only benameedars, the transfer made from Rajah Rajendro Singh to them being the transfer only of the nominal or benamee right. The facts have been found by both the lower Courts in favour of the defendants upon this point. But the Subordinate Judge, at the end of his judgment, says: "The plaintiffs assert that they made the purchase in good faith; but, taking this to be true, the Court cannot make a third party a loser, when a person has purchased in good faith the right of such third party from others who are not the owners."

We cannot say that this is good law; but, upon the facts as found, we think the plaintiffs have no right to recover the property. It is found by the Subordinate Judge that the defendants had been the rightful owners before the grant of the pottah in the name of Rajah Rajendro Singh, and had been in possession up to the time of the suit. In another place, he says that "the property was in the ostensible names of Dumai and Mattare, but the property as before was in the possession of the defendants, and was owned by them." So that we have here a case where the benameedars have no possession, and the property is in the possession of the persons from whom they were benameedars. In such a case the person purchasing from the benameedars was bound to inquire what was the interest of the persons who were in possession. It is a question of equity, whether the person buying from the benameedars can be considered to have had actual or constructive notice that the benameedars were not the real owners, and that the purchase was made simply in their names for the other persons.

It was on this principle that I decided a case which is reported in 6 Bombay High Court Reports, p. 59, where the purchase had been made from the person who was the nominal owner, but it appeared that there was a trust for some charity for the benefit of the Chinese community in Bombay, and there was a possession by persons who were objects of the charity. I held that the purchaser was bound to inquire what the nature of that possession was, and was affected by notice of the trust for the charity. The principle is that, if a purchaser, although he may be a purchaser for value, has actual or constructive notice of the trust, he is bound by it to the same extent and in the same manner as the person from whom he purchases. And, where there is a person in possession of the estate other than the nominal owner, the person in whose name the title-deed is, the purchaser is bound to inquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession.

That rule must be applied to this case. There may be cases in which a purchase from a benameedar would be sufficient, and would give a good title, but, in such a case as the present, where the defendants were in possession, I think the plaintiffs' purchase from the benameedars did not give them any title or right to recover the property. The appeal will, therefore, be dismissed, although the law laid down by the Subordinate Judge is not correct. The respondent will have his costs.

The 27th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Special Appeal.

Case No. 1620 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 21st June 1873, reversing a decision of the Moonsiff of Sahibgunge, dated the 31st December 1872.

Sooraj Kant Acharje (Plaintiff), *Appellant*,

versus

Khoodee Narain Manna and others (Defendants), *Respondents*.

Mr. C. Piffard for Appellant.

Baboo Sreenath Doss for Respondents.

A judgment, which shows on the face of it want of due consideration of evidence and the introduction of foreign matters into the case, may be brought up before the High Court in special appeal.

Couch, C.J.—We think we cannot allow the decision of the Judge to stand. He says that the evidence was altogether on one side, as in fact it was, it being that for two years rent had been paid at the rate at which it was claimed. Then he says that the plaintiff "fails to show any agreement for enhanced "rent, or that actually enhanced rents "were paid." We cannot understand his saying that the plaintiff failed to show that enhanced rents were paid, and if they had been paid for three years, it would be evidence of an agreement to pay rent at that rate. But the Judge goes on to state what appears to us to be the key to his judgment, *viz.*, that the enhancement of all ryots in this mehal and their "resistance to the same "is well known, and there could be no "enhancement of rent, the parties not agree-"ing to it, and even if exactions had been "forced from the ryots for some years, and "they were clearly proved, I cannot consider "such payments to be the rents as due "subsequently from the ryots. I would rather "look upon such excess payment as *abwabs* "and cesses." There is nothing in the case to justify the Judge in speaking of these as exactions. It is clear that he unfortunately imported into the case what he had no business to take into account—some knowledge he had acquired of the state of things in this mehal. A judgment which shows on the face of it a want of due consideration of the evidence in the case, and the introduction of other matters, is one which we think we cannot allow to stand. There is an error in the decision of the case and in the investigation of it which has affected the decision on the merits, and it may be brought before this Court in special appeal. The appellant is entitled to have the unbiased judgment of the Lower Appellate Court on the facts of the case. The decree must be reversed, and the case remanded for re-hearing.

The costs will follow the result.

The 27th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges*.

Registration in Collectorate—Cause of Action.

Case No. 1242 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 13th March 1873, affirming a decision of the Moonsiff of Monghyr, dated the 20th July 1872.

Rewat Mahton and another (two of the Defendants), *Appellants*,

versus

Penum Mundar and others (Plaintiffs), *Respondents*.

Baboo Boodh Sen Singh for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

Where parties relying on their title to certain property apply to have their names put into the Collectorate books, and their application is successfully opposed by other parties claiming the same property on the ground of a conveyance made to themselves, such opposition constitutes a good cause of action to the parties first mentioned if they have the right alleged.

Phear, J.—We think that no ground has been furnished to us upon which we ought to interfere with the decision of the Lower Appellate Court upon special appeal.

It was first objected that the plaintiffs had shown no cause of action in this suit. But the purpose of the suit is to have a declaration of title to property; and the plaintiffs distinctly say that, in reliance upon the strength of their title which they want to have declared, they went to the Collectorate to have their names put into the Collectorate

books; but that the defendants successfully opposed this application on the ground that Meherban Mahton, the first defendant, in whose name the property stands, executed in their favour a *shurakutnama*, which gave them the right to the property. This conduct on the part of the defendants constitutes a very good cause of action—exceedingly good ground why the plaintiffs should come into Court to vindicate their right to the property if they have the right.

It was next objected that the property was of a value much beyond the jurisdiction of the Moonsiff who tried the suit in the first instance, and that therefore the decrees of the Courts below were bad for want of jurisdiction. But the valuation which the plaintiffs put upon the plaint was within the limit of the Moonsiff's jurisdiction, and no issue was raised or asked for in either of the Courts below as to the value of the property.

It was pressed upon us that this Court will entertain the question of jurisdiction at any stage of the proceedings; and a case was cited to us from the 14 Weekly Reporter, p. 228, in which this Court had, on special appeal, after as many as five previous hearings, set aside all the decisions of the Courts below upon an objection to the jurisdiction which was made then for the first time. But in that case it seemed to the Judges, who heard the special appeal, upon the facts which the plaintiff himself set out in his plaint, that the value of the property was incontestibly beyond the limit of the Moonsiff's jurisdiction. In the present instance, we have nothing of this kind to go upon. It is true that there are statements in the plaint from which we may infer that the property, many years ago, was of a larger value than the present limit of the Moonsiff's jurisdiction, and the statements thus made in the plaint would be exceedingly good evidence bearing upon an issue of jurisdiction, if an issue upon that point had been raised. But it is impossible for us to say, upon these statements alone, that the value of the property must necessarily be taken to be, as against the plaintiffs, of a larger value than that for which a suit could be brought in the Moonsiff's Court. It would be necessary for us, before we could act upon this objection, to direct that an issue as to the value of the property should be framed and sent back to the first Court to be tried. But this is a course which we do not think it necessary or right to take at this stage of the proceedings.

The other objections which have been made on special appeal seem to be all directed to the value of the evidence, and to question the soundness of the judgment which the Lower Appellate Court has formed upon the evidence with regard to the facts of the case. Without expressing any opinion either way upon the value of these objections, or upon the merits of the case itself, it is enough for us to say that we think that they are not of such a nature as we can entertain on special appeal.

The appeal is, therefore, dismissed with costs.

The 28th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Revenue Settlement—Enhancement of Rent.

Case No. 484 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 5th February 1873, reversing a decision of the Moonsiff of Begoosurai, dated the 25th November 1872.

Roopun Roy and another (Defendants), *Appellants,*

versus

Purdeep Singh and others (Plaintiffs), *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Gunesh Chunder Chunder for Respondents.

If a ryot has a right of occupancy, his rate of rent can only be enhanced in the mode prescribed by law; if he has not, his landlord can only claim arrears of rent on the ground of actual agreement, express or implied. Such claim cannot be made at an enhanced rate, simply because the landlord has settled with Government at a higher rate of revenue.

Phear, J.—It seems to us that the Subordinate Judge has committed error in his

decision. The plaintiff seeks to recover arrears of rent from the defendant in respect of the year 1278. And he states the amount of those arrears at Rs. 98-11 annas. The defendant admits that he owes rent to the plaintiff for the year 1278, but he says that the rent which he owes is less than Rs. 98-11 annas. And indeed there seems to be scarcely any doubt that the plaintiff in this suit seeks to recover from the defendant a higher rate of rent than he has hitherto been receiving from the defendant. In other words, he is seeking to recover arrears of rent at an enhanced rate, although he does not say so in terms, neither has he made any foundation for a claim of this kind according to the provisions of the Rent Law. It seems, however, that the cause of action upon which he comes into Court to make this claim upon the defendant is, that he has lately taken a settlement from Government of land, of which this is a portion, at a higher rate of revenue than that at which he held it before. And the Subordinate Judge says: "It "would be quite contrary to equity if the "plaintiffs pay to Government at the rate "of Rs. 3 per beegha, and receive rents "from the ryots at a less rate. There is "no need of issuing a notice for obtaining "rent equal to the amount of malgoozaree "fixed by Government in the settlement. "On the contrary, a notice is necessary to "be issued when the plaintiffs wish to obtain "rents more than that fixed by Government "in the settlement, or if, after the settlement "by Government, the plaintiffs themselves "had realized from any tenant at a less "rate."

The position thus taken up by the Subordinate Judge is, we think, unsound. If the defendant is a ryot having a right of occupancy, then his rate of rent can only be enhanced in the mode prescribed for that purpose by the Rent Law. If he be not a ryot having a right of occupancy, then the plaintiff has laid no foundation for this suit. He can only claim arrears of rent upon the footing of actual agreement, express or implied. The first Court took the view which we have just endeavoured to explain, and gave the plaintiff a decree simply for the rent at the old rates; in fact, the rates admitted by the defendant. And it appears to us that this was a right decision. Accordingly we reverse the decree of the Lower Appellate Court, and affirm that of the first Court. The appellant must have his costs in this Court and in the Lower Appellate Court.

The 28th April 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Partition—Revenue-paying Land— Jurisdiction —Declaratory Decree.

Case No. 1730 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 23rd July 1873, reversing a decision of the Moonsiff of Howla, dated the 24th April 1873.

Ruttun Monee Dutt and others (Plaintiffs), *Appellants.*

versus

Brojo Mohun Dutt and another (Defendants), *Respondents.*

Baboo Aukhil Chunder Sen for Appellants.

Baboo Sreenath Banerjee for Respondents.

A suit for partition of revenue-paying land is not cognizable by a Civil Court; and it cannot succeed even as to lakhiraj land unless it specifies quantity and situation.

Failing in such a suit, a plaintiff cannot as of right claim a declaratory decree.

THIS was an application for a partition of a certain plot of land described as comprising 3 dags, No. 124 of nowabad property, and Nos. 125 and 126 of resumed lakhiraj land.

The plaintiff claimed two-thirds of the whole, and asserted a local custom whereby the elder brother was, on a partition taking place, entitled to claim the northern portion of the block. The defendant, amongst other things, disputed the right of the plaintiff to more than one-half. The first Court gave the plaintiff a decree for two-thirds of the land.

The second Court reversed that decision, holding that a suit of this nature "for partition of land of a joint undivided revenue-paying mehal is not cognizable by the Civil Court." It seems to me that the Subordinate Judge is perfectly right on this point. If the Civil Court could direct the partition of a small quantity of revenue-paying land, the Civil Court could also divide a larger quantity or successive small quantities making up the whole, without the intervention of the Collector, on whom the power to make a division is expressly conferred by Regulation XIX. of 1814.

It is said that dag No. 124 is rent-free land, and capable of being divided by the

consider the effect of the ruling laid down by the Privy Council in the case in 9 Weekly Reporter; and it is probably sufficient for us now to say that the circumstances of that case were entirely different from those of the present case. There the suit appears to have been brought solely for the purpose of establishing the plaintiff's right to enhance, and the cause of action relied upon initiated in the service of notice. Neither side attempted to treat the suit as a mere claim for arrears of rent, until the litigation reached the Privy Council. Here the suit was from the beginning essentially a suit to recover arrears of rent due in respect of the years 1278 and 1279, and the question whether plaintiff had made out a right to be paid rent at an enhanced rate for 1279 was only part of the larger question what was the rate at which the rent was due for that year. We think, therefore, that the Lower Appellate Court did not commit any error in decreeing arrears of rent for 1279 at the rate which it found to be the true rate, although it was less than the enhanced rate claimed by the plaintiff.

We think that the defendant's first objection also fails. As the result of the defence set up by the defendant in the present case, amongst other issues framed were the following: *First*, what were the old rates at which the defendant paid rent to the plaintiff for this land? and, *secondly*, is the defendant entitled to hold this land permanently at fixed rates? These were the two principal issues between the parties. The matter of suit, regard being had to the defence set up, could not properly be tried between the parties without the determination of these issues. It thus became incumbent upon the Court to decide, first, what was the rate of rent at which the defendant had been holding of the plaintiff up to the end of Choit 1278. And next, was he entitled, as he alleged he was, to hold the land permanently at that fixed rate? Accordingly, it cannot rightly be complained of on special appeal that the Lower Appellate Court came to, and recorded, specific findings upon these issues. In other words, we think that the appeal of the defendant, so far as it complains that the Lower Appellate Court has come to a finding on the second issue, cannot be sustained. It was pressed upon us, and a decision of the Privy Council was adduced to show that, inasmuch as this finding was useless for the purposes of this case (because the Court had also found that the plaintiff had not made good his claim to enhanced rate), therefore the finding ought not to be allowed to stand upon the record as a judicial decision between the parties. It seems to us, however, that, as the Court was certainly called upon to come to a decision one way or the other on this issue, the decision at which it arrived must remain matter of record. Whether it will ever hereafter affect the defendant prejudicially or not must be left to depend upon the circumstances of the case in which it may, if ever, be adduced as evidence. We think that we cannot, on this special appeal, interfere with it, or make any declaration with regard to its possible prospective effect.

The plaintiff in his cross-appeal complained that the Judge had refused, for insufficient reasons, to give him rent at enhanced rates. But we are of opinion that the ground upon which the Judge based this part of his decision is sound. The plaintiff asked for enhanced rent, because he said the productive power of the land had increased by means other than the agency of the defendant ryot. And the mode in which he proposed to show that the productive power had so increased was this, that a new watercourse had been laid out and set in operation by the plaintiff just at the commencement of the year 1279. The Judge was of opinion that this cause of increase in the productive power of the land could only be in operation, if at all, by the plaintiff's own account during the year 1279; and he thought that, under the terms of section 18 of the Rent Law, it was necessary that the cause relied upon should be an existing and operating cause, one which had already produced effect at the time when the notice was served. And we agree in that opinion. A decision in the 12 Weekly Reporter, p. 531, seems to corroborate this view. The words of the section 18 are that "no "ryot having a right of occupancy shall be "liable to an enhancement of the rent "previously paid by him, except on some one "of the following grounds." And the second of these grounds is: "That the value of "the produce or the productive powers of "the land have been increased otherwise than "by the agency or at the expense of the "ryot."

Section 14 prescribes the mode in which the zemindar must proceed in order to get the enhancement of rent to which section 18 refers. And under section 14 a notice of the intended enhancement must be given in or before the month of Jeit, which must specify the rent to which the ryot will be subject for the ensuing year, and the ground on which the enhancement of the rent is

claimed. We think the ordinary meaning of these words is that the notice must specify a ground of enhancement which is actually subsisting and in force, operative, at the time when the notice is issued, and not a ground, or more truly matter, for speculating or anticipating that a cause of increased productiveness will arise or come into force after the period when the notice is served. The Judge finds as a fact that this water-course which the plaintiff relied upon as being the cause of the increased productiveness of the land was itself excavated in Jeit 1278, and that the notice itself was issued in the same month.

On the whole, we are of opinion that both the appeal of the defendant and the cross-appeal of the plaintiff fail, and must be dismissed.

We think that each party must pay his own costs.

The 29th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Set-off—Contribution—Act VIII. of 1859, s. 121.

Case No. 1272 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 13th February 1873, modifying a decision of the Moonsiff of Tajpore, dated the 17th September 1872.

Hossena Bebee (Plaintiff), *Appellant,*

versus

James Smith (Defendant), *Respondent.*

Mr. M. L. Sandel for Appellant.

Mr. R. T. Allan for Respondent.

The claim which a defendant may, under Act VIII. of 1859, s. 121, set off against a plaintiff's money-claim must itself be of the nature of a debt. A claim based upon principles of equity, *e. g.*, a claim to contribution, cannot be tried by way of set-off under the provisions of this section.

To admit of a set-off, there must be, by the nature of the two claims, such a connection between the claim and counter-claim that the truth and completeness of the one cannot be judged of or measured without reference to, and a consideration of, the other.

Phear, J.—THIS is a suit brought by the plaintiff, one of several co-sharers in a considerable property, to recover Rs. 683-10-1½ principal with interest in respect of arrears of rent which, she says, are due from the defendant to her as her share for the years 1276, 1277, and 1278.

The defendant admits the plaintiff's claim to the rent for which she sues, but says that, during the years in question, he paid on behalf of all the shareholders the Government revenue due in respect of the estate, and that the plaintiff's quota of this revenue was Rs. 111 odd annas for the year 1276, Rs. 114 for the year 1277, and Rs. 113 for the year 1278, and he claims in this suit to set off these items against the arrears of rent due from him to the plaintiff.

The question now before us is whether the defendant can in this suit set off these items against the plaintiff's claim.

We think that he cannot. The section of the Civil Procedure Code which authorizes a defendant, when sued for a money-debt, to set off a money-claim against him, is section 121. It is in these words: "If, in a suit "for debt, the defendant desire to set off "against the claim of the plaintiff the amount "of any debt due to him from the plaintiff, he "shall tender a written statement containing "the particulars of his demand, and the "Court shall thereupon inquire into the "same: Provided that, if the sum claimed "by the defendant exceed the amount cogni-"zable by the Court, the defendant shall not "be allowed to set off the same, unless he "abandon the excess."

If this section were absent from the Code, then the remedy of a defendant, who had a money-claim against the plaintiff who sued him for money, could be obtained only by bringing a separate suit. And this remedy is still open to the defendant in all cases to which section 121 does not apply, or in which the defendant has not availed himself of it. Now, on looking closely at the words of this section, we see, as probably it might have been reasonably anticipated, that the claim which the defendant may thus set off against the claim of the plaintiff must itself be of the nature of a debt. It would be exceedingly inconvenient if in answer to a simple money-claim made by a plaintiff it were open to the defendant to set up matter which ought to be the subject of a substantive suit, and to be explained and set out at length in a plaint rather than in a written statement filed in answer to the claim of the plaintiff. It never was intended by the words of section 121 that two suits entirely different in their character should be tried together—the one instituted by the plaintiff

against the defendant, and the other instituted by the defendant against the plaintiff. And so we find that the claim which, under section 121, can be set up by a defendant in answer to a money-claim of the plaintiff must be a debt.

If we, however, inquire into the character of the set-off which the defendant makes in the present case, we see at once that it is not a debt. His claim against the plaintiff, if it is valid and capable of being established, is a claim which he would have to make against her jointly with her co-sharers, and would have to be supported by evidence of fact which had occurred affecting both her and the co-sharers, and would depend for its merits upon the conduct of the co-sharers as well as that of the plaintiff herself towards the defendant; rather, perhaps, we ought to say, it would depend upon conditions of equity to be made out between the defendant on the one side and the plaintiff and her co-sharers on the other side. On the whole, it would be a matter that could not be fairly and properly tried excepting in a separate suit instituted for the purpose. For what is the answer of the defendant when looked at closely? He says: "It is true that I agreed, under the terms of my lease, to pay to you and the owners of this property a certain rent for this land; and, in particular, to pay you individually the share which you claim; but I have under the circumstances which have occurred been in the habit of paying on behalf of the owners of the property the Government revenue which is due in respect of it, and have hitherto been allowed to deduct the money so paid from the total amount of rent due from me to the shareholders: and I say that the aliquot part of the Government revenue which you, the plaintiff, in your relation with your co-sharers, ought to pay is, or rather was, in the year 1276 Rs. 111, 1277 Rs. 114, and so on."

If the defendant had to make out the case which he here sets up, he would be bound to show that the portion of the Government revenue which the plaintiff was bound to contribute in aid of and as regards her other co-shareholders was in these particular years Rs. 111, 114, &c. But this is precisely a case of contribution. And it is now some time ago settled that the liability to contribute towards a burden of this kind is a liability which, in the absence of express words, does not rest upon contract, but which is based upon principles of equity. Therefore the obligation of the plaintiff, if there is such an obligation, to repay the defendant a portion of the money which he has advanced on behalf of all the shareholders of the property for the purpose of paying the Government revenue, is not a debt resting upon a contract between herself and him, or even upon a *quasi* contract, but is an obligation to be ascertained and determined by the application of the principles of equity to circumstances surrounding the defendant, her co-sharers, and the plaintiff, which are far from being necessarily simple, and which may be exceedingly complicated. It appears to us that the Court cannot try a question of this kind by the way of set-off to a plaintiff's claim under the provisions of section 121 of the Civil Procedure Code, but the defendant must have recourse to a separate action for the purpose.

Mr. Allan pressed upon us that, apart from statutable enactment, Courts of Equity always take into consideration claims by way of equitable set-off set up on the part of the defendant, which are, by the nature of the case, connected with the claim of the plaintiff. And in support of this position he referred us to section 434 of Story's Equity Jurisprudence. But the answer to this, in the first place, is that the plaintiff's claim is not a claim, in the proper sense of the term, of an equitable character. The plaintiff seeks to recover a simple money-debt, not to enforce an equity. And, in the second place, we apprehend that the connection which is intended by the words used in the section referred to, is a connection in equity between the claim of the plaintiff and the counter-claim of the defendant. If the claim which the plaintiff in equity brings against the defendant is so connected with the counter-claim which the defendant sets up against the plaintiff that the one cannot be properly and sufficiently inquired into and ascertained without consideration of the other, then a Court of Equity will allow a set-off which the defendant in this way makes. There must be, by the nature of the two claims, such a connection between them that the truth or completeness of the one cannot be judged of or measured without reference to, and a consideration of, the other. But, as we have already endeavoured to point out, the claim of the plaintiff in this case is a simple money-claim resting upon the plain words of a contract, whereas the claim which the defendant sets up against her is a claim arising out of transactions, by no means simple in their character, in which the interests of other people, besides the plaintiff, are even more largely involved than those of

the plaintiff herself, and which has no immediate connection with his contract to pay rent to the plaintiff..

Therefore it appears to us that, apart from any legislative enactment, the Court could not rightly, in the present suit, take into consideration the matter of the defendant's set-off for the purpose of determining whether the plaintiff's claim was good or not; and also that section 121 of Act VIII. of 1859 does not enable it to do so.

In this view, we are of opinion that the decision of the Lower Appellate Court was erroneous, and that of the first Court was in substance correct.

We reverse the decree of the Lower Appellate Court, and affirm that of the Moonsiff, with costs in both the Courts.

The 5th May 1874.

(Extraordinary Original Civil Jurisdiction.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Grants for Maintenance—Mitakshara Law—Impartible Estates — Limitation — Infants—Custom—Act XXV. of 1857, ss. 3 & 9.

Thakur Kopilnauth Sahi Deo, *Plaintiff*,

versus

The Government, *Defendant.*

Messrs. Lowe, Evans, and *Lingham* for Plaintiff.

The Advocate-General and *Mr. Kennedy* for Defendant.

B J, who was in possession of Pergunnahs Odeypore and Siri in Lohardugga, was found guilty of rebellion. All his property was forfeited to Government, and he was subsequently sentenced to death and executed. A suit was eventually instituted on behalf of his infant son for the restoration of the land and house which had been confiscated. The case made had two aspects: *First*, that the estate which had been granted towards maintaining the title and dignity of the Thakur was inalienable; *secondly*, that it was subject to the Mitakshara Law, modified by the family-custom of primogeniture, and plaintiff became, on his birth, a co-sharer with his father:

HELD that the grant being for maintenance, and the descent being to the heirs male, did not make the estate inalienable. So long as there is an heir male, the grantor or his heirs cannot resume such an estate; but a particular law or custom is necessary to convert an estate, which is conditional upon there being an heir male, into an estate which cannot be aliened:

HELD that the law of the Mitakshara, by which each son has by birth a property in the ancestral estate, is inconsistent with the custom that the estate is impartible, and descends to the eldest son, and is not applicable to this estate:

HELD that the suit was barred by s. 9 of Act XXV. of 1857, which contains no exception in favour of infants, and that the right of action having been extinguished was not revived by the repeal of the Act.

Couch, C.J.—THE facts out of which this suit arose are as follow:—

Bishnauth Sahi, the father of the plaintiff, was a descendant from Aynee Sahi, a younger brother of Maharajah Rogonauth Sahi Deo, formerly Rajah of Chota Nagpore, and was in possession of an estate consisting of the Pergunnahs Odeypore and Siri in Lohardugga, the subject of the suit, which had been granted by Maharajah Rogonauth Sahi Deo to Aynee Sahi. On the 4th of December 1857, Captain G. N. Oakes, Principal Assistant Commissioner at Lohardugga, wrote to Captain W. H. Oakes, Deputy Commissioner of Chota Nagpore, as follows:—

"Dated Chota Nagpore, the 4th December 1857.

"SIR,—It appearing from the proceedings of this Court, herewith transmitted, that Thakur Bishnauth Sahi has been guilty of rebellion, and cannot, after diligent search, be found, I have the honor to request that you will hold an inquiry under section 2, Act XXV. of 1857, in order that, on proof of his having been guilty of the above offence, all his property shall be forfeited to Government."

On the 10th December 1857, the Deputy Commissioner replied to this letter that an inquiry had been held by his Court, and, as it had been proved that Thakur Bishnauth Sahi had been guilty of rebellion, and could not, after diligent search, be found, an order had that day been passed by the Court adjudging that all the property of Thakur Bishnauth Sahi should be forfeited to Government, and requested the Principal Assistant Commissioner to adopt the necessary measures to carry out the orders of the Court.

Accordingly, on the same 10th of December, in a proceeding of the Fouzdary Court of the Lohardugga Division, held before the Principal Assistant Commissioner, after

stating that a letter from the Deputy Commissioner, dated that day, to the effect that Thakur Bishnauth Sahi was proved guilty of rebellion against the Government; that he was absconding and had not been arrested, though several measures had been adopted for his arrest; and that all his moveable and immoveable properties should therefore be confiscated and taken by Government, it was ordered that a perwanna be drawn up to the address of the jummadar directing that he should proceed and confiscate and make an inventory of the rebel's property which was confiscated, and to the tehsildar, directing him to send for all the ryots, and prepare a jummabundee. Mohiput Lall, the tehsildar of the Attached Estates Department in Zillah Lohardugga, proved that this perwanna or order was executed, on the 5th of January 1858, by all the ryots being summoned, and recognizances being taken from them for the payment of their rents, and that since then the collections had been made from his office. On the 9th of September 1858, the tehsildar made a return giving the names of the villages of which the estate consisted.

At the Sessions Court of the Commissioner and Deputy Commissioner of Lohardugga, held on the 14th, 15th, and 16th of April 1858, under Acts XIV. and XVI. of 1857, Bishnauth Sahi was tried and convicted of rebellion against the Government between the 2nd of August 1857 and the 21st of March 1858, and was sentenced to suffer death. He was hanged on the 16th of April 1858, and, on the same day, an order was made in the Court of the Deputy Commissioner that the whole of his moveable and immoveable property should be confiscated.

In July 1858, Mussamut Thakuranee Banessur Kumar Deye, describing herself as the mother and guardian of the plaintiff, who was born on the 25th of September 1854, presented a petition to Captain Davies, the Senior Assistant Commissioner of Lohardugga, alleging that the first ancestor of Bishnauth Sahi got the estate for khurposh (maintenance), with the condition attached that the same was to be enjoyed by him and by his family and descendants; and that the custom as to ancestral khurposh land was that the eldest descendants have become maliks in succession with the title of Thakur of the whole zemindary, and the younger brothers have received khurposh according as they deserved, and, on the death of the Thakur, his son, and, in case of the Thakur dying childless, the eldest surviving descendant of the party through whom the inheritance descended, had been entitled to enjoy and possess the estate as khurposh; that, on the death of Bishnauth Sahi, his right and interest died with him, and, according to the family-custom, the confiscated land belonged to her infant son, the plaintiff, as his ancestral inheritance, and praying for the restoration of the land and house which had been confiscated.

This petition is endorsed as registered in the suit-book on the 26th of July 1858, and, on the 17th September 1858, the following order was made upon it: "That report will be made for khurposh (maintenance) and house of petitioner." On the 23rd of July 1859, an order was made by the Court of Lohardugga, held before Captain Davies, Senior Assistant Commissioner, by which, after stating that sanction of the Government to the sum of Rs. 30 per month for food and raiment for Mussamut Thakuranee Bassessurree Kooar, wife of Thakur Bishnauth Sahi, had been accorded, it was ordered that the Thakuranee should be informed that her application of the 23rd of March could not be granted. The application of the 23rd of March is not in evidence, and it does not appear that any formal order was made on the petition of the 26th of July 1858.

The present suit was begun in the Court of the Deputy Commissioner, Lohardugga, on the 1st of April 1872, by a petition for permission to sue *in formâ pauperis*, which was granted on the 19th of June 1872. The suit having been removed into this Court, a written statement of the plaintiff was filed on the 23rd of July 1873.

The case of the plaintiff has two aspects: One, which is in the plaint, is that the estate was to devolve, on the death of Aynee Sahi, on the next Thakur in succession, which would be his eldest son, and then to the eldest son of such succeeding Thakur and so on in perpetuity; and, if a Thakur died without leaving a son, it would go to his next brother or his eldest son; and that no Thakur had any interest beyond his own life, and had no power to alienate the estate in any way, either voluntarily or involuntarily, the estate being devoted towards maintaining the title and dignity of Thakur. The other, which is in the written statement, is that the estate was granted to Aynee Sahi Deo for the maintenance of himself and his descendants, all of whom were governed by the Mitakshara Law, according to the custom and usage prevailing in his family, and for

the support of the dignity and title of Thakur; that the estate was by the custom of the family impartible, and descendible according to the law of primogeniture upon the male heirs of the original grantee, subject to the right of such descendants as the members of a joint family to receive maintenance thereout, either directly or by the allotment of separate villages to be held by the grantees and their male descendants in the male line; that the estates, which, with the title and dignity of Thakur, devolved upon the successive holders thereof, were subject to the Mitakshara Law, save in so far as that law was modified by the aforesaid usage and custom; and that, by the provisions of the Mitakshara Law so modified, the plaintiff became on his birth a co-owner with his father in the ancestral estates, and, on his father's death, became entitled to hold and enjoy them with the title and dignity, notwithstanding any sentence of confiscation pronounced against Bishnauth Sahi, of the estates held by him as Thakur.

We will first consider the case in the plaint.

By the decree of the Dewanny Court of Zillah Ramgurh, dated the 23rd of February 1815, in the suit in which Rogonauth Sahi Deo, the grandfather of the plaintiff, and others were plaintiffs, and Dukhin Sahi Deo and others were defendants, it was declared that the custom of the Nagpore Pergunnah was that, on the death of the Rajah and of the Thakur, the eldest son becomes the Rajah and Thakur, and that the plaintiff Thakur Rogonauth Sahi Deo, he being the eldest son of the late Thakur Nath-than Sahi Deo, was, as regards the entirety of the dehat which were in the hands of Thakur Dheerajnauth Sahi Deo, deceased, after his father, through having become the Thakur, alone entitled to, inasmuch as he bore with him the interest of that person according to the recognized family-custom of both parties; and to the others, that is, the brother, the uncle, and the nephew of the plaintiff, Thakur Rogonauth Sahi Deo, there did not reach, according to the usage and custom of their family, the right to sue for the dehat (villages), which formed the subject-matter of the suit, in the way that the plaintiff Rogonauth above-named had done, inasmuch as, under the operation of the established family-custom, they were simply entitled to get villages from the said Thakur Rogonauth Sahi Deo, just enough for their support, in the same way as others who are brothers and Thakurs.

Colonel Dalton, the Commissioner of Chota Nagpore, a witness for the Government, said that Chota Nagpore zemindary constitutes Chota Nagpore proper; and in his letter to the Government of Bengal of the 28th of March 1859, in which he submitted a report on this estate and another in the Chota Nagpore Division, the proprietor of which had also been hanged for rebellion, he says that the original deed of gift to Aynee Sahi had not been found, "it was doubtless conferred "as a maintenance-grant, and, according to "the terms of such grants and the practice "established by decision of the Courts in "regard to this estate, it was inherited in "succession by heirs male of the original "grantee; the late Bishnauth Sahi was the "seventh Thakur of this line; the direct "descent was broken three generations ago "when, in consequence of the death of "Thakur Dheerajnauth without issue, the "estate and title was inherited by Nathen "Sahi, who was Dheerajnauth's cousin thrice "removed."

The evidence of the plaintiff's witnesses as to the nature of the grants, and the course of the descent, was to the same effect. And Colonel Dalton, in his valuable work on the Ethnology of Bengal, p. 169, says: "The "circumstances under which the Rajah's "ancestor rose to power preclude his making "any division of the raj. It remains to this "day an undivided estate, and the succession "to it is regulated by local custom of primo-"geniture acknowledged under Regulation X. "of 1800; but, as the families increased, "the younger members or collateral branches "were supported by maintenance-grants, "which lapse to the parent estate on failure "of heirs male to the grantee."

But the grant being for maintenance, and the descent being to the heirs male of the original grantee, do not make the estate inalienable. So long as there is an heir male, the grantor or his heirs cannot resume the estate; but we have no evidence of any law or usage existing in Chota Nagpore proper or in this family at the time of the grant to Aynee Sahi, which would authorize a grant with a condition against alienation, and creating a succession of life-estates. A particular law or custom is necessary to convert an estate which is conditional upon there being an heir male into an estate which cannot be aliened so that it shall not descend to the heir, as was done in England by the Statute de Donis. The evidence, instead of proving such a law or usage, and that the grant was in those terms, shows the contrary; it being proved that alienations of parts of such estates as these have been made in jaghir and mokur-

ruree. The instances spoken of, where attempts have been made to set aside such alienations, are too recent to be of any value.

We will now consider the case in the written statement. The foundation of this is that the successive holders of the estate were subject to the Mitakshara Law, save in so far as that law was modified by the usage and custom; and that the estate was impartible, and descendible according to the law of primogeniture upon the male heirs of the original grantee.

Now, Opendro Nath Sahi Deo, a member of the family, in answer to the question, "In the Maharajah's family what Shastras "prevail," said: "We follow the customs of "our family. If the Shastras agree with our "customs, we obey them; if they do not "agree, we do not obey the Shastras, but "follow the customs of the family."

And, from Colonel Dalton's work before quoted, it appears (p. 163 and following pages) that this family were not Hindoos, and were governed by their own customs. They have adopted the law of the Mitakshara; but it has been grafted upon their own customs, which is important in considering to what extent they are governed by it.

The question appears to be reduced to this: Is the law of the Mitakshara, by which each son has by birth a property in the paternal or ancestral estate (Chap. I., sec. 1, v. 27), consistent with the custom that the estate is impartible, and descends to the eldest son? The property by birth gives to each son a right to compel the father to divide the estate—8 W. R. 15; 1 Madras Rep., A. C., 77—which is inconsistent with the estate being impartible. On the father's death, the whole estate goes to the eldest son, and the property by birth in the others has no effect. Property by birth in such an estate is a right which can never be enjoyed by the younger sons.

It is not only not necessary to secure the descent to the eldest son, but, if it had effect in respect of the younger sons, it would prevent it. This part of the Mitakshara Law cannot be reconciled with the custom, and we think we should hold that is not applicable to this estate. The following authorities support us in this: In Neelkisto Deb Burmono *vs.* Beerchunder Thakoor, 12 Moore's I. A. 523,* the Judicial Committee say: "Still, when a raj is enjoyed and inherited "by one sole member of a family, it would be "to introduce into the law, by judicial construction, a fiction, involving also a contradiction, to call this separate ownership, "though coming by inheritance, at once sole "and joint ownership, and so to constitute a "joint ownership without the common incidents of co-parcenership. The truth is, "the title to the throne and the royal lands "is, as in this case, one and the same title. "Survivorship cannot obtain in such a possession from its very nature, and there can "be no community of interest; for claims to "an estate in lands, and to rights in others "over it, as to maintenance, for instance, are "distinct and inconsistent claims."

In Rajah Yanumula Venkayamah *vs.* Rajah Yanumula Boochia Vankondora, 13 Moore's I. A. 333,* where, by the custom of the family, the talook was impartible and descendible to a single heir, their Lordships say: "These grants, by way of maintenance, "are, in the ordinary course of what is "done by a person in the enjoyment of a "raj or impartible estate, in favour of the "junior members of the family, who, but for "the impartibility of the estate, would be "co-parceners with him," from which they appear to be of opinion that the Mitakshara Law, by which the sons become co-sharers with the father by birth, does not apply to an impartible estate.

And Chief Justice Scotland, in Yenumula Gavuridevamma Garu *vs.* Yenumula Ramandora Garu, 6 Madras Rep. 93, says: "Instead of the several members of the family "holding the property in common, one takes "it in its entirety, and the common law "rights of the others, who would be co-parceners of partible property, are reduced "to rights of survivorship to the possession "of the whole dependent upon the same "contingency as the rights of survivorship "of co-parceners *inter se* to the undivided "share of each, and to a provision for maintenance in lieu of co-parcenary shares."

In Beer Pertab Sahee *vs.* Maharajah Rajender Pertab Sahee, 12 Moore's I. A. 1,† the zemindary was impartible, and was treated as the self-acquired estate of Chutterdharee Sahi. He had four grandsons living at the time of his death, and he made a will giving the estate to the son of the eldest grandson, who was a consenting party to it. Their Lordships said in the judgment (p. 39): "But the question whether, according to the "law of the Benares School, a Hindoo can, by

* 12 W. R. (P. C.) 21.

* 13 W. R. (P. C.) 21.
† 9 W. R. (P. C.) 15.

"will, make an unequal distribution of his "self-acquired immoveable property amongst "his male descendants without their consent "does not arise in this case. The only person "entitled to impeach the disposition by will "is Onyar Pertab, the eldest grandson, who is "a consenting party to it. There are no "inchoate rights of inheritance in the junior "members of the family. They did not by "birth acquire that community of interest "with their grandfather in his self-acquired "lands, which is the foundation of the sup-"posed restriction on his power." The plaintiff's case in truth is that only the eldest son becomes a co-owner with his father, which is not the law of the Mitakshara. Either all the sons must become so, or none of them do, and the right of the eldest is only to inherit on his father's death.

Now, by section 3 of Act XXV. of 1857, the forfeiture extends to all property and effects of or to which the offender shall be possessed or entitled. Bishnauth Sahi was possessed of the estate, and had, we think, an interest in it beyond an estate for life, which interest was forfeited, and the plaintiff did not, on Bishnauth Sahi's death, become entitled to the estate.

It remains for us to decide the question of the law of limitation. We have thought it better not to decide the suit solely upon this ground, but to give our judgment on the main question also.

Section 9 of Act XXV. of 1857 requires a suit for the recovery or restoration of property, which has been seized under the Act, to be instituted within one year from the time of the seizure. The Act contains no exception in favour of infants. There is no ambiguity in the language, nor anything in the Act to show an intention that they should be excepted. We have no authority to add to this section an exception which the Legislature has not thought fit to make. We must therefore hold that the suit is barred by section 9, although it has been repealed by Act IX. of 1871. We notice that it has been repealed, because the learned Counsel for the plaintiff appeared to rely upon that as preventing its application to this suit. But the right to bring a suit was extinguished, and it was not revived by the repeal of the Act.

The suit of the plaintiff will be dismissed, and the amount of stamps which would have been paid by the plaintiff, if he had not been permitted to sue as a pauper, which will be calculated by the Registrar, is to be paid by the plaintiff.

The 16th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Trust—Suit under Act XX. of 1863—Costs.

Case No. 104 of 1869.

Regular Appeal from a decision passed by the Judge of East Burdwan, dated the 31st December 1868.

Sookram Doss Mohunt and others (Plaintiffs), *Appellants*,

versus

Nund Kishore Doss Mohunt and others (Defendants), *Respondents*.

Messrs. E. P. Wood and *R. T. Allan* and *Baboos Radhika Churn Mitter*, *Ashootosh Dhur*, and *Kumla Kant Sen* for Appellants.

Baboos Unnoda Pershad Banerjee and *Rajendro Nath Bose* for Respondents.

Where a suit under Act XX. of 1863 is for the benefit of a trust, and no party to the suit is in fault, *e. g.*, where the right to the succession is disputed, and it is necessary to secure the property, the Court may order the costs to be paid out of the estate; but, where a person is in fault, no such order ought to be made.

Couch, C.J.—There must be a decree that the first defendant do pay to the present Mohunt the sum of Rs. 51,731, which has been found due from him, with interest at the rate of 6 per cent. per annum from this date when the decree is made, to the time of payment. As to the claim of the Government, with respect to which it is said the Collector made a mistake in not deducting the amount when he refunded the money, we think that the allowance of 10 per cent., which has been deducted, must be considered sufficient to cover all the expenses. There is no evidence before us that this is not sufficient. It certainly would seem in an estate of this magnitude to be quite sufficient. It must not be supposed that, because the Collector did not deduct the sum when he refunded the money, we hold that he is not entitled to it now. We think we have power to decide what ought to be allowed, and that the 10 per cent. is sufficient.

As to the costs of the Maharajah of

Burdwan, he does not show any cause for making either the estate or the present Mohunt liable for his costs. We think that he should bear his own costs, and that the plaintiff should get his costs from the first defendant under the Procedure Code. The ordinary course would not be to order them to be paid out of the estate, and Act XX. of 1863 does not appear to give the Court power to make any such order. There being an express legislative provision in that Act for the costs of a suit of this description, I should doubt whether the Court has power to order the costs to be paid out of the estate in a case not described in the Act. But, even if we had the power, it is not shown that in this case it would be proper to exercise it. It does not appear that the first defendant is not in a position to pay the costs. No doubt the claim against him is a large one, and there may be considerable difficulty in recovering the costs from him; but there is no proof that he cannot pay them. There is only the allegation, easily made and very frequently found to be untrue, that the party is a pauper. Section 18 of Act XX. of 1863 says: "If the Court shall be of opinion that the suit has been for the benefit of the trust, *and* that *no* party to the suit is in fault, the Court may order the costs, or such portion as it may consider just, to be paid out of the estate." The object of that appears to me to be that suits which may be for the benefit of the estate —for instance, where the right of succession is disputed, and it is necessary to secure the property belonging to the endowment, and to provide for the performance of worship or service—although no person can be said to be in fault, should not be discouraged or prevented by there being no provision for the costs. Where the suit is for the benefit of the trust, and it appears to the Court that no party to the suit is in fault, it provides that the Court may order the costs to be paid out of the estate. I think we are justified in drawing from these words the inference that, where a person is in fault, no order for costs to be paid out of the estate ought to be made. We should be putting a construction upon the Act, which the words do not bear, if we adopted the argument of the learned Counsel for the plaintiff that the word "and" might be read "or." The first defendant must be made liable to pay the plaintiff's costs in the suit. I do not understand that the Government has asked for costs, and it will bear its own costs.

Jackson, J.—I agree.

The 22nd April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, J. B. Phear, W. Ainslie, and G. G. Morris, *Judges.*

Act VIII. (B.C.) of 1869, s. 6—Right of Occupancy—Transfer—Ejectment.

Case No. 27 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 18th November 1872.

Nurendro Narain Roy (Plaintiff), *Appellant,*

versus

Ishan Chunder Sen (Defendant), *Respondent.*

Baboos Sreenath Dass and *Mohinee Mohun Roy* for Appellant.

Baboo Gopal Lall Mitter for Respondent.

A right of occupancy which a ryot has under Act VIII. (B.C.) of 1869, s. 6, is not transferable.

When such ryot sells his holding, his right of occupancy ceases, and it cannot protect the purchaser against ejectment.

This case was referred to the Full Bench by Markby and Birch, JJ., with the following remarks:—

Markby, J.—In this case it appears that, on the 31st March 1838, the zemindar granted to one Kristo Chunder Doss a pottah of 301 beeghas of bunj or waste land at a yearly rent of Sa. Rs. 18-13, to hold the same by raising bunds, and excavating tanks in, and by cultivating, the said land himself, or by means of tenants, from generation to generation, as a mokurruree tenure; and there was a stipulation that the rate of rent should never be changed.

Kristo Chunder held under the pottah until the 5th December 1859, when the defendant purchased and got into possession, and was accepted by the zemindar as his tenant under the pottah in the place of Kristo Doss.

On the 6th May 1871, the zemindaree was sold for arrears of Government revenue, and purchased by the plaintiff, and, on the 22nd September 1871, the plaintiff delivered to the defendant a notice to quit.

Several objections were taken by the defendant which have been found to be untenable; the only substantial question being that which we reserved for consideration, namely, whether the defendant is protected from being turned out by the proviso of section 37 of Act XI. of 1859; in other words, whether he is a "ryot having a right of occupancy." If he is, although his rent may be enhanced according to law, he cannot be ejected.

This question was raised in the lower Court by the fifth issue in a somewhat inaccurate form, and we cannot say that either the evidence or the finding of the Subordinate Judge is quite as clear and as full as it might be; but upon the whole we think we may take it as established that the land, when the pottah was originally granted, was waste land without any tenant upon it; that Kristo Chunder entered upon the occupation himself; and that he brought a portion of the land into cultivation himself, and prepared the way for cultivating the remainder by excavating a large tank, and bringing tenants on to the land, by whom a further portion of the land was brought into cultivation. About two-thirds of the land appears to be now under cultivation, and all, or very nearly all, of this is held by tenants under the defendant. The tenants appear to hold what are called bhag-jotes, that is to say, the defendant is entitled to a share in the produce.

Under these circumstances, we think that the tenure of Kristo Doss was in its inception a ryotee tenure. It was certainly not the tenure of what has been called a middleman, for he was the immediate occupier of the soil. Nor could it, in our opinion, be rightly called the tenure of a talookdar. The pottah confers no privileges upon the grantee other than those of an ordinary ryot, and contemplates that the grantee will bring the land into cultivation by his own personal exertions, as was actually the case. We therefore think that Kristo Doss was a ryot, and continued to be so down to the time when he sold his tenure to the defendant.

It seems to us also that the defendant is a ryot; he succeeded to a ryot, and there was nothing to change his status; if, therefore, he acquired a right of occupancy from Kristo Chunder, he is within the protection of the section. He had only been in occupation eleven years nine months and seventeen days when the notice was served upon him; he had, therefore, gained no right of occupancy himself, and there are many decisions of this Court that the possession of the transferee cannot be added to the possession of the transferror. The last of these decisions is in the 17 W. R. 179, and the only decision to the contrary (5 W. R., Act X., 55) must, we think, be considered to be overruled.

The questions to be decided are therefore reduced to these two: (1) Whether the right of occupancy which Kristo Doss had at the time of the sale to the defendant was transferred to the defendant? and (2) Whether, if it was not so transferred, is it still in existence in Kristo Doss or his heirs, and being in existence, will it prevent the plaintiff from ejecting the defendant?

The first of these questions has been not unfrequently said to have been decided by a Full Bench in a case reported in 7 W. R. 528, and if that had been the case this reference would have been unnecessary. But this case decides a totally different point, as may be seen by considering the circumstances out of which it arose. The defendant held a non-transferable tenure, and he had held it for more than twelve years. He then attempted to transfer it, but the zemindar refused to recognize the transfer, and sued him for his rent. The argument for the defendant was, that, because he had gained a right of occupancy, therefore that which was a non-transferable tenure had become a transferable one, and that therefore his liability ceased. The question was not referred, because there were any conflicting decisions upon the point, but because of its importance, and as pointed out by the Full Bench, no cases had ever gone to this extent. No argument appears to us necessary to show that this decision has no bearing upon the subject now under consideration.

Of the other cases, the following have been relied upon in favour of the transferability of the tenure: 1 W. R. 86; *Ibid.* 826; 4 W. R., Act X., 2; and 11 W. R. 405. The following have been relied on for the opposite view: 9 W. R. 522; 11 W. R. 162; 15 W. R. 152; and 17 W. R. 179. It is not easy in all these cases to be quite

sure of the grounds on which they proceed, but it is not, we think, possible to reconcile all.

Besides these cases it may be convenient to refer to cases in which it has been held that the ryot, by sub-letting his land, does not determine his right of occupancy, 9 W. R. 344; 10 W. R. 113; and 12 W. R. 111.

There is also a case in which it has been held that, if a ryot having a right of occupancy transfer his right to another, the right of occupancy is not thereby forfeited, and the zemindar cannot turn the grantee out of possession—11 W. R. 94.

It is this last case which renders the second of the above questions necessary. There is, it is true, no other decision upon this very point, but it appears to us that the two questions are so closely connected as to make it desirable that both should be considered together. The two questions referred are, therefore, those above stated.

Baboo Sreenath Dass for the appellant contended, before the Full Bench, that, though the defendant may be regarded as a ryot, yet he is not protected from being ejected from the land by reason of his not having a right of occupancy therein under the proviso of section 37 of Act XI. of 1859.

The record shows that, on the 6th of May 1871, the appellant purchased the zemindaree for arrears of Government revenue, and, on the 22nd of September 1871, he gave the defendant, who was then in possession, notice to quit the land. At the time when the notice to quit was given, the defendant (respondent) had only occupied the land for a period of eleven years nine months and seventeen days. Section 6 of Act X. of 1859 says: "Every ryot who has cultivated "or held land for a period of twelve years "has a right of occupancy in the land so "cultivated or held by him, whether it be "held under pottah or not, so long as he "pays the rent payable on account of the "same." The respondent having only been in possession or occupation eleven years nine months and seventeen days has therefore acquired no right of occupancy in the land himself. It is true that Kristo Chunder Doss, the original ryot, had a right of occupancy, because he had cultivated the land for upwards of twelve years from the time the pottah was given to him by the zemindar; but Kristo Chunder Doss's right of occupancy cannot be transferred to the respondent, inasmuch as it has already been decided, not only in the case of Nunkoo Roy *vs.* Mohabeer Pershad and others, 11 W. R. 405, but also by a Full Bench Ruling in the case of Ajoodhya Pershad *vs.* Mussamut Imam Bandi Begum, 7 W. R. 528, that "a right of occupancy is not saleable."

Moreover, in the last paragraph of the judgment of Sir Barnes Peacock, p. 529, he says: "Speaking for myself, I am not at all "sure that a right of occupancy gained "under section 6 of Act X. of 1859 is "necessarily heritable;" *vide* also the case of Denobundboo Dey *vs.* Ramdhone Roy, 9 W. R. 522.

A right of occupancy then is merely a personal right; it may be acquired by a ryot either by cultivating the land himself for twelve years and upwards, or it may be acquired by a ryot from his ancestor who had cultivated the land for that period.

In the case of Bootee Singh and others *vs.* Moorut Singh and others, 20 W. R. 478, Mr. Justice Phear says: "It seems to us "more than doubtful whether any evidence "could establish that a bare right of "occupany under the Act was transferable "irrespective of the will of the zemindar;" *vide* also the case of Tara Pershad Roy and others *vs.* Soorjo Kant Acharjee Chowdhry, 15 W. R. 152. Under the circumstances, therefore, Kristo Chunder Doss could not transfer his right of occupancy to the respondent.

With regard to the second question, it seems clear that, though the right of occupancy is not transferred, it is still not in existence in Kristo Chunder Doss, because Kristo Chunder, by having sold the land to the respondent, had entirely abandoned, not only his right of occupancy, but also all title and interest in the land.

Baboo Gopal Lall Mitter, for the respondent, submitted that the right of occupancy which Kristo Chunder Doss held was transferable to the respondent under section 6 of Act X. of 1859. The last paragraph of section 6 says: "The hold-"ing of the father *or other person* from "whom a ryot inherits, shall be deemed to be "the holding of the ryot within the meaning "of this section." The word *inherits* here has a wider signification than the mere limited one of succession from father or other ancestor to the son. It contemplates every right of succession which a ryot might derive, not only from his ancestors, but also from any other ryot who has cultivated the land for twelve years or more. Otherwise, the words "*or other person*" in the Act are unnecessary and can have no mean-

ing. It is idle to suppose that the words "*or other person*" mean *ancestors*, because if a ryot can inherit from his father, it necessarily follows that he can inherit from his grandfather or other ancestor independently of the words "*or other person.*"

In the case of Huro Chunder Goho and another *vs.* Mr. A. D. Dunn, 5 W. R. 55, it was held that: "where the zemindar consents "to the transfer of a tenure from one ryot "to another, the possession of both must be "considered to be continuous, and the right "of occupancy to date from the time of the "first holder."

Again, in the case of Mussamut Taramonee Dossee *vs.* Birressur Mozoomdar, 1 W. R. 86, the Judges say: "The question then "arises—Is a right of occupancy a transfer-"able tenure? We think that it is so "transferable. A right of occupancy is "after all a perpetual lease, the holder of "which cannot be ejected so long as he pays "a fair and equitable rent. There are "many similar rights common in different "parts of Bengal, such as the jotes of "Rungpore and the howlas and neem-"howlas of Backergunge, which are in effect "in no respect higher than that of a right "of occupancy, inasmuch as they are mere "personal rights, which are, and have always "been, held transferable as well as heritable."

With regard to the second point, it has been clearly decided in the case of Gorachand Moostafee *vs.* Buroda Pershad Moostafee, 11 W. R. 94, that the mere transfer of a right of occupancy does not work as a forfeiture of the rights and interests of occupant ryots themselves in the land. Therefore, the respondent cannot be ejected, inasmuch as he is now holding from Kristo Chunder Doss, in whom the right of occupancy still exists, in spite of the transfer.

The judgments of the Full Bench were delivered as follows by—

Couch, C.J. (Ainslie, J., concurring)—In the judgment by which this case is referred to us, it is found that Kristo Doss was a ryot, and he continued to be so down to the time when he sold his tenure to the defendant. The way in which the case comes before us does not allow us to consider whether Kristo Doss really was a ryot or not. We must take the fact as found by the two learned Judges. I wish to prevent its being assumed that upon the facts which appear in this case I should have found that he was a ryot.

The first question put to us is, whether the right of occupancy which Kristo Doss had at the time of the sale to the defendant was transferred to him.

This is a question which must be considered and answered independently of any custom. In answering it I wish particularly to be understood as not giving any opinion respecting rights of occupancy where there is a custom to transfer them. In these cases the landlord or zemindar may be supposed to have allowed the ryot to occupy according to the custom. If the ryot has by custom a right to transfer, the landlord may be supposed to have assented to the right of occupation which he gave to the ryot being transferred by him. There may be many cases in which a ryot may have a right by custom to transfer. We must exclude all these from consideration in answering this question.

In my opinion it is to be answered solely with reference to the words of section 6 of Act VIII. (B.C.) of 1869, by which the right is given, not for the first time, but on which it now depends. And whether, when Act X. of 1859 was passed, this was the creation of a new right in a ryot, or the recognition by the Legislature of an existing custom to allow the ryot to continue to hold, does not make any difference in the construction of the Act. If the Act creates a new right, we must look at the words of it for what the right is; and if it recognizes a custom, it recognizes it only to the extent expressed, and the result is the same.

The words of the section are that every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under a pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, neejjote, or seer land belonging to the proprietor of the estate or tenure, and let by him on a lease for a term, or year by year, nor (as respects the actual cultivator) to lands sub-let for a term, or year by year, by a ryot having a right of occupancy. The holding of a father or other person from whom a ryot inherits shall be deemed to be the holding of a ryot within the meaning of this section.

These words appear to me to point to a ryot having the right in land cultivated or held by him, and so long as he pays the rent, and to the right not being one which can be transferred to some other person. It is a right to be enjoyed only by the person who holds or cultivates and pays the rent, and has done so for a period of twelve years. It does not speak of his acquiring a right which

he might, having acquired it, transfer or make use of as a subject of property, but it seems intended to secure to a ryot who has cultivated or held for twelve years a continuance of his cultivation or holding so long as he pays the rent. And the provision at the end of the section, by which the holding of a father or other person from whom the ryot inherits is to be deemed the holding of the ryot, supports this construction; for it appears to show that, except in that particular case, the holding must be entirely by the person who claims the right. This is a law which imposes a restriction upon the proprietary rights of the zemindar or landlord, and a ryot cannot claim under it anything more than the words clearly give to him. There are not here, in my opinion, words of so doubtful a meaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer. The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property which could be transferred. I would therefore answer the first question by saying that the right which Kristo Doss had at the time of the sale was not transferable. The question, as I have said, is solely upon the Act, and independent of the existence of any custom.

The second question is, whether if it was not transferred, is it still in existence in Kristo Doss or his heirs, and being in existence, will it prevent the plaintiff from ejecting the defendant? Now, if a ryot having a right of occupancy endeavours to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be rightly considered to have abandoned his right, and that nothing is left in him which would prevent the zemindar from recovering the possession from the person who claims under the transfer. And not only may he be considered to have abandoned it, but if the right which is given by the law is one which exists only so long as he holds or cultivates the land, when he ceases to do that by selling his supposed right and putting another in his place, his right is gone and cannot stand in the way of the landlord's recovering possession. If it were not so, the law would become nugatory. The position of things would be that the transfer by the ryot is invalid, and gives the transferree no right to the possession, but the ryot could not recover possession from the transferree as he would be bound by his act of transfer; nor could the landlord recover possession because the outstanding right in the ryot would be in his way. The result would be that, although the transfer is invalid, the transferree would be able to keep possession and to set the landlord at defiance. I think in this case it may be considered either that the ryot has abandoned his right altogether, and therefore it cannot be set up as an answer to the suit by the landlord for possession, or that his right has ceased, has been put an end to, because it existed only so long as the ryot himself continued to hold or cultivate the land. I would, therefore, in answer to the second question, say that any supposed right which may be in existence in Kristo Doss or his heirs will not prevent the plaintiff from ejecting the defendant.

Jackson, J.—I entirely concur in the judgment which has just been delivered, and have very few words to add. I should be inclined to describe the right, whether created or recognized by section 6 of the Rent Act, as being a right resulting from the connection between the occupying tenant and the land which he occupies for a space of twelve years. The Act expressly declares that the holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot; and there I think one may say that the well-known maxim *inclusio unius*, &c., would apply.

As to the second question, the answer appears to me to be very clear, for by the sale out and out to another person, the ryot voluntarily terminates that connection between himself and the land which he had occupied which is necessary to the existence of the right of occupancy. The law allows a sub-letting by a ryot who has a right of occupancy, though it does not permit the growth of a right of occupancy within a right of occupancy. So long as the ryot having a right of occupancy merely sub-lets the land, he maintains that connection between himself and the land which is essential to the existence of the right; but when he has transferred his right to another, he no longer maintains that connection.

I wish also to say that I expressly concur in the observations which the Chief Justice made at the outset of his judgment, namely, that we are dealing with this case on the facts found by the learned Judges who referred it, and by that we are limited.

There is only one other observation which I wish to make as to the case which

was referred to in 20 W. R. 139. I do not apprehend that the learned Judges who decided that case meant to suggest that after a ryot having a right of occupancy had parted with his right by transfer, and the zemindar had evicted the transferree as having no right to occupy the land, the ryot might afterwards come in and insist upon the right he had voluntarily parted with as entitling him to enter upon the land. If, however, any such claim should hereafter be set up in any other case, it will doubtless have to be considered.

Phear, J.—I entirely concur with the Chief Justice. I understand the questions which are put to us to have reference solely to that peculiar right of occupancy which I may call the creature of section 6 of the Rent Law, and that in the matter which is now before us we are entirely disembarrassed, as the Chief Justice has said, of all considerations which might affect or enter into questions relative to the alienation of the right to hold and occupy land founded on the element of custom, or otherwise. And it seems to me that under this hypothesis the questions which have been put to us in this reference are both immediately answered in the negative when the view is taken of section 6, as I think it ought to be, to the effect that the right of occupancy which is the subject of this section is rather of the nature of a personal privilege than a substantive proprietary right. I think that there can be no right of occupancy under the terms of this section other than in a person who is cultivating or holding the land as a ryot in the situation which is mentioned in this section; and that therefore a person can only have this right who is actually cultivating or holding the land, and then only if he has cultivated or held the land as a ryot for a period of twelve years according to the rule for estimating that time which is prescribed in the section; and that rule is that only the actual cultivation or holding of the person who sets up the right, and in the case where he has taken the cultivation or the holding of the land by inheritance from a predecessor, then, constructively, the cultivation or holding of that predecessor, counts. The section does not give to any one other than the person who has actually held or cultivated land for the period of twelve years, either by himself alone, or by himself and his predecessor, from whom he has taken by inheritance, together, the right of occupation which is the subject of the section. And if this is so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chunder Sen, the defendant in the case, has not a right of occupancy in the land which is the subject of suit because he has himself only cultivated or held it as a ryot for a period of a little more than eleven years, and the person who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Kristo Doss, from whom he took by purchase. In that state of things, he is not entitled by the words of section 6 to add any years of Kristo Doss' holding to the years of his own holding. And certainly Kristo Doss, in the view that I have taken of the section, can have no right of occupancy in the land, because he is not now cultivating or holding it, but, on the contrary, has long been out of the occupation of it; he has not cultivated it; he has not held it in any sense whatever during the period of the last eleven years and upwards. To use the words of the section, he is not a person who is occupying or holding the land.

The second branch, also, of the second question which has been referred to us, seems to be answered in the negative by the decision which is reported in 20 W. R. 139—a decision, the correctness of which has not yet been impeached—supported by the decision in Special Appeal No. 1651 of 1872.*

I concur in the judgment which has been delivered by the learned Chief Justice, and have nothing substantial to add to it. I ought, however, perhaps to remark, with regard to an observation which has been made on the case reported in 20 W. R. 139, that it was obviously not the intention of the Bench which passed that decision to say anything judicially as to whether or not the grantors or transferrors of the jote in that case still had, in the events which had happened, any right to require possession of the land at the hands of the zemindar. All that that decision decided was that whatever the rights of the transferrors as against the zemindar might be, those rights did not prevent the zemindar, under the circumstances of the case, from recovering possession of the land from a stranger.

Morris, J.—I concur with the Chief Justice in thinking that both the questions referred to us should be answered in the negative.

* 20 W. R. 478.

The 23rd April 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act XX. of 1866, s. 53—Specially registered Bond—Sureties—Jurisdiction.

Poorno Chunder Ghose and another, *Petitioners,*

versus

Gobind Chunder Mookerjee, *Opposite Party.*

Baboo Doorga Mohun Doss for Petitioners.

Baboo Bykuntnath Doss for Opposite Party.

Certain parties having executed a bond for repayment, with interest, of a loan for which they pledged immoveable property and found sureties who undertook to be responsible in case the amount was not recovered from the borrowers, the bond was specially registered under Act XX. of 1866. Subsequently a decree was obtained upon the bond ostensibly under the provisions of s. 53.

HELD that in the circumstances no decree could be made except for the money lent with interest and costs, and that the Court was not competent to make any declaration against the property pledged or to make the sureties liable.

Jackson, J.—IN this matter we have no doubt, in so far as the petitioners who obtained this rule are concerned, that the decree complained of must be set aside. It was a decree made ostensibly under the provisions of section 53 of the Indian Registration Act of 1866. Certain persons named Eshan Chunder Dey and others having borrowed a sum of money from parties whom we may describe as the plaintiffs, executed a khut or bond for the repayment of the advance with interest, and in that instrument they pledged certain immoveable property as security for payment of the debt. Also in another part of the same instrument Protap Narain Ghose, Ram Chunder Dutt, Kala Chand Dutt, and Poorno Chunder Ghose became sureties (mâl-zamin as they call it) for the repayment of the loan, undertaking that in case the amount advanced should not be recovered from the moveable and immoveable properties of the borrowers, then they shall be answerable for the same. This document was presented for registration before the Sub-Registrar of Burrisal by, it is said, Joogul Kishore Ghose, one of the parties executing the deed. It is then stated: "Execution was admitted. Joogul Kishore "Ghose of Bazra Joogini, Protap Narain "Ghose of Bahar, Poorno Chunder Ghose of "Bazra Joogini, and Ram Chunder Dutt of "Bazra Joogini. Protap Narain Ghose and "Poorno Chunder Ghose are agents for "Koroona Moyee, Bhobani Mohun Mala "and Chunder Kant Ghose." Then there is a certificate in Bengali to the effect:—

"খত দেহেন্দাগণ আমার সমক্ষে এই স্বীকার
"করিলেক যে অত্র তমঃসুকের টাকা নিরূপিত
"সময়ের মধ্যে আদায় না হইলে ১৮৬৬ সনের
"২০ আইনের ৫৩ ধারার বিধান মতে অত্র
"তমঃসুকের মিয়াদ গতে মায় সুদ টাকা বিনা
"নালিসে আদায় হইতে পারিবেক।"

The plaintiffs brought this bond into the Court of the Subordinate Judge and applied for a decree against all the parties subscribing, and accordingly they obtained a decree for the payment of the sum advanced together with interest at the specified rate down to the date of realization and with a declaration that the amount should be realized by the sale of the property pledged; and such decree was made against all the defendants. The decree-holders first proceeded to execute this against the actual borrowers, and certain execution-proceedings went on between them from 1868 to 1871. Finally, seeing that nothing more could be obtained from the borrowers, they next proceeded against the sureties. These persons offered various objections and have finally come to this Court, saying that the decree being contrary to the law may be set aside. We think it is clear that in the circumstances of this case no decree could be obtained upon special registration of this bond except a simple decree for money in the terms of section 53 together with interest at the rate specified to the date of the decree with costs, and *that* against the borrowers alone and without any declaration as against the property pledged. The liability of the sureties is only to commence when the property, moveable and immoveable, of the actual borrower is exhausted. It was not competent to the Court under section 53 even to make any decree or declaration as against the property pledged; still less could it give a decree making parties liable whose liability would only commence when that property and other properties belonging to the borrowers had been in the first place fully proceeded against. It seems to us that to make a decree as this against the sureties was wholly beyond the power of the Subordinate Judge, and that the decree so far as affects them must be set aside and this rule made absolute with costs, Rs. 80.

The 24th April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Act XI. of 1859, s. 37—Auction-Purchaser's Rights—Transfer.

Case No. 1215 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 17th March 1873, affirming a decision of the Additional Sudder Moonsiff of that District, dated the 11th November 1872.

Koylash Chunder Dutt (Plaintiff), *Appellant,*

versus

Jubur Ali (Defendant), *Respondent.*

Baboo Okhil Chunder Sen for Appellant.

Baboo Sreenath Banerjee for Respondent.

The rights, which are conferred upon a purchaser at a sale for arrears of revenue, under Act XI. of 1859, s. 37, are capable of being transferred to another person, if the transfer follows immediately upon the sale or within a reasonable time thereafter.

Markby, J.—In this case the question which arises for determination is whether the plaintiff can exercise the power, under the provisions of section 37 of Act XI. of 1859, to recover possession of a tenure which was a valid and subsisting tenure in the hands of the defendant until the date of the sale for arrears of revenue, but which the plaintiff insists that under the provisions of that section he has a right to cancel. The answer to that question will depend upon whether or no the rights which are given under that section to an auction-purchaser at a sale for arrears of revenue have passed to the plaintiff in this case. Now, the circumstances of this case are that the plaintiff, being himself the purchaser at that sale, sold his rights to the defendant No. 4, and the defendant No. 4 has re-granted to the plaintiff a putnee pottah which covers the land which forms what we may call the old tenure and something more. But it seems to us that, for the purposes of this case, we may consider the plaintiff to be precisely in the same position as if he was not the purchaser at the sale for arrears of revenue. It does not seem to us that the fact of his selling the tenure to the defendant No. 4, and then obtaining a putnee pottah from him, renders his position either better or worse. We may take it as if a third person, who purchased at a sale for arrears of revenue, had sold the land to another, and that person had granted a putnee pottah to the plaintiff, and then inquire whether the plaintiff, as putneedar, has the right which he claims. Now, it has been said in the first place that the putneedar is in a different position from the person who has purchased the entire zemindaree. But we do not see anything upon which that distinction can be founded. Subject to the payment of the rent reserved to the zemindar, in an ordinary case (and there is nothing to show that this is not an ordinary case) all the rights of the zemindar pass to the putneedar, and therefore with the rights of the zemindar would pass this right also, if it is once established that this is a right of the nature which can pass at all upon the sale of the property. Therefore we are brought back to the simpler question whether or no the rights which are conferred upon a purchaser at a sale for arrears of revenue under section 37 are rights which are capable of being transferred to another person. As far as we are aware, there is no decision of the Privy Council directly upon this point, but on several occasions the matter has been made the subject of argument before the Privy Council, and is alluded to in their judgments. The first case in which it was referred to is the well-known case of Ranee Surnomoyee *vs.* Maharajah Suteesh Chunder Roy Bahadoor, reported in 10 Moore's Indian Appeals, p. 123.* The Privy Council in that case say, in dealing with Regulation XLIV. of 1793 (and in this respect the language of the Regulation is the same as in Act XI. of 1859): "It is to be observed that in terms this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation" But this is only a doubt

* W. R. (P. C.) 13.

thrown out by the Privy Council, and that is not the point upon which the decision in that case turned. Then, in the case reported in 12 Moore's Indian Appeals, p. 271, * the matter was referred to a little more fully. The Privy Council, being of opinion that upon other grounds the right to cancel the tenure could not be asserted, say that they do not deem it necessary to consider under Regulation XI. of 1822 whether the stringent powers given by those enactments to purchasers *eo nomine* could in any case be exercised by the heirs or assignees of such purchasers. Justice and sound policy alike require that, inasmuch as the law has given them for the particular purpose only of enabling the purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship to under-tenants and insecurity to property, they should be exercised within a reasonable time. And their Lordships believe that that object has now been in some measure secured by Acts Nos. X. and XIV. of 1859. It is observable that this expression of opinion, so far as it is an expression of opinion, is somewhat different from what was thrown out in the first case. The Privy Council in the second case do not seem to intimate any opinion that the exercise of these powers must be strictly limited to the very identical person who is the actual purchaser at an auction-sale for arrears of revenue. They seem to intimate an opinion that the proper construction to be put upon the Act would be that those powers should be exercised within a reasonable time in order to secure the object of the statute. Then we find in a more recent case, which is reported in 12 B. L. R., p. 210,† that this point again arose, and there it appears to have been conceded that a purchaser from the purchaser at the auction-sale, immediately after the sale and at a time when he could not be taken to have waived any rights which that transaction may have given him, acquired the same rights which he would have acquired had he been the actual purchaser at the revenue-sale. Now, that again is not of course any decision of the Privy Council; it is only a concession of Counsel. But, in accordance with the view of the law which was suggested in the second of the two cases which we have referred to, namely, that, where the transfer from the auction-purchaser to the person who seeks to exercise the rights under section 37 follows immediately upon the sale, or follows within a reasonable time after the sale, the purchaser might exercise those rights. It appears to us, therefore, that, although, as we have said there is no distinct authority upon the point, the construction of the law suggested by the Privy Council may be adopted in this case. It certainly does not seem to us that it would secure the object of the Act if it was made incumbent upon the purchaser to exercise his rights immediately upon the sale. It would take considerable time before the purchaser can fully ascertain what are the persons whom he can eject under the law. His right to eject will have to be exercised very strictly, and it is not against the persons who are in possession as tenants that he can exercise them; he must first acquaint himself with the nature of the tenure under which they hold. On the other hand, it would not probably be for the advantage of the tenants that the purchaser should be forced to exercise his rights immediately, because he might very well desire for the purpose of doing justice to them, and for their advantage, to enter into engagements with them. We think therefore that we may now very well hold that all that is required under the law is that those rights should be exercised within a reasonable time. Taking that view of the case, we think there is nothing upon which we can say that those rights were not exercised in this case within a reasonable time. The sale for arrears of revenue took place in 1865, and this transaction, in which the plaintiff ultimately became putneedar, appears to have taken place in or about the year 1868, and it must now be taken that in the meantime no recognition of this tenure had taken place either by the plaintiff or by the person from whom he now derives his title. Under these circumstances we ought to hold that the plaintiff had in him the rights which are conferred upon the purchaser at the auction-sale for arrears of revenue by section 37 of Act XI. of 1859, and that he had a right to cancel this tenure.

The result will be that the decisions of the lower Courts will be reversed, and that the plaintiff's suit will be decreed with costs.

As there are no materials on the record for drawing up the decree in the form which the Code of Civil Procedure requires, the case must be remanded to the Moonsiff to draw up the decree in accordance with our judgment, making such inquiries as are necessary for that purpose.

* 11 W. R. (P. C.) 10.
† 20 W. R. 44.

The 29th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Special Appeal—Issues—Rent—Pottah—Evidence.

Case No. 1104 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 24th February 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 31st May 1872.

Sheo Sahoy Singh (Defendant), *Appellant,*

versus

Bechun Singh and others (Plaintiffs), *Respondents.*

Baboos Kalee Prosunno Dutt and *Boodh Sen Singh* for Appellant.

Mr. R. E. Twidale and *Baboo Kalee Kishen Sen* for Respondents.

A case was remanded for re-trial on its merits because it was found, in special appeal, that material error had been committed in consequence of the omission on the part of the Lower Appellate Court to frame issues between the parties, *e. g.*, the suit being for arrears of rent, the issue, *inter alia*, whether plaintiffs, who were shareholders with others, were entitled to claim the fraction of the rent for which they sued.

Where a tenant continues to hold land after his term, his pottah will be evidence of the rent at which he is holding over, in the absence of evidence to the effect that the rent was altered subsequently to its expiration.

Phear, J.—The plaintiffs sue to recover the sum of Rs. 187-10 annas odd as principal and damages for arrears of rent, which they say is due to them from the defendant in respect of 10 beeghas and 10 cottahs of land for the period of time between 1276 and 1278. The plaintiffs do not claim to be entitled to the entirety of the rent due from the defendant, but admit that they are shareholders therein with others; they sue as ticcadars to the extent of 14 annas and 13 dams only out of 16 annas of the land which is the subject of suit, together with other lands.

The schedule appended to the plaint appears to have given the details of the rent alleged to be payable by the defendant. There was in it an item for the principal rent; an item for awab; an item for fisheries; an item of jack-fruit, and so on.

The defendant states, among other things, by way of defence, that the plaintiffs are not entitled to sue for 14 annas 13 dams of the rent. He also says that out of the land specified in the plaint as being land for which he was bound to pay rent to the plaintiff, the first eight and ten plots of land were *newaz-durga* land, which he held under an independent title, and for which, therefore, rent was not due from him to the plaintiffs.

We have not had the written statement read out to us in full, nor is it necessary on this special appeal that we should give immediate consideration to it.

The first Court gave a decree in favour of the plaintiff for "Rs. 34-13 annas of rent of jote, and Rs. 4 sayer for the years in suit minus the sums credited by plaintiff and deposited by defendant in Court."

On appeal from this decree, the Judge upheld it in its entirety, and dismissed the appeal.

It is now objected on special appeal, amongst other things, that issues were not framed in the first Court, and that the omission to frame issues has led to an incompleteness in the trial in both Courts, and to error in the decision upon the merits of the case. In the first place, the defendant urges that it was a material issue which should have been raised between the parties, whether or not the plaintiffs were entitled to claim the fraction of the rent from the defendant for which they sued in this suit. And the omission to frame an issue had led to this consequence, namely, that neither the first Court nor the second Court directed its attention to this question either expressly or by implication. We find that, according to the plaintiffs' own account, all their co-sharers are not parties to the suit. And the consequence is that it, no doubt, lies upon the plaintiffs to make out that they are entitled, independently of the co-sharers who are not parties to the suit, to demand from the defendant payment of a fractional part of the rent, the entirety of which he owes to them and their co-shareholders collectively. And it is also perfectly plain that the defendant has denied the plaintiffs' right to claim this fractional share of the rent. Mr. Twidale, on behalf of the respondent, has pointed out to us that, though an issue was not raised on this point, yet there was evidence upon the record which would in law justify the Courts in coming to the conclusion that the plaintiffs had the right upon which they based their suit. Supposing this to be so, yet we find that neither the first Court nor the second Court had stated any opinion upon the point. Neither the first Court nor the Lower Appellate Court

has expressed any conclusion as to whether or not the evidence makes out the plaintiffs' right, separately from the remaining co-sharers, to claim this share of the rent from the defendant. It appears to us that the defendant's contention on this head is just, and that the omission to frame an issue has led both the Courts to neglect coming to a finding upon a matter which was of material importance in determining the matter of the present suit between the parties

Again we find that neither the first Court nor the second Court has expressed in any way the slightest opinion as to whether on the evidence before the Court the first eight and ten plots of land mentioned in the plaint were *newaz-durga* land held by the defendant on different terms from the rest of the land for which rent was claimed, or not.

The defendant further objected before us that the Lower Appellate Court had not tried the question whether the plaintiff was entitled to the items of rent which came under the head of *julkur* and *bunkur* rights. It appears that the first Court did direct its attention to this question, but the Lower Appellate Court has entirely omitted to notice it. No doubt there is evidence upon the record which possibly might serve to satisfy the Court that the defendant had admitted his obligation to pay rent or dues under these heads; and it is not necessary for us to express the slightest opinion as to whether the Moonsiff's finding upon this question is the correct finding or not. But it does seem to us that the defendant was entitled to have had an explicit finding come to by the Lower Appellate Court upon this question. And probably the argument of the defendant's pleader is well founded that the omission to frame issues might have in some degree led the Lower Appellate Court to pass over the point without notice.

There is a cross-appeal preferred by the plaintiffs themselves upon the same head. The Lower Appellate Court awarded a certain sum in the lump as the amount due from and payable by the defendant in respect of the *julkur* and *bunkur* rights. But the plaintiffs say that they are entitled to have a specification of the exact amount due in respect of the *julkur* and *bunkur* items separately. And it appears from the form in which the plaint with its attached schedule is put, that there was, in fact, an issue between the parties upon each of these items separately.

Several objections were pressed upon us by the defendant-appellant with regard to the mode in which the evidence had been dealt with by the Courts below. In particular, it was said that the Judge was wrong in thinking that the jummabundee papers were proved; whereas, in fact, they were not, and that consequently the opinion which he supported with the aid furnished by these papers was not good in law.

Again, the appellant said that the first Court at any rate had accepted the part of his case in which, he said, he had been holding a portion of the land under a pottah which had expired; and that this being so, this pottah ought to have had effect given to it, because if he was a tenant holding land after the expiration of his term upon which he had entered under a written contract, then, in the absence of any evidence to the contrary, it ought to be presumed that he was continuing to hold the land at the terms mentioned in the document. The Moonsiff apparently had this argument before him, but he meets it by saying that after the pottah had expired, it was competent to the plaintiff to enhance the defendant's rent, and therefore the pottah could afford no evidence of what that rent actually was. But this position seems to be erroneous. The pottah will be evidence of the rent at which the defendant was holding over in the absence of any evidence to the effect that the rent had subsequently to the date of its expiration been altered.

On the whole, we think, taking the matter of the two appeals which are now before us into our full consideration, that there has not been so complete a trial in the Lower Appellate Court as there ought to have been. And we think that the defendant-appellant has good ground for maintaining that material error has been committed as a consequence of the omission on the part of the Court to frame issues between the parties in this suit. In this view we think we must reverse the decision of the Lower Appellate Court, and send back the case to that Court for re-trial on its merits. And in re-trying the case, the Judge will frame the issues which arise between the parties upon the plaint and the written statement taken together. And if he finds it necessary, in the exercise of his discretion, when those issues are framed, to procure fresh evidence upon one or more of them, he can do so after recording his reasons therefor in pursuance of the provisions of section 355 of the Civil Procedure Code.

The costs will abide the event.

There will be two sets of costs.

The 1st May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Lunacy—Evidence—Representation.

Case No. 2082 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 16th June 1873, reversing a decision of the Additional Sudder Moonsiff of that District, dated the 19th November 1872.

Kala Chand Ghose (one of the Defendants), *Appellant,*

versus

Sreemutty Shoolochuna Dossia (Plaintiff), *Respondent.*

Baboos Mohinee Mohun Roy, Kalee Mohun Dass, and *Hem Chunder Banerjee* for Appellant.

Baboos Chunder Madhub Ghose and *Bykuntnath Dass* for Respondent.

The bare assertion of witnesses, unsupported by any details of the causes, the course, and the treatment of the malady, ought not to be accepted as satisfactory proof of insanity.

A person who was appointed manager of a lunatic's affairs, by consent obtained while she was of sound mind, and who is capable of making a defence on her behalf, is competent to represent her in a suit although not appointed under the law as representative of the insane.

Ainslie, J.—THIS suit was instituted in the year 1872 to set aside a sale held in 1860, eleven years eleven months and upwards before the date of the institution of this suit, in execution of a decree for rent obtained against the present plaintiff and her husband's brother and Anund Moyee, the widow of another brother. The plaintiff alleged that from the year 1261 up to Assin 1278, she was insane and altogether incompetent to transact any business whatsoever. She further alleged that the proceedings in the rent-suit were tainted with fraud.

The first Court dismissed the suit and found most distinctly that there was no reason whatever for supposing that there was fraud in the proceedings, and pointed out one very material fact, *viz.*, that Juggut Chunder, the surviving brother, and one of the persons interested in the talook, had by that sale lost his own interests in the property; that he had gained nothing by the sale; and that if there was any fraud on his part, it was a fraud to his own injury, which the Moonsiff considers was a thing hardly possible. The Moonsiff also found that there was no satisfactory evidence in respect of the alleged insanity of the plaintiff.

On appeal the Subordinate Judge has found in most positive terms that the insanity is established. He says in one place: "The "witnesses clearly and distinctly prove that "plaintiff was of unsound mind for eighteen "years as totally unfit to lead a sensible "life;" and again he says: "I have no "hesitation to find that it is clearly proved "that plaintiff was not in a state of sound "mind at the time the decree was passed," that is, in 1859, "and execution of the "decree taken out against her." It is not our intention to consider whether this finding of fact can be questioned in special appeal, because we think it is unnecessary for the purposes of this suit to go into that point. We cannot, however, pass by this finding without remarking that it is extremely unlikely that any one should become insane and cease to be insane in a moment. From the finding of the Subordinate Judge one is led to suppose that the commencement, as well as the termination, of the plaintiff's insanity was instantaneous. In the case of insanity of such long duration, certainly the recovery would be gradual. The Subordinate Judge ought to have gone in detail into the evidence and ascertained clearly up to what period the plaintiff remained so completely insane as to be altogether unable to understand matters, and at what date her recovery commenced, and at what date she became capable of understanding business explained to her, though she might not be altogether free from all traces of her ailment. This question of insanity required a most careful examination, and we cannot think that bare assertion by witnesses, unsupported by any details of the causes, the course, and the treatment of the malady, ought to be accepted as satisfactory proof. However, for the purposes of this suit, we may accept the finding as it is.

We have now to pass to the question of alleged fraud, by which it is said the rent-decree of 1859 had been obtained. It appears that Anund Moyee, the third sharer, brought a suit on the allegation that no summons was ever served upon her, and succeeded in recovering her one-third share of the talook from the hands of the auction-purchaser. The order of the Principal Sudder Ameen in that case was not that the whole of the proceedings, the decree, and

the sale were to be set aside as fraudulent, but that the rent payable under the decree was to be charged to Juggut Chunder, the sale, except as to Anund Moyee's share, was to stand good, and Anund Moyee was to recover her one-third share. With reference to that judgment, which has been put in this suit, the Subordinate Judge says: "The decree alluded to is no evidence in the "case, but the existence of the fact that "Anund Moyee, owner of one-third of the "talook, succeeded to recover possession of "her share from the auction-purchaser is in "favour of the plaintiff to give a probable "inference that the auction-purchaser was "not protected." If Anund Moyee succeeded, as apparently she did succeed, merely on the ground that she had no notice of the suit, we do not see what inference can be drawn from that circumstance against the auction-purchaser, and apparently the Subordinate Judge himself hesitates to draw any inference at all. He goes on to say: "The Moonsiff finds that plaintiff's "witnesses state vague hearsay to prove the "fraud. But I must remark that he should "not have recorded, while taking deposition "of the witnesses, what he could not use as "evidence;" and further on: "On a careful "perusal of the papers, it appears to me that "the witnesses went on to state that Juggut "Chunder, defendant No. 1, is related to "defendant No. 2, and defendant No. 2 is "also related to defendant No. 3, and as "Anund Moyee, widow of one of the "brothers of Juggut Chunder, succeeded in "recovering her share, they (witnesses) were "led to think that the sale was not *bonâ* "*fide*. The witnesses, rather, on referring to "the connection of circumstances, proceeded "to state that the transactions were fraudu-"lent." There the Subordinate Judge stops, and this question of fraud is not touched any further. It might be necessary to send back the case to the Subordinate Judge for a distinct finding on the question of fraud, but that his judgment shows that there is no evidence to support the charge. He sets out the evidence which, he thinks, can be opposed to the finding of the Moonsiff, and that evidence, as he states it, consists simply of inferences drawn by the witnesses themselves from certain facts. It was the business of the witnesses to state facts, and it was the Court's business to draw inferences therefrom. The facts that the defendants Nos. 1, 2, and 3 were connected, and that Anund Moyee succeeded on one particular ground in getting back possession of her share, are really no evidence on which the Subordinate Judge could be justified in coming to the conclusion that the transaction was fraudulent. Taking his own view of the evidence, we think it would be perfectly useless to send the case back; for, upon the evidence as it stands, it is clear that the allegation of fraud cannot be sustained.

The Subordinate Judge then proceeds to deal with the law of the case, and he says that whereas it is established that the plaintiff was not of sound mind at the time the suit was instituted and decree made against her, she is entitled to recover possession—all the proceedings against her being simple nullities. But the Subordinate Judge has altogether omitted to consider whether in fact there was any representation of the plaintiff in the rent-suit. Now it is set out in the judgment of the Moonsiff, and it has not been contradicted, that the plaintiff "herself admits in her "plaint that after her husband's demise, she "held possession of her share under the "management of the latter," that is, of Juggut Chunder, "who was therefore the virtual "sole owner of the entire talook." We have then this state of facts that Juggut Chunder was the manager for the plaintiff up to the time of her insanity with her consent; that it is in no way shown that he ceased to be her manager, or anybody took his place after she became insane; and that a decree was made in a suit which we must take to have been properly conducted, because no fraud has been proved as shown above, and we have no right to impute fraud to the plaintiff in that suit nor to suppose that the proceedings of the Court were not in due form. What reason have we to suppose, on this record, that this present plaintiff ceased to enjoy the profits of the estate from the time of her insanity down to the date of sale? None whatever. It seems to us we must take it that the management of Juggut Chunder on her behalf continued, and that she did receive the profits, and was in all probability supported by Juggut Chunder out of those profits. That being so, are we to say, or allow her to say, that Juggut Chunder could represent her for the purpose of managing her affairs and applying the profits of the talook to her use, but could not represent her when the zemindar sued her for arrears of rent? It seems to us that there was a person who, although not appointed under the law as representative of the insane, was in fact her representative by consent obtained while she was of sound mind, and who was quite capable to make a

defence on her behalf in the suit instituted against her. We must also hold that arrears of rent did exist, and we are bound to take it that the decree made was obtained *bonâ fide*, and the fact that Juggut Chunder allowed his own share to go to sale to his own loss is a strong circumstance in favour of the sale being *bonâ fide*. Under the circumstances it seems to us that the plaintiff ought not to be allowed to recover in this suit; that she had at the time of the suit a representative who was a party to the suit, and was competent to make defence on her behalf; and that there being no special fraud established, the auction-purchaser ought not now to be disturbed. We think therefore the judgment of the Lower Appellate Court must be set aside, and the judgment of the first Court dismissing the suit restored with all costs.

The 4th May 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Act VIII. of 1859, s. 73—Parties to a Suit—Costs.

Case No. 2340 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 26th May 1873, affirming a decision of the Moonsiff of Gurbetta, dated the 10th January 1872.

Robert Watson & Co. (Plaintiffs), *Appellants,*

versus

Hurgobind Sookul and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Bama Churn Bannerjee* for Appellants.

No one for Respondents.

Persons who without their consent are made parties to a suit in the appellate stage, cannot be made liable for costs, simply because they encouraged the plaintiff to bring the suit, and provided him with the necessary funds:

HELD (by Markby, J.) that parties refusing to be put on the record could not at that stage be made parties, and that all that the Court was competent to do was to dismiss the suit for want of parties.

Markby, J.—I THINK that the order of the District Judge, so far as it directs that Messrs. Watson & Co. should be made parties to the suit, must be set aside. I do not see how, if Messrs. Watson & Co. were really interested in the suit and were likely to be affected by the result, they could be made plaintiffs at this late stage against their consent. It seems to me that at any rate at this stage of the case, under that section, if the necessary parties were not before the Court, and they refused to be put upon the record, all the Court could do was to dismiss the suit for want of parties. Moreover, there is nothing which appears to me to show that Messrs. Watson & Co. were necessary parties to this suit at all, either before or after the signing of the ekrar to which the District Judge refers.

The respondent is not here to support the order made by the District Judge; and in an ordinary case, we should, upon the ground above stated, set aside the order of the District Judge.

As, however, the District Judge evidently thought it necessary, for the ends of justice, that Messrs. Watson & Co. should be made liable for costs, I have thought it right to consider whether the order of the District Judge may not be supported as to the payment of costs without making Messrs. Watson & Co. parties to the suit.

Upon the whole, however, I cannot come to the conclusion that we are justified in saying that this is a good order.

As was once before pointed out by this Bench, 20 Weekly Reporter, p. 124, the cases in which a person who is not a party to the suit can be made subject to the order of the Civil Court are very rare, and unless such powers have been specially conferred upon the Civil Court by the Legislature, caution must be exercised before assuming them. This Court on its original side has exercised the power of punishing summarily persons other than the parties to the suit, who make an improper use of the process of the Court from improper motives; but as I have said before, I do not think the Courts of the Mofussil possess such a general power; and even if they did possess it, I do not think this is a case in which it could be exercised; for I do not think that it can be contended for a moment that there is any ground shown for supposing that Messrs. Watson & Co. have acted from improper motives. The remarks of the Moonsiff upon this point are very strong, but they are not very easy to follow, and they cannot have any influence upon us, because they were made without Messrs. Watson & Co. having been heard. Moreover, the District Judge does not adopt the very strong view

taken by the Moonsiff. The District Judge only says that if it had not been for the active assistance given by Messrs. Watson & Co. for their own ends, this suit would not have been brought, and it is upon this finding of the District Judge that the order must be supported, if it is to be supported at all.

I can find no case which has gone to this length. Messrs. Watson & Co. may have desired to see the plaintiff succeed and the defendant ejected; they may have considered that the defendant was not an eligible person to have as a sub-tenant on their estate, or they may have held out to themselves prospects of advantage, if he could be ejected; and with a desire to get rid of the defendant they may have encouraged the plaintiff to bring this suit, and have furnished him with the necessary funds. This is the utmost which the District Judge has found against Messrs. Watson & Co. But this will not warrant a summary order, directing Messrs. Watson & Co. to pay the costs of this suit. This is not like the case where the real party to a suit, for the express purpose of avoiding the liability to costs, has put forward a pauper who has no real interest. Upon this being discovered, it might be in the power of any Court to order the real party to pay the costs, although his name was not ostensibly upon the record. But that is not the present case. Nor is there anything to show that Messrs. Watson & Co. did not *bonâ fide* believe the plaintiff to be their tenant, and that the rights which he claimed in this suit were such as he was honestly entitled to. The Moonsiff, no doubt, expresses an opinion to the contrary, and thinks this suit was brought to ruin the defendant. But Messrs. Watson & Co. had not then been heard; and when the proper proceedings were taken for giving Messrs. Watson & Co. an opportunity of being heard, this charge was entirely dropped. Nothing of the kind is stated in the petition put in by the defendant on the 18th April, nor in the notice issued by the Judge upon the same day.

For these reasons I think the order of the Judge directing Messrs. Watson & Co. to pay these costs must be set aside.

Milter, J.—I concur in holding that the order of the Judge directing Messrs. Watson & Co. to pay the costs of this suit must be set aside. Without expressing any opinion as to the legality or otherwise of the Judge's proceeding in making Messrs. Watson & Co. parties to the suit, it appears to me that the decree making them liable for costs cannot stand. They were made parties after the appeal had been filed by the original plaintiff; and it is clear that the evidence already existing on the record could not be used against them without their consent. No such consent appears to have been given, and no fresh evidence has been adduced in their presence. Therefore the finding of the Lower Appellate Court, which has been made the basis of the decree for costs against them, is virtually grounded upon wholly inadmissible evidence, and consequently is bad in law. This special appeal, which has been brought only against that part of the decree of the Lower Appellate Court which makes Messrs. Watson & Co. liable for costs, must therefore be decreed.

The 4th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, ss. 241, 242, 243, & 246—Attachment of a Debt—Limitation.

Case No. 1329 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 31st March 1873, affirming a decision of the Moonsiff of Sasseeram, dated the 31st December 1872.

Mussamut Rambutty Kooer (Plaintiff), *Appellant,*

versus

Kamessur Pershad (one of the Defendants), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Act VIII. of 1859, s. 246, applies only to immoveable property or to specific moveable property, not to a debt due. When a debt due to a judgment-debtor is attached in the hands of the person who owes it, he may pay it into Court voluntarily under s. 241, or under compulsion under s. 242, or be sued for it under s. 243.

A person sued thus would not be barred, because of the

lapse of a year, from setting up any ground of defence which he may have against the claim.

Phear, J.—The material facts of this case appear to be these: A sum of money supposed to be in the hands of the present defendant, due to a certain judgment-debtor, was attached by the judgment-creditor to answer his decree against the judgment-debtor. Upon this attachment being effected, the present defendant made some objection, which is not very clearly before the Court. The objection was overruled, the sum of money was put up for sale in execution of the decree, and sold, we may say, to the present plaintiff, although we believe he gets his immediate title through the auction-purchaser by a private transfer. On the title thus obtained, the present plaintiff brings the suit against the defendant to recover the whole of the money alleged to have been due from the defendant to the judgment-debtor at the time when the attachment was effected.

The defence is that there really was no money in the hands of the defendant at the time of the attachment belonging to the judgment-debtor, or due to the judgment-debtor; that there had been, no doubt, a certain sum of money deposited by the judgment-debtor in the hands of the defendant as security for the due performance of the terms of the lease; but that the lease had come to an end or been terminated by the parties, and the money appropriated to the purposes for which it had originally been deposited; and that it had been thereby, as one of the Courts below termed it, entirely "absorbed." And both the Courts below have considered that this defence was made out, and have accordingly dismissed the plaintiff's suit.

It is now objected on special appeal that, inasmuch as this defence is in reality nothing more than the objection which the defendant made to the attachment when the attachment was effected, and inasmuch as further he did not, upon that objection being overruled, as it was overruled, bring his suit within a year according to the provisions of section 246 of the Civil Procedure Code, he is barred from setting it up as a matter of defence now. The argument is that, because the lapse of a year had the effect of barring him from bringing a suit to establish this objection, it must necessarily also have the effect of preventing him from setting up this objection as a defence to an action brought against himself. It appears to us that this ground of complaint against the legality of the judgment of the Lower Appellate Court is not sound. The money which is said to have been attached in the hands of the defendant was not ear-marked coin; it was at the most a debt due from the defendant to the judgment-debtor. And a debt is not, in our opinion, the subject of section 246. It appears very plain that section 246 applies only to immoveable property or specific moveable property. This is not, as we have said, a specific chattel in the shape of coin; it is, according to the account of the plaintiff, at the best, merely a debt due from the defendant to the judgment-debtor in respect of which the defendant might have various rights, such as set-off, of a compensatory nature. Indeed the selling of this money appears to have been altogether irregular. The procedure which ought to have been followed is that which is directed in sections 241, 242, and 243 of the Civil Procedure Code. When a debt due from a third person to the judgment-debtor is attached in the hands of the person who owes it, then he may either, under section 241, pay it into Court voluntarily, or, under section 252, if he objects for any good cause to pay it, he may be made to pay it by order of Court; or, if his objection to pay it is founded upon any *bonâ-fide* ground of defence, the Court may, under section 243, appoint a manager to sue for it. And these three modes seem to be amply sufficient to enable the Court, in the interest of the judgment-creditor, to recover any debts which may be due to his judgment-debtor. Section 246 is not applicable to the case, for that section clearly contemplates property of which the judgment-debtor is entitled to the possession in specie. We see no reason why, in the present suit, the defendant should be estopped from setting up any good ground of defence to the plaintiff's claim which he may have. For the moment, putting aside the irregularity which has been committed, we may assume that the plaintiff is in the position of a manager appointed by the Court under section 243, and in such a case there can be no doubt that a person sued would have a right to set up any ground of defence which he might have to the claim which the manager makes against him.

In this view it is not necessary for us to say whether or not, had the case come within the scope of section 246, the last passage of that section would have had the effect for which the present appellant contends. It appears to us that the decisions of the lower Courts are in substance correct, and, therefore, this appeal ought to be dismissed with costs.

The 4th May 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Land Acquisition Act (X. of 1870), ss. 39 & 40—Order of Distribution.

Case No. 1298 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 31st March 1873, affirming a decision of the Moonsiff of Arrah, dated the 28th December 1872.

Dwarka Singh (Defendant), *Appellant,*

versus

E. Solano and another (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Mr. C. Gregory and *Baboo Omer Nath Bose* for Respondents.

In proceedings under the Land Acquisition Act (X. of 1870), the order of distribution contemplated by s. 39 is not a final order on adjudication of the rights of the parties to the property for which compensation has been assessed and awarded; but the question determined may, under the proviso in s. 40, be re-heard in a regular suit.

It seems to me that the lower Courts were right in holding that section 58 of the Land Acquisition Act (X. of 1870) is no bar to the present suit. Comparing the words of that section with those of section 40, it is quite clear that there is a wide distinction between the two sections. One section applies to suits brought to re-open the whole of the award including the question of valuation; and the other, merely to suits the object of which is to raise questions respecting the distribution of the compensation awarded.

At first I had some doubts as to whether a decision by a Judge under the provisions of section 39, determining the proportion in which the persons interested are to share in the compensation, when such decision has been confirmed or has not been appealed from, does not take effect as a final adjudication.

Both the parties to the present suit were before the Judge when he gave his decision under section 39, but I think it is correctly argued by the respondent that the words of the proviso in section 40 are so wide that they admit of the re-hearing in a regular suit of a question which has been determined by the Judge under section 39. Section 40 is as follows: "Payment of the compensation shall be made by the Collectors according to the award to the persons named therein, or in the case of an appeal under section 39, according to the decision on such appeal." This provision, read with sections 37 and 39, directs payment to be made to the persons interested who have agreed in the apportionment of the compensation, when the particulars of the apportionment have been specified in the award under the former section, or when a distribution of the compensation has been ordered, under section 39, to the persons named in the order for distribution.

This proviso is then added:—

"Nothing herein contained shall affect the liability of any person who may receive the whole or any part of the compensation awarded under this Act to pay the same to the person lawfully entitled thereto." By the words, "awarded under this Act" and "person lawfully entitled thereto," I understand "awarded under the provisions of section 37 or section 39 taken into the earlier sections which refer to the fixing of the amount of compensation to be paid by the Government," and "person who can establish a title by regular suit."

Section 37 expressly makes the apportionment recorded thereunder final between the parties thereto.

Section 39 is silent as to the finality of the order of distribution between the parties to the proceedings held under it, and does not expressly prohibit the bringing of a separate suit.

I hold that the order of distribution is not a final order on adjudication of the rights of the parties to the proceedings under the Land Acquisition Act to the property for which compensation has been assessed and awarded. Were it otherwise, it seems to me that questions involving titles to properties of which the land taken for public purposes might be a trifling fraction would be finally adjudicated in proceedings under the Act—a result which cannot have been contemplated by the Legislature.

Taking this view of the law (Act X. of 1870), it is unnecessary to go into the preliminary objection taken by Mr. Gregory that no special appeal will lie under section 27 of Act XXIII. of 1861.

The finding of the Lower Appellate Court on the merits appears to be based entirely on facts, and is unassailable in special appeal; and the appeal is, therefore, dismissed with costs.

The 5th May 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII. of 1859, s. 246—Limitation.

Case No. 2138 of 1873.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 10th June 1873, affirming a decision of the Moonsiff of Madareepore, dated the 30th November 1871.

Kaminee Debia (one of the Plaintiffs), *Appellant,*

versus

Issur Chunder Roy Chowdhry (one of the Defendants), *Respondent.*

Baboo Sreenath Banerjee for Appellant.

Mr. C. Jackson and *Baboos Rash Beharee Ghose* and *Doorga Mohun Doss* for Respondent.

A party, who has failed in establishing a claim preferred under Act VIII. of 1859, s. 246, whether he gave any evidence or not, must bring a suit to establish his right within one year, or else he will be barred.

Jackson, J.—We think it quite clear in this case that the suit is barred. The plaintiff set up a claim in respect of this land under section 246, which was dismissed in the year 1866. It is contended that, as the claimant in that case gave no evidence, there was no complete adjudication, and therefore the order ought not to be considered as made under that section. This is a complete fallacy. The claim was made and was disallowed. It makes no difference whether the claimant gave any evidence or not. He had the opportunity of doing so; and, if he did not choose to do it, it was his own fault. If we were to hold otherwise, a claimant, under section 246, has only to abstain from adducing his witnesses or some of them, in order to entitle him to an extension of time, and to disturb the purchaser's possession 12 years after his purchase. It is then said that, under the ruling in 8 Weekly Reporter, p. 73, this suit ought not to be barred, inasmuch as a decision under section 246 merely refers to possession. The facts of that case are not stated with sufficient fulness, and we are not aware that the decision has been followed in any later case. Under the circumstances, we do not think it necessary to refer this matter to a Full Bench. We have no doubt on the point, and the same view of the law has been taken by the other Division Benches of this Court, *viz.*, that a party, who has failed in establishing a claim preferred under section 246, must bring a suit to establish his right within one year, or else he will be barred. The special appeal is dismissed with costs.

We may mention that, in a case in 21 Weekly Reporter, p. 133, before the learned Chief Justice and Mr. Justice Glover, this very case in 12 Weekly Reporter was referred to, and there the learned Chief Justice thought it unnecessary to refer the case to a Full Bench, and that opinion was concurred in by Mr. Justice Glover, who was one of the Judges who decided the case in 8 Weekly Reporter.

The 6th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble C. Pontifex, *Judge.*

Damages—Carriers' Liability—Bill of Lading—Onus Probandi.

Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.

G. Shetliff (Defendant), *Appellant,*

versus

C. Scott and others (Plaintiffs), *Respondents.*

Mr. Branson and *Mr. Macrae* for Appellant.

Mr. Lowe and *Mr. Evans* for Respondents.

When a shipmaster undertakes that goods shipped by him shall be delivered, subject to the exceptions and conditions mentioned in a bill of lading, in good

order and condition, he takes upon himself the consequences and contingencies other than the exceptions expressed in the bill of lading, or which are implied by law.

In an action to recover damages for injury caused to the goods by the negligence of the defendant as a common carrier, it is not necessary for the plaintiff to give evidence of such negligence unless the defendant has shown that the injury was occasioned by a cause which was within the exceptions. Then the plaintiff would be at liberty to show that there was negligence so as to deprive the defendant of the benefit of the exceptions.

THIS was a suit to recover Rs. 8,161-4-0 as damages for injury to certain goods of the plaintiffs shipped on board the steam ship "Winestead." of which the defendant was master, which, plaintiffs alleged, had been caused by the negligence of the defendant as a common carrier.

The plaintiffs stated that in December 1872 Messrs. Scott, Son, & Co. of London shipped, on board the defendant's vessel, 2,000 boxes of stearine candles and 1,000 boxes of brandy, which were then in good condition, for conveyance from London to Calcutta, and obtained bills of lading, whereby the defendant promised to deliver the said goods to the order of Messrs. Scott, Son. & Co. in Calcutta, in the like good order and condition as that in which they were shipped. Messrs. Scott, Son, & Co. endorsed the bills of lading to the plaintiffs to whom the said goods were consigned, and the plaintiffs are the holders of the bills of lading. When the goods were landed by the vessel on her arrival at Calcutta, they were considerably damaged by fresh water, as the plaintiffs alleged, by the negligence of the defendant, and in consequence of such damage the plaintiffs were compelled to sell the goods by public auction to avoid further loss, which they did after holding a survey on the goods, of which survey the defendant had notice. The plaintiffs laid their damages as follows :—

Sound Value of

2,000 boxes of candles ...	Rs. 14,062-8-0	
1,000 ,, of brandy ...	,, 11,000-0-0	
		25,062-8-0

Amount realised on Sale by Public Auction.

2,000 boxes of candles ...	Rs. 11,281-4-0	
1,000 ,, of brandy	,, 5,700-0-0	
		16,981-4-0
	Rs.	8,081-4-0

showing a loss of Rs. 8,081-4-0, which amount, together with Rs. 80 for the costs and charges attending the survey, making a total of Rs. 8,161-4-0, the plaintiffs sought to recover from the defendant.

The terms of the bills of lading for the candles and brandy were similar. The bill of lading for the candles was as follows :—

Eastern Trade Bill of Lading Outwards, No. 1, via "Suez Canal."

Shipped in good order and condition by Scott, Son, & Co. on board the steam ship "Winestead," whereof is master for this present voyage, lying in the Port of London, and bound for Calcutta *viâ* Suez Canal, with liberty to discharge and receive goods and passengers at Colombo and Madras, and to take in coal or other necessary supplies at any intermediate port or ports, to sail with or without pilots, and to tow and assist vessels in all situations of distress, two thousand boxes candles, being marked and numbered as per margin, and to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Calcutta or so near thereto as, she may safely get unto order, or to his or their assigns. Freight for the said goods and primage (if any) to be paid by the shippers in London on delivery of the bills of lading in cash without deduction, ship lost or not lost average as accustomed.

GALLATLY, HANKEY, SEWELL, & Co.,
109. *Leadenhall Street*,
LONDON.

1 2000

CALCUTTA.

The following are the exceptions and conditions above referred to; weight, measure, quality, contents, and value unknown:

The act of God, the Queen's enemies, pirates, robbers by land or sea, restraint of princes, rulers or people, loss or damage from machinery, boilers or steam, or from explosion, heat, or fire on board in hulk or craft, or on shore, jettison, barratry, any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship, and all and every the dangers and accidents of the seas, rivers, and canal, and of navigation of whatever nature or kind, are excepted.

The ship is not liable for insufficient packing or reasonable wear and tear of packages, for inaccuracies, obliteration or absence of marks, numbers, address, or description of goods shipped, leakage, breakage, loss or damage by dust from coaling on the voyage, sweat, rust, decay, fines and expenses and losses by detention of ship or cargo caused by incorrect marking, or by incomplete or incorrect description of contents or weight, or of any other particulars required by the authorities at the port of discharge, upon either the packages or bills of lading, shall be borne by the owner of the goods. The steamer, while detained at any port for the purpose of

coaling, is at liberty to discharge and receive goods and passengers. The owners of the steamer will not be accountable for gold, silver, bullion, specie, jewellery, precious stones, or precious metals, or beyond the amount of one hundred pounds for any one package, unless the bills of lading are signed for such goods, and the value declared therein. If medical fluids or any other goods of an inflammable, damaging, or dangerous nature are shipped without being previously declared and arranged for, they are liable, upon discovery, to be thrown overboard, and the loss will fall upon the shippers or owners of such fluids or goods.

The goods are to be discharged from the ship as soon as public intimation is given that she is ready to unload; and, if not thereupon removed without delay by the consignee, the master or agent is to be at liberty to land the same, or, if necessary, to discharge into hulk, lazaretto, or hired lighters at the risk and expense of the owners of the goods.

In case of quarantine, the goods may be discharged into quarantine depôt, hulk, or other vessel as required for the ship's despatch. Quarantine expenses upon the goods of whatever nature or kind shall be borne by the owners of the goods.

In case of the blockade or interdict of the port of discharge, or if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods, and the ship's responsibility shall cease when the goods are so discharged into proper and safe keeping, the master giving immediate notices of the same to the consignees of the goods so far as they can be ascertained. The master or agent shall have a lien on the goods for payments made or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods. In case any part of the within goods cannot be found during the ship's stay at the port of destination, they are, when found, to be sent back by first steamer at the ship's risk and expense, and subject to any proved claim for loss of market.

The ship shall not be liable for incorrect delivery, unless such package shall have been distinctly marked by the shippers before shipment with the name of the port of destination.

In witness whereof the master or agent of the said ship has signed three bills of lading, exclusive of the master's copy, all of this tenor and date, one of which being accomplished, the others to stand void.

G. SHETLIFF.

Dated at London, December 16th, 1872.

The defence was that, when the brandy and boxes of candles were put on board the "Winestead," they were to all appearance dry externally and in good condition, but that the contents of the cases were not, and could not have been, examined by the defendant; that the goods were carefully stowed with sufficient and proper dunnage in the afterhold of the ship along with other goods for Colombo and Madras, while other goods were landed in good order and condition, and in no way damaged by either salt-water or fresh water; that cargo for Calcutta stowed in the immediate vicinity of the plaintiffs' goods had been landed perfectly dry and in good order and free from all damage by water. The defendant averred that the plaintiff's goods were carefully carried and conveyed while on board his ship, and (with the exception of a few boxes and cases which were broken and damaged, and the plaintiffs' claims in respect of which have been fully settled and satisfied) the said cases and boxes were delivered by the defendant to the officers in charge of the jetty in the like order and condition, and the defendant obtained from the jetty-officers clean receipts for the goods. The defendant denied that the damage was caused after the goods were placed in his custody, and said that, if they were damaged, as alleged by the plaintiffs, the damage must have been suffered by the goods before they were delivered to him for carriage, and that such damage did not arise through his default and neglect.

The following is the judgment of Macpherson, J., which was appealed against:—

I think it is well proved that these cases of brandy and boxes of candles did reach Calcutta all of them more or less wet and discoloured and damaged by fresh water in the manner stated by the plaintiffs, and that the value of the shipment was in consequence considerably diminished.

It has been suggested by the defendant that the damage was caused by the "sweating" of the candles. That theory, however, cannot be accepted for a moment on the evidence which has been given. Moreover, supposing there were grounds for believing that the candles had damaged themselves and their boxes by sweating, the question of damage to the brandy would remain untouched; for the sweating of the candles could not possibly soak the brandy cases and their contents.

The whole consignment having arrived here damaged, the question is, is the captain liable to make good the damage? The principal defence is that the damage was not caused on board the defendant's ship; and the defendant suggests that, if the boxes arrived in a wet and damaged condition, they must have been wet before they were

put on board. But, for several reasons, I think it clear that they were not wet when put on board. In the first place, we have the bill of lading, which says that the goods were shipped in good order. In the second place, supposing the cases had got wet, in any ordinary degree, in the course of trans-shipment in London, they would have become dry down in the warm hold of the steamer long before they reached this. But the evidence is that they had not only been badly wetted, but were still absolutely soaking inside when landed in Calcutta. And supposing it to be possible that the wetting in England was so thorough that it would last to the extent described till the goods arrived here, how am I to believe that, if the goods had been shipped in such an utterly soaking state, the captain would have given a bill of lading for them as shipped in good order? In the third place, if it be admitted that the boxes got wet on board the barges in the course of trans-shipment in London, and that that might account for some of them reaching this wet, still this would not account for all being wet. Supposing them to have been neglected and left uncovered by the bargemen, that will not account for the whole of them being soaked. There were some 3,000 boxes in all; and, even if they were exposed to the rain for a time, although the outer boxes would get wet, the great majority would remain untouched by the rain. In the fourth place, there were with these boxes a number of other cases containing drugs, which were stored in the same part of the vessel. It is proved that these cases of drugs were also wetted, although (they being more secure and carefully packed) the damage was much less than in the case of the brandy and candles. Now it is proved that these cases of drugs were not sent alongside in barges, but were sent to the steamer by land in vans, in order to insure greater care being taken of them. Supposing, I assume, that the bargemen were neglectful of their duty, it is asking me to stretch a very considerable point when I am called upon to assume that, at the very same time, the vanmen were being guilty of a similar neglect of duty as regards these cases of drugs, which they were conveying to the steamer by land. Finally, there is the evidence of the witnesses examined in London under commission that the goods were taken good care of in the barges; and the defendant himself says the cases were, to the best of his knowledge, all right externally when shipped.

The goods having been shipped in good condition, the next question is how they got into the state in which they were landed here? The defendant denies any damage on board his ship, and in no way accounts for the cases having got wet. I find as a matter of fact that they were damaged on board the ship; and I think the plaintiffs have proved that the damage may have arisen, and did arise, from want of proper care being taken in the stowage of these goods. The plaintiffs show they were stored in the lower hold above coals. The coals were in the bottom of the ship; then came some iron and machinery and cases of hardware; and above that were these boxes of brandy and candles. It is proved that coals, when damp, generate steam, and that the damage done to these cases is such as might have been caused by their being kept in a hold full of steam. There was no matting or anything else immediately over the coals to prevent steam from rising. It is not proved that steam was in fact generated, but it is proved that coals are not unfrequently shipped more or less damp; and, moreover, that, in this particular instance, there was water in the bilge of the ship immediately below the coals, and at no great distance from them. Having the grand fact before me that the cases were shipped sound, and reached this soaking and damaged, I think the plaintiffs have made out a sufficient case, and have proved the damage was caused by improper stowage. In Czech *vs.* The General Steam Navigation Company (L. R., 3 C. P. 14), there was much less evidence as to the cause of the damage than there is in this case.

Possibly, we have not the whole truth before us as regards what occurred on board ship. Mr. Branson objects that there is no evidence of the details of the damage. I think there is ample evidence. The plaintiffs took every reasonable means to ascertain precisely the condition of the consignment. At the earliest possible moment they called the defendant's attention to the matter, and asked him to attend and join in a survey which they proposed to hold. The captain declined to attend the survey, or to have anything to do with the matter. The survey was then held, and was conducted by qualified and disinterested persons who opened a very large number of cases, and have given such evidence as no jury would hesitate to accept as ample proof of the state in which these boxes were landed. I do not think the plaintiffs are entitled to as large a sum as they claim by way of compensation. Relying upon Mr. Livesay's evidence as to the general

price in Calcutta of brandy of the inferior quality of this shipment, and upon the evidence of Mr. Parker, who says that a subsequent shipment of the same brandy in larger bottles was sold by him in the bazar at Rs. 8-8, I think I shall give the plaintiffs quite as much as they are entitled to if I take the price of the brandy to be Rs. 8 a dozen. I shall take 4 annas 5 pie as the price of the candles, and I shall allow the costs of survey, Rs. 80, and costs of suit on scale No. 2.

The defendant appealed from this judgment on the following grounds:—

1st.—For that the learned Judge ought not to have held upon the evidence that the brandy was landed in Calcutta in any way damaged by fresh water.

2nd.—For that the learned Judge ought not to have held upon the evidence that the said brandy and candles were damaged on board the steam ship "Winestead" so as to make the defendant liable for such damage.

3rd.—For that the learned Judge, though he says in his said judgment that he relies upon the evidence of Mr. Livesay and Mr. Parker, did in fact by his judgment and decree award and give to the plaintiffs damages greatly in excess of the damages proved by the said witnesses.

4th.—For that the judgment and decree are against the weight of evidence.

5th.—For that the learned Judge ought not to have awarded to the plaintiffs the costs of this suit.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C.J.—All we have to do in this case is to determine whether the amount of damages awarded is proper. The defendant signed a bill of lading in which he stated that he had received on board the vessel in good order and condition 2,000 boxes of candles. There is a similar bill of lading for 1,000 cases of brandy. The goods were to be delivered at Calcutta, subject to the exceptions and conditions mentioned in the bills of lading, in good order and condition. By this he took upon himself the risk of the consequences and contingencies other than the exceptions expressed in the bill of lading, or which are implied by law. It was not necessary for the plaintiffs to give evidence of negligence on the part of the defendant, unless he showed that the injury which the goods had sustained was occasioned by a cause which was within the exceptions. Then the plaintiffs would be at liberty to show that there was negligence so as to deprive the defendant of the benefit of the exceptions in the bills of lading. There is no evidence that the admission in the bill of lading that the goods were received on board the vessel at London in good order and condition was not true. It is proved that when the goods arrived and were delivered here they were not in good order and condition. The defendant has not shown that the damage which the goods had sustained was occasioned by any of the causes mentioned in the bill of lading. Mr. Branson admitted that he could not show that, and he was unable to point to any evidence showing that the case came within any of the exceptions. The plaintiffs are consequently entitled to recover the amount of damages which they have sustained.

With respect to the damage to the brandy, Mr. Branson contended, and we think fairly, that the plaintiffs are bound by the evidence which Mr. Livesay, who was their own witness, gave. This evidence is very distinct, and would reduce the damages for the brandy by Rs. 750. We think this ought to be allowed, and that the damages should be so reduced.

As to the candles, the evidence both of Mr. Parker and of Mr. Livesay would make the market-price at the time when the candles were sold by auction 4 annas 3 pie per packet. In fact, Mr. Livesay made it something less. He said that the market-price then was from 4 annas to 4 annas 3 pie a packet. Taking the higher price, there will be a deduction on account of the candles of Rs. 520.

It was contended that the plaintiffs had a large contract for the purchase of candles at 4 annas 5 pie, and that if these candles had arrived in good order and condition, they might have delivered them in performance of the contract, and so have realized that price. The defendant, however, did not know anything of the contract, and was not bound so that it can be used against him as the measure of damages. The way in which the contract might possibly have been used was to show the market-price at that time. But we do not know when the contract was made, and what the market-price then was. We cannot therefore look at the contract, and must reduce the damages on account of the candles by Rs. 520.

The appellant has failed as to the main question in appeal, and we do not think that this reduction of damages ought to exempt him from paying the costs of the appeal in which he has substantially failed. The costs will be on scale No. 2.

The 6th May 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Lessor and Lessee—Cause of Action—Ejectment.

Case No. 2173 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 26th July 1873, affirming a decision of the Subordinate Judge of that District, dated the 28th September 1872.

Nund Lall Mookerjee and another (two of the Defendants), *Appellants,*

versus

Khurgessur Banerjee (Plaintiff), *Respondent.*

The Advocate-General and *Mr. C. Jackson* and *Baboos Tarucknath Sen* and *Bama Churn Banerjee* for Appellants.

Baboos Hem Chunder Banerjee and *Sreenath Bonerjee* for Respondent.

Unless lessees hold over after the expiration of their lease, or hold under a yearly tenancy after notice to quit, the lessor has no cause of action against them to recover possession.

Jackson, J.—THE plaintiff brought this suit against the defendants to recover possession from them of a tank with the land which underlay it, to which a right of fishery was annexed, alleging that the defendants had taken this tank upon a *ticca* holding for ten years commencing from 1266 B. S., and that he had frequently called upon them to quit the possession of the tank and deliver it up to him, but that the defendants declined to do so.

The defendants set up a permanent lease. In the judgment of both the Courts the plaintiff has been declared entitled to recover possession of the tank, and he has got a decree accordingly with costs. The Lower Appellate Court, concurring with the Court of first instance, finds the permanent lease set up by the defendants to be untrue. As to the kubooleut on which the plaintiff relies, it gives no final or positive decision one way or the other, but it says that whether that be so or not, it is clear that the defendants are not entitled to withhold possession from the plaintiff, and therefore cannot resist his suit. Now the valuable part of the enjoyment of this tank was unquestionably the right of fishing in it, and there does not seem any ground on which separate possession of the land which underlies the tank is claimed; in fact, that claim appears to have been introduced merely for the purpose of swelling the valuation of the suit in order to bring it in the Subordinate Judge's Court. Unless, therefore, the defendants had been holding over after the expiration of their lease or holding under a yearly tenancy after notice to quit, the plaintiff had no cause of action in the present suit; and if the defendants had merely made an answer to that effect, the decision would have been very simple. The defendants, however, set up a perpetual lease; issues were accordingly framed, and the Courts have found that the lease was not made out. We think we ought not to render this finding infructuous by setting aside the decree altogether, but, on the other hand, as the plaintiff had no cause of action although he has succeeded on the issues of fact, so far as the findings are concerned, we think he is not entitled to the costs of this suit. The findings of the lower Courts will be upheld, but the parties will be left to bear their own costs throughout.

The 8th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Zur-i-peshgee Lease—Possession—Damages—Special Appeal—High Court's Power of Supervision.

Case No. 1454 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 10th April 1873, reversing a decision of the Moonsiff of that District, dated the 14th August 1871.

Shaikh Shamdanee (one of the Defendants), *Appellant,*

versus

Bhojoo Ram (Plaintiff), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Nil Madhub Bose for Respondent.

Plaintiff was in possession of a house under the terms of a zur-i-peshgee lease, and was ejected by defendants, other than defendant No. 5, under color of their having bought the right, title, and interest of No. 5 in the property at an auction-sale. Plaintiff sued to recover from the defendants jointly the principal secured by the lease with interest thereon:

HELD that, as the defendants, other than No. 5, were not privy to the contract, they were not liable to be called on to satisfy its terms; and that the suit ought to have been framed either to recover possession or to recover damages:

HELD that, as the Lower Appellate Court's decision against the above defendants was fundamentally wrong in law, and their liability in the essential matter of the suit had not been properly tried, the High Court, although not warranted to interfere in special appeal (by reason of the suit being a money-claim under Rs. 500), were justified in interfering under their general powers of supervision.

Phear, J.—THE case of the plaintiff is that he was in the possession and enjoyment of a certain house under the terms of a zur-i-peshgee lease, dated the 8th Pous 1259, and executed by one Ram Churn Halwaee, ancestor of the defendant No. 5, when he was wrongfully ejected from the possession thereof by the defendants, other than the defendant No. 5, under colour of having bought the right, title, and interest of the defendant No. 5 in this property at an auction-sale. He complains that he has thereby lost the benefit of the zur-i-peshgee lease, and he seeks to recover from all the defendants jointly the amount of the principal secured by the zur-i-peshgee lease with the interest named therein. In other words, he sues all the defendants alike upon the terms of the zur-i-peshgee deed to recover the debt which was secured thereby. But, on the case laid by him, the defendants, other than the defendant No. 5, are not privy to that contract, and are not liable to be called upon to satisfy its terms. If they have wrongfully dispossessed him of the property which he was holding under it, then he may either recover back that property from them by a suit for the purpose, or make them responsible for damages which their wrongful act has caused him. He has not framed his suit for either of these two alternative purposes; he has not brought a suit of ejectment against the defendants with a view to recover possession of the property, neither has he framed his suit in the form which it ought to take, if he desired to recover damages from the defendants. It is obvious that, if he did sue the defendants to recover damages, it would be incumbent upon him, in order to make out his claim, to show amongst other things what the damage actually was which he sustained as the consequence or by reason of the defendants' wrongful conduct. And, as the complaint against the defendants is confined to this—namely, that they deprived him of possession of the house which he held in pledge to secure the repayment of the zur-i-peshgee money, the damages would probably be measured at the outside by the value of the house. But, as has already been stated, he has not framed his suit for either of these purposes; he has sued the defendants simply upon the footing of the contract itself. And it seems to be very plain that, excepting the defendant No. 5, none of the defendants are liable to the plaintiff on the terms of the contract. The plaintiff's suit, therefore, against all, excepting the defendant No 5, ought to fail. And we think that the decision of the Lower Appellate Court, so far as it gives the plaintiff a decree against the present appealing defendants, is wrong at its very foundation. The ground on which the Subordinate Judge has placed his decision does not in law justify the decree which he has made against the appellants. It has been objected before us that we cannot entertain this appeal, because the plaintiff's claim was a mere money-claim for less than Rs. 500. But, inasmuch as we are of opinion that the decision of the Subordinate Judge is fundamentally wrong in law. and that the liability of the appellants towards the plaintiff in the essential matter of suit was not properly tried in the Lower Appellate Court, we think we ought to interfere in this case under our general power of supervision.

We accordingly set aside and reverse the decision of the Lower Appellate Court, so far as it affects the appellants, with costs in both the Courts.

We need hardly remark that this decision will not affect the plaintiff's right to claim damages against these defendants, if so advised, and if he has good reason for doing so.

The 8th May 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Act XXVII. of 1860—Certificate of Administration.

Case No. 7 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 11th December 1873.

Mussamut Tripoora Soonduree, *Appellant.*

Baboo Aukhil Chunder Sen for Appellant.

Case.—An estate having been sold, subsequent to the death of its owner, for arrears of revenue, the widow applied for the sale-proceeds in deposit to the Collector, who refused to deliver them to the applicant, unless she

produced a certificate under Act XXVII. of 1860. She applied accordingly for such certificate to the Judge, who rejected her application on the ground that the case did not come within the scope of the Act, as "the sum in deposit was not in any sense a debt due to the deceased at the time of his death:"

HELD that, as the sale-proceeds were payable to the estate of the deceased, there was nothing in the law to prevent the Judge from entertaining the application.

Kemp, J.—NOBODY appears for the respondent in this case. It is clear that the Judge is wrong in his interpretation of Act XXVII. of 1860. That Act was passed for the purpose of enabling parties claiming or representing estates of deceased persons to recover debts payable to such estates. The sale-proceeds, although they may have been recovered after the decease of Wooma Churn Biswas, are clearly payable to his estate, and, therefore, if the petitioner is the widow of Wooma Churn, there is nothing in the provision of the law which prevents the Judge from entertaining her application. The case is remanded for the Judge to decide upon the petition of the appellant with reference to these remarks.

The 8th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Act VIII. (B. C.) of 1865—Act X. of 1859, s. 106—Suit by Zemindar.

Cases Nos. 2218 and 2219 of 1873.

Special Appeals from a decision passed by the Officiating Judge of Backergunge, dated the 1st July 1873, affirming a decision of the Additional Moonsiff of that District, dated the 25th August 1871.

Nobin Chunder Sen Chowdhry (Plaintiff), *Appellant,*

versus

Nobin Chunder Chuckerbutty and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Bhowanee Churn Dutt* for Appellant.

Baboos Hem Chunder Banerjee and *Doorga Mohun Doss* for Respondents.

A suit by an auction-purchaser to obtain khas possession of an under-tenure which had been sold under Act VIII. (B.C.) of 1865 was dismissed on the ground that the suit in which the zemindar had obtained the decree was a fraudulent one, and the purchaser knew that it had been against the wrong party. In special appeal, Act X. of 1859, s. 106, was pleaded in justification of the zemindar:

HELD that the zemindar could not bring such a suit as he had brought against a person other than the one whom he knew to be the proprietor of the under-tenure, and from whom for a series of years he had been receiving rent.

Ainslie, J.—THE plaintiff, the special appellant in this case, as purchaser at an auction-sale of an under-tenure, under the provisions of Act VIII of 1865 of the Bengal Council, sues for khas possession.

The Courts below have found that the person who was defendant in the rent-suit never had possession; that the zemindar knew that she was not in possession; that he had recognized the present defendants as the persons who were in possession of the tenure; that the suit in which the decree was obtained was a fraudulent suit; that the purchaser knew that the decree was against the wrong party; and that there was no arrear due.

The greater part of the argument on this special appeal has been directed to the facts, as if it were a regular appeal in which those findings might be reviewed upon the ground that they are against the weight of the evidence.

The only point which seems to us to require any notice is to the effect that, under the provisions of section 106 of Act X. of 1859, nothing short of registration of the transfer of a tenure will protect the tenure in the hands of the transferee against decree and sale at suit of the zemindar. Two cases were particularly cited, one from the 20 Weekly Reporter, page 59, and the other, a Full Bench judgment, at page 94 of the 21st volume of the same report. The learned Chief Justice, in the case in the 20th Weekly Reporter, says: "A decree had been obtained "for an arrear of rent due in respect of the "under-tenure. The defendant in that suit "was the person whom the zemindar had a "right to suppose was the tenant." In this case it has been found that the zemindar knew perfectly well that the person he was suing was not the tenant. Therefore that case is distinguishable from this; and on the

same ground the judgment of the Full Bench appears to us to have no bearing on this case, because the case referred to the Full Bench was in effect this (it is not reduced exactly into the form of a question, but the facts are stated), whether a zemindar could bring a suit against registered jotedars after their rights had been sold to another party who had not, before the institution of the suit, registered the transfer; and could he, in such suit, cause the tenure to be put up to sale again. So that the suit was one against persons who were registered in the zemindar's serishta, and there can be no doubt whatever that so long as he sues those persons he is within his rights.

In the course of the judgment the learned Chief Justice says: "In Act X. words which are capable of a much wider meaning are substituted for the words of the Regulation. The Act says generally that, if there is a decree for arrears of rent, the tenure may be sold." These words, no doubt, are very wide, but they must be read with a passage which occurs further on in the same judgment in the following words: "It appears to me, taking sections 105 and 106 together with the proviso, that it was intended that the zemindar should be at liberty to treat as the holder of the tenure, and the person whom he might sue for the arrears of rent, the person who is registered in his books as the owner, unless any one could show that there had been a transfer, and that there was sufficient cause for its non-registration." So that it is clear, both from the nature of the case which was submitted to the Full Bench, and from the words of the Chief Justice, that he was considering the case as one in which the decree for arrears of rent on which the sale was founded was one against a registered proprietor. We do not think it can in any way be held that that judgment affects such a case as the present one, in which it has been found that the zemindar wilfully brought the suit against a person other than the person whom he knew to be the proprietor of the under-tenure, and from whom for a series of years he had been receiving the rent. And it is to be noted in this case that the suit was not against the registered proprietor, but against somebody whom he chose to substitute in the place of the registered proprietor, and whom he knew not to be the person in occupation of the tenure.

We are, therefore, of opinion that the special appeal must be dismissed with costs.

The 8th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Mortgage—Sale of Mortgagor's Interests—Notice to Mortgagee.

Case No 1931 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 1st July 1873, reversing a decision of the Moonsiff of Kooshteah, dated the 25th January 1872.

Bhoobun Joy Acharjea (Defendant), *Appellant,*

versus

Anund Lall Chowdhry (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Sreenath Doss for Respondent.

Where a mortgage-deed gave to the mortgagee an option, in the event of a sale of the interests of the mortgagors, to throw up a lease which he held from them for the mortgaged jote, and claim immediate payment from the surplus sale-proceeds:

HELD that, before the mortgagors could withdraw the surplus proceeds from the Court, it would be necessary for them to give notice to the mortgagee of their intention to do so.

Ainslie, J.—THIS suit is brought to obtain possession of a share in a jote purchased at an execution-sale by cancellation of a pottah given to defendant No. 1 by defendants Nos. 2, 3, and 4. The facts of the case, as far as it is necessary to state them, are as follow: The defendants Nos. 2, 3, and 4, mortgaged a certain jote to defendant No. 1, the special appellant before us, and on the same date granted him a lease extending over 16½ years from 1272 to 1288, in which provision was made for the satisfaction of the mortgage-debt. The two transactions must be taken together, and so far the judgment of the Court below is undoubtedly right; but it appears to us that the Judge has erred in the construction of one of the provisions contained in the mortgage-deed, which he reads as a stipulation that, in the event of a sale of the interests of the mortgagors, the mortgagee shall take the amount lent by him from the surplus sale-proceeds. On reference to the deed, it is quite clear that it was an option given to the mortgagee, but that he was in no way bound to take the money. If, as has happened, a sale took place, he would be at liberty, but not bound, to throw up his lease, and claim immediate payment out of

the sale-proceeds. This being so, it would follow that, before the mortgagors could withdraw the surplus sale-proceeds from the Court, it would be necessary for them to give notice to the mortgagee of their intention to do so, in order to enable him to determine whether he would take advantage of that particular clause in the mortgage-deed, or continue to hold on under the mortgage. What apparently has been treated as a tender of payment is really nothing more than this notice by the mortgagors to the mortgagee. The plaintiff in this suit bought the rights and interests of two out of three mortgagors. He took thereby merely the right to redeem the mortgage. There was no privity between him and the judgment-debtors whose interests were sold, so that this notice by the judgment-debtors to the mortgagee to take the money out of Court, if he wished to do so, such notice being given after the right to redeem had passed from them, could operate in any way in favour of the plaintiff. He comes into Court absolutely without a previous tender of any part of the debt, without tendering it in Court, and seeking to redeem only a fractional share of the mortgage. It seems to us that under these circumstances the suit must fail. The decision of the Lower Appellate Court is reversed, and the decision of the first Court is restored. The appellant will get his costs of all the Courts.

The 11th May 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Resumption-proceedings—Jurisdiction of Civil Court—Notice.

Case No. 191 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 11th December 1872, affirming a decision of the Moonsiff of Attyah, dated the 30th May 1871.

Ram Chunder Shaha (Plaintiff), *Appellant,*

versus

The Collector of Mymensingh and Pubna on behalf of Government and another (Defendants), *Respondents.*

Baboos Sreenath Doss and *Tarinee Kant Bhuttacharjee* for Appellant.

Baboos Unnoda Pershad Banerjee and *Bhugobutty Churn Ghose* for Respondents.

The decree of the Resumption Court as to the liability of a resumed mehal to be assessed with the Government demand, is final, and the decision in a resumption-suit as to proprietary rights and claims to land mentioned in the resumption-decree is not open to the jurisdiction of the Civil Court.

In resumption-proceedings it is not necessary to give notice to a party not in possession, or to make him a formal party to the suit.

Kemp, J.—RAM CHUNDER SHAHA, zemindar of Pergunnah Attyah, brings this suit for confirmation of his title in a 4-annas share in the lands in dispute. In his plaint he deducts the share of the 12-annas sharers, and includes only his 4-annas share. In the preamble of the plaint the words used are "for confirmation of my title," and at the end of the plaint the word "possession" is used in this manner, not that he sues for confirmation of possession, but that his possession has been jeopardized by the decision of the Deputy Collector of Pubna, dated the 15th August 1867, which was confirmed by the superior Revenue Authorities, namely, the Collector and the Commissioner.

The plaint states that, on the 31st of January 1848, the lands were released by the Deputy Collector of the Mymensingh District under orders of the Special Commissioner, and that from that time the plaintiff has been in possession of the disputed lands; that, on the 15th of August 1867, the Deputy Collector of Pubna having made a settlement with other parties for these lands as appertaining to Chur Pookhurya, the plaintiff intervened, but his objection was rejected by that officer, and that gave him his cause of action.

The Government have been made a party to this suit. In their written statement they objected that the suit was barred, inasmuch as the lands in dispute were resumed on the 29th of April 1846 by the Pubna Revenue Authorities; that the Government have been in possession ever since. The nature of the possession of Government is clearly set out in the written statement, namely, that they have possessed these lands by making from time to time settlements with various parties, and have received revenue from them.

Both Courts have dismissed the plaintiff's suit. The first Court on the question of limitation does not, in our opinion, give a very satisfactory decision; for, although the Moonsiff admits that the Government have filed measurement-proceedings, measurement-chittas, and settlement-proceedings to be found on the record, yet, because the Government have not shown that they have received the revenue, the plea of limitation fails. A cross-appeal was made by the Government to the Subordinate Judge on this point, and the decision of the Subordinate Judge is still

more unsatisfactory than that of the Moonsiff. The Subordinate Judge observes that the cross-appeal "is materially weighty," and that is the only decision we have on the question of limitation. On the merits, the first Court is of opinion that, inasmuch as the lands in dispute are admittedly identical with the lands which were resumed in 1846, that fact having been ascertained by a local inquiry and the discovery of certain landmarks, such as an indigo factory, &c., which renders it easy to identify the lands, that they are clearly the same as those resumed in 1846. The first Court, after coming to that finding, applies the decision of the Sudder Court to be found in the decisions of 1847, to the present suit, and holds that the plaintiff's suit is inadmissible. He also remarks that the plaintiff has not produced a complete copy of the proceeding of Mr. Pogson, dated 31st January 1848, under which the plaintiff alleges that the lands claimed were released to him, and that he has only produced an abstract copy, which does not show all the circumstances in detail. Moreover, he found from that abstract that the lands released were not specifically demarcated, and that the Deputy Collector, without inquiring as to the correctness or incorrectness of the jummaee-jummee papers of the disputed lands, assumed as the basis of his inquiry papers which contained a larger quantity of land; that he measured the land with reference to those papers, and, finding that the lands of the released kismut fell short of the quantity of land mentioned therein, he made up the deficit by encroaching upon the lands of other kismuts. He found in fact that the Deputy Collector, in his zeal to make up the lands which had been released to the zemindar of Attyah, crossed the river, and encroached upon lands belonging to another pergunnah. On the question of possession there is no clear finding.

We have already remarked upon the unsatisfactory decision of the Subordinate Judge on the question of limitation. On the merits he comes to the same finding as the first Court, namely, that the suit of the plaintiff must be dismissed under the precedent of the 18th of July 1847.

The main point taken in special appeal before us is that the Lower Appellate Court is in error in holding that the resumption-proceedings of 1846 are binding upon the plaintiff, inasmuch as the plaintiff was not a party to those proceedings. There is also a plea that the lower Court was wrong in deciding the case without examining all the witnesses, and that the Lower Appellate Court was also wrong in holding that the proceeding of the Deputy Collector of Mymensingh of 1848, releasing the chur lands, was illegal. We think in this case that it has been established by the concurrent finding of both Courts that the lands which were resumed, so far back as in 1846, are identical with the lands claimed by the plaintiff, and inasmuch as the plaintiff in his plaint substantially claims to have his title declared in these lands, the Courts below were right in applying the Sudder Court's decision of 1847, which has been referred to and followed in subsequent decisions of this Court, and in dismissing the plaintiff's claim.

On the question of possession, we find that the Government have filed in this case the chittahs of 1849, the settlement-proceedings of 1853, of 1854, of 1858, and of 1867, in support of their claim that they have been in possession ever since the resumption in 1846. In a decision to be found in Volume X., Weekly Reporter, p. 103—Mahomed Gazee Chowdhry *vs.* Lall Beebee and another—the learned Judges who decided that case refer to the decisions of the Sudder Court of 1847 and 1850, as also to a decision to be found in Volume V., Weekly Reporter, p. 22, and they lay down the law thus, 'that the proper distinction is that the decree of the Resumption Court as to the liability of the resumed mehal to be assessed with the Government demand is final; but the subsequent dealing by the Settlement Officer with alleged proprietary rights and claims to land, not being land mentioned in the resumption-decree, is not final, but open to the jurisdiction of the Civil Court. Now this is not a case in which the Settlement Officer has dealt with proprietary rights and claims in lands not being lands mentioned in the resumption-proceeding, but this is a claim to have the title of the plaintiff declared to lands resumed by Government so far back as in 1846. Then it is said that the plaintiff was not a party to the proceedings of 1846. All we can say to that is that it is the plaintiff's own fault, if he was not a party to these proceedings, as it must be presumed that the notifications were issued as prescribed in the resumption-law. In a late case before the Chief Justice and Mr. Justice Glover, in which Baboo Sreenath Doss, as in this case, appeared for the appellant, one of the grounds taken was "that the defendants "having been no parties to the resumption-"suit instituted in 1852, and decided in 1861, "they cannot be bound by the decision in

"that case, and that the lower Court was in "error in using that decision." The learned Chief Justice held that there was no ground of special appeal, and, as to the 4th ground of appeal, the one we have alluded to, that the answer which has been given to that ground is a correct one, namely, that it is not necessary to give the party a notice, and to make him a formal party to the suit as he was not in possession; and in this case also there was no necessity for giving personal notice to the plaintiff before us. He has, as observed above, brought his suit in 1869 to have his right declared to lands which were resumed so far back as in 1846. We therefore think on the question of title that the Courts below have decided the case on a right principle, and we dismiss the special appeal with costs.

The 11th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Putnee Lease—Separate Payments.

Case No. 2216 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 9th June 1873, affirming a decision of the Subordinate Judge of that District, dated the 21st September 1872.

Sham Chand Mitter (Plaintiff), *Appellant,*

versus

Juggut Chunder Sircar and another (Defendants), *Respondents.*

Mr. C. Jackson and *Baboos Sreenath Doss* and *Nil Madhub Sen* for Appellant.

The Advocate-General and *Mr. Piffard* for Respondents.

The fact of a putneedar having made separate payments of rents, of having registered his name with each of the sharers, and of being prepared to enter into a fresh engagement with one of them, does not amount to a cancellation of the original lease and substitution of a new lease.

Ainslie, J.—In this case it appears that Joy Chunder Pal Chowdhry originally granted a putnee of 8 annas of certain property to Messrs. Cockerell & Co. Subsequently Joy Chunder Pal's interest was divided into two equal parts. The plaintiff now holds one of those shares. Messrs. Cockerell & Co. sold their putnee to Mr. Doyle in 1867, and Doyle gave a mowrosee lease of the whole property to different persons—the defendant and another, with whom we are not at present concerned. The zemindars afterwards proceeded against Doyle for arrears of putnee rent, but, instead of proceeding jointly for the arrears of the 8 annas, that is, of the whole putnee, each sharer proceeded for the arrears of his own 4-annas share, and two sales were accordingly held. The plaintiff, purchaser at one of these sales, who was also the proprietor of a half share of the zemindaree interest, now sues to set aside the mowrosee of the defendant created by Doyle. The effect of the separation between the zemindars and lease of the mowrosee to two persons has been that there are what we may describe as four interests, each extending to one-fourth of the original putnee, and thus it comes about that several suits have been instituted. In the present suit, the Subordinate Judge has found in express terms that there has been separate payment of rent by Doyle to the plaintiff; that there was a proposal of a separate agreement being executed in favour of the plaintiff, but that in fact no separate document was executed. On these facts the Subordinate Judge held that it was not established that the original putnee tenure had been extinguished, and a new tenure created, being guided in his judgment by the opinion of this Court in another suit arising out of these transactions, precisely similar in its facts to the present suit. The report of this case is to be found in 15 Weekly Reporter, p. 446.

The Lower Appellate Court has also followed that opinion, and affirmed the decision of the first Court. It has not expressly found the facts, but has assumed them as found by the Court of first instance. In another of the suits that arose out of these transactions, and which also came before this Court, the same facts were suggested as existing, and, on these facts, another Division

Bench, in an unreported judgment in Special Appeal No. 406 of 1863, was of opinion that it might be shown that there had been creation of a new tenure, and remanded the case for a finding on the alleged facts and the issues of law arising out of them. In the present case, if we take it that there have been separate payments of rents, and that Doyle registered his name with each of the 4-annas sharers, and was prepared to enter into a fresh engagement with plaintiff, we think that does not amount to a cancellation of the original lease and substitution of a new lease. We concur with Justices Loch and Paul, who delivered judgment in the earlier case, in holding that the transaction, so far as it went, amounted to nothing more than an arrangement entered into for the convenience of the parties for the payment of rent, and we do not think that the Judge was wrong in adopting this opinion. Granting that the Judge has not specifically found the facts, still it seems to us that there is no case at all for a remand; for taking the facts on which the appellant insists, and which have been found by the first Court, and not negatived by the Judge, it seems to us that the Judge was quite warranted in finding on them that they are not sufficient to support the plaintiff's case. Further, there are other considerations which, we think, ought to prevent us from making any remand. Separate registration in the zemindar's serishtah, which has been so much insisted upon, really is evidence of a very feeble character, because it might be only a natural consequence of separation between the original representatives of the original putnee. It seems there was no longer any single zemindaree office in which transfers could be registered. There is another important fact which strongly supports the judgment of the Lower Appellate Court, namely, that there is no fresh lease executed on account of the sub-divided putnee. There is no rule that we know of forbidding the creation of a putnee tenure by oral agreement, but it is extremely improbable that Doyle having the security of a written document would forego his rights under that writing, and take a title under an oral agreement. It would require the strongest evidence to establish such a transaction, and it does not seem to us that there is any evidence on the record which warrants our sending the case back to the Judge for reconsideration.

We therefore think that this special appeal ought to be dismissed with costs.

The 12th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Right of Occupancy—Act VIII. (B.C.) of 1869, s. 6.

Case No. 1181 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 16th January 1873, affirming a decision of the Moonsiff of Arrariah, dated the 22nd July 1872.

A. J. Forbes (one of the Defendants), *Appellant,*

versus

Ram Lall Biswas (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Taruck Nath Sen for Respondent.

The continuous possession for twelve years, which is the subject of s. 6 of the Rent Law, must be a possession under one and the same right. This right may be in its inception joint with other persons, and, by the death of co-sharers, ultimately become a sole right without its continuous nature being affected.

Phear, J.—THE question in this suit is whether or not the plaintiff has a right of occupancy, upon the foundation of which he can claim to be put back into the possession of the land in suit.

The case upon which he bases his right of occupancy appears to be that in 1266 he obtained from the zemindar a settlement of the land with himself alone, and that, from that time, until he was subsequently ousted by the defendants—a period of more than twelve years—he was in possession and occupation of the land as a ryot.

Both the Courts, so far as we can understand their judgments, seem to be of opinion that this case is not strictly made out. The first Court, after saying that, according to the admission of the defendants, the disputed holding was settled with the plaintiff and Heera Thakoor, Emrut Singh, and Jharoo Mundul for five years at an annual jumma of Rs. 59, thus proceeds: "This proves plaintiff's possession for more than twelve years, either singly or jointly with the aforesaid individuals."

The Subordinate Judge puts the facts somewhat differently. He says: "I hold, "therefore, on the recorded evidence, that the

"plaintiff's possession during the period "under review was, on the whole jote, as the "ijmalee holding of himself and his partners, "who having admittedly died, left plaintiff "alone the occupant in 1870, from which "year his sole possession is undenied, and "that such joint possession on an ijmalee "jote does give title to surviving holder to "count the period of his joint possession "with his subsequent possession singly in "computing the period of twelve years for "claiming the right of occupancy."

It thus appears that the view of the facts taken respectively by the first Court and by the second Court is not exactly the same. And it is not quite clear whether either Court is of opinion that the evidence makes out that the plaintiff has himself been in possession of the land for a period of at least twelve years by one and the same right. In the 8 Bengal Law Reports, p. 338,* is reported a decision of this Court to the effect that possession or occupation of land jointly with co-sharers under a lease cannot, for the purpose of establishing a right of occupancy under section 6 of the Rent Law, be added to the sole possession of the claimant following upon that joint possession after the termination of the lease. In other words, that the continuous possession for twelve years, which is the subject of section 6 of the Rent Law, must be a possession under one and the same right. And it appears to us that the real issue in the present suit is whether or not the plaintiff had, before he was ousted, as he alleges, occupation as a ryot of the land which is the subject of suit for a period of at least twelve years under one and the same right? This right might be, in its inception, joint with other persons; for if, by the death of the co-sharers, it had ultimately become a sole right in the plaintiff himself, still it would have been continuous throughout in its nature. And the real question in this case is whether the plaintiff had occupied the land as a ryot by one and the same right in this manner for a continuous period of twelve years. We are unable, on the judgment of the lower Courts, to say that this issue has been satisfactorily tried. And therefore it seems to us that the decision of the lower Court ought to be reversed, and the case remanded for re-trial of the issue which we have mentioned, upon the evidence which is on the record.

The costs of this appeal will abide the event.

* The 12th February 1872.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Case No. 763 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 25th May 1871, reversing a decision of the Moonsiff of that District, dated the 22nd December 1870.

Shaikh Mahomed Chaman (Plaintiff), *Appellant,*

versus

Ram Pershad Bhukut and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Tarucknath Dutt and *Tarucknath Paleet* for Respondents.

Macpherson, J.—It appears to us that the Subordinate Judge is right in holding that the plaintiff has not acquired a right of occupancy. The twelve years' occupancy on which he relies is made up in this way. First, he and one Khoda Buksh held the land for five years under a pottah granted to them both. Since the expiry of the term of that pottah, the plaintiff has alone been in occupation for seven years. And he now contends that this constitutes twelve years' occupation, giving him a right of occupancy under section 6, Act VIII. of 1869.

In our opinion the right of occupancy acquired under section 6 must be an occupancy of one and the same kind; that is to say, it must be occupancy by the person pleading it, or by his father or some other person from whom he inherits. Here the first five years' occupancy relied on by the plaintiff were years during which the land was cultivated and held, not by the plaintiff alone, but by the plaintiff and Khoda Buksh. It seems to us that this is a distinct and different holding from the subsequent holding by the plaintiff alone. The plaintiff has therefore failed to prove that he cultivated or held the land for twelve years, and thereby acquired a right of occupancy.

The appeal must be dismissed with costs.

The 12th May 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit to set aside a Settlement—Collector to be made a Party.

Case No. 1211 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 8th April 1873, affirming a decision of the Moonsiff of Panchpookhoria, dated the 31st July 1871.

Krishno Lall Nag (Defendant), *Appellant,*

versus

Bhyrub Chunder Deb (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Bykunt Nath Doss* for Appellant.

Baboos Kalee Mohun Doss and *Nullit Chunder Sen* for Respondent.

In a suit to set aside an order of a Commissioner of Revenue to obtain a settlement of a chur, and to have a

declaration of title with possession, it was held (on the principle laid down in the Full Bench decision of the 16th March 1874, 21 W. R. 327) that the Collector ought to have been made a party.

Kemp, J.—THE defendant is the special appellant in this case. The plaintiff sued to set aside the order of the Chittagong Commissioner of Revenue, to obtain a settlement of an 8-annas share of chur Shurushutty, to have his title declared to that extent in that chur, and to obtain possession.

The plaint alleges that the Collector made a settlement for one year with the plaintiff at a jumma of Rs. 303; that defendant No. 1 having appealed to the Revenue Commissioner against that settlement, the Revenue Commissioner, on the 2nd of August 1870, reversed the order of the Collector, and ordered the settlement to be made with the defendant; that, under cover of that settlement, the defendant has taken possession of the disputed land. From the date of that order of the Commissioner, the plaintiff's cause of action accrued. Then the plaint sets out how the title of the plaintiff was acquired. It also alleges that, on the 15th of Agrahon 1273, the plaintiff purchased the talook from the father of the defendant No. 1; and that this disputed land is an increment to that talook, and, as such, that he is entitled to the settlement in preference to the defendant.

The objections taken by the defendant were, *first*, that the Collector should have been made a party; *second*, that the suit of the plaintiff is barred, inasmuch as the settlement has been made with the defendant on the 25th of April 1867, and the suit is not brought within three years from the date of that settlement; and, *third*, that the plaintiff has purchased only a limited portion of kismut Mohajeinskundy, and that the conveyance of Agrahon 1273 did not pass the accetion chur Shurushutty.

Both the lower Courts have given the plaintiff a decree.

The first Court held that the entire rights in the talook passed under the kobala, as well as any other rights that may in future accrue on the ground of the said right.

On appeal, the Subordinate Judge, in dealing with the question as to whether the Collector ought to be made a party or not, observed that the Government may make a settlement with whom they please, and that they are indifferent so long as they can get their revenue; therefore it was unnecessary to make them a party. Then, with reference to the limitation point, the Subordinate Judge held that the suit was not barred, referring to a decision in Volume XVII., p. 145 of the Weekly Reporter, in support of his view. On the merits he found that chur Koomareah and Mohajeinskundy are one and the same mouzah; and that the plaintiff had purchased those mouzahs from the defendant's father.

The Subordinate Judge concurred with the first Court as to the ground on which that Court held that chur Koomareah and Mohajeinskundy are one and the same village. He also found that, as the chur in dispute is an accretion to the tolook which the plaintiff has purchased, that in his opinion the disputed chur should be settled with the plaintiff.

On appeal to this Court, the same points are taken that were taken in the Courts below. On the first point, namely, as to whether the Collector ought to be made a party or not, we are referred to a decision of the Full Bench, dated the 16th of March 1874, in Special Appeal No. 882 of 1873,* where this question, although it was not put by the Judges referring the case, was discussed, and the following principle was laid down: "It appears to me," observes the Chief Justice, "that there has been an error "in the proceedings in holding that the "Government was not a proper party to the "suit. The Government having given a "lease of the lands to another person, it was "proper that it should have an opportunity "of showing that this had been properly "done. And, if the Government were a "party to the suit, the person who got the lease "from the Government might be freed "from liability upon it. Now, another suit "will be necessary to finally decide the "matters between these parties, as the "Government, being no party to this suit, "will not be bound by the decision in it." Now, in this case, the Government have not been made a party, and both Courts have held that the settlement which the Government have made is to be set aside, and that the settlement is to be made with the plaintiff. There has been no decision as between the Government and the Government lessee under which the Government lessee can claim to be freed from liability, or which would bind the Government. We therefore think that, on the principle laid down by the Full Bench, the Collector ought to have been made a party to the suit; but we also think

* 21 W. R. 327.

that the Courts below are wrong on the merits of the case. Therefore we shall not remand the case in order to have the Collector made a party.

Now, it appears to us that the plaintiff's title rests on a kobala, dated the 15th Agrahon 1273. That kobala is not disputed. It is a registered document, and is signed by the father of the defendant No. 1. That kobala conveys talook Hureebullub Roy, which is a *shikmee* talook. Chur Shurushutty, after it was resumed, was settled with the defendant for a period of ten years. It was registered under a separate jumma and number, and it has been recorded as a separate mehal on the Collector's towjee. It appears that subsequently a settlement was made with Mr. Wise; and that, at the time this conveyance was made, or on the 15th of Agrahon 1273, Mr. Wise was in possession of the disputed chur. After Mr. Wise's term of the lease expired, the settlement was made by the Commissioner of Revenue with the defendant, which settlement the plaintiff seeks to set aside by this suit.

Turning to the deed of conveyance, we find that it conveys talook Hureebullub Roy with defined boundaries, and among those boundaries is mentioned as the western boundary of the lands the very chur now in dispute. Within those boundaries are conveyed to the plaintiff the lands of talook Hureebullub Roy for the sum of Rs. 900, the said talook being recorded with a jumma of three rupees, which is a separate jumma from the jumma of chur Shurushutty.

Then it has been argued that an increment or accretion is always a contingent right of the zemindar, and, unless there are words in some way to restrict the rights of the purchaser, he would be entitled to such accretion. There is a very recent decision on the question to be found in Volume XXI., Weekly Reporter, p. 115. That decision is, however, under review, and it does not go further than this that, where "there are "no words which tend in any way to restrict "the right of the purchaser from claiming "any accretion, the increment is always a "contingent right which the zemindar has." That was a case where the rights and interest of the Government had been purchased by the plaintiff in that suit.

Then there is another case, which is alluded to in the decision just quoted, to be found in Weekly Reporter, Volume IX., p. 312, in which the late Chief Justice, after observing that no conveyance had been put in evidence, says: "It is admitted that the "plaintiff is entitled to the zemindaree of "Kootubpore, and that he is in possession of "it; and, in the absence of any evidence to "show that the conveyance, from the Govern-"ment to the plaintiff, of Kootubpore was so "worded as not to pass the increment, or "that it expressly reserved the increment to "the Government, it must be presumed that "the person who is now the owner of "Kootubpore is entitled to the same interest "in the increment which he has in the estate "to which it has become annexed."

In the present case, we hold that the words in the deed of conveyance are sufficient to reserve the increment, and it has been already remarked that the increment in question is a separate mehal registered under separate jumma and number.

Therefore, being of opinion that the lower Court has come to a wrong conclusion on the merits of the case, we decree the special appeal, and reverse the judgment of the Subordinate Judge, with costs.

The 12th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Hindoo Law—(Mitakshara and Dyabhaga)—Inheritance—Daughters.

Case No. 1336 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 27th March 1873, reversing a decision of the Subordinate Judge of that District, dated the 22nd April 1872.

Dowlut Kooer (Plaintiff), *Appellant,*

versus

Burma Deo Sahoy and another (two of the Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Appellant.

Mr. R. E. Twidale and *Baboos Hem Chunder Banerjee* and *Bykuntnath Doss* for Respondents.

Under the Mitakshara, as well as under the law of the Bengal School, the unmarried daughter takes the whole of the property in preference to her married sisters; but under the Mitakshara she only takes in priority to them and not to the ultimate exclusion of their right to inherit from their father. On her death it goes, according to the ordinary rules, to the next surviving heir of the next full taker of the property.

Phear, J.—In this case one Jusoda Kooer, daughter of Brij Beharee Lall, upon the death of her mother, took the property which is the subject of suit, and which had belonged to her father, Brij Beharee Lall, deceased, in preference to her sister Dowlut Kooer; the reason of her being preferred to her sister in this respect being that she was then unmarried, whereas Dowlut Kooer was married.

Jusoda Kooer, after thus obtaining the property, married; and it is alleged in this suit that she has a son, one Jankee Pershad, who is still living. Jusoda Kooer herself has lately died; and Dowlut Kooer, her sister, who survives her, now makes claim to the property in succession to her. And the question is whether Jusoda Kooer took the property on the death of her mother for an absolute estate, or whether she took it only for the estate of the female heir of her father Brij Beharee Lall.

The right of the daughters under Mitakshara law to inherit the property of their father in default of male heirs and in default of his widow, rests on the provisions of section 2, Chapter II. of the Mitakshara.

There appears in this section to be no restriction upon this right of inheritance or limitation in the nature of the tenure by which the daughter holds her father's property when she thus succeeds to it; but at the same time neither is there in the Mitakshara any expressed restriction or limitation in this respect as to the right of the widow in the property which she takes upon her husband's decease. In both cases alike the Mitakshara is very concise, and merely says that the widow or the daughter, as the case may be, in default of male heirs, takes the property. Nevertheless the Courts of this country and the Privy Council have unquestionably declared a limitation of right in the mother's case, and they found it upon the general character and situation of the female heir. In the case which is reported in the 8 Moore's Indian Appeals, p. 551,* the Privy Council makes the restriction of the widow's right depend upon general considerations which are just as applicable to the case of the daughter as to the case of the widow: in other words, which are common to the circumstances of all female members of the joint Hindoo family. The restriction or limitation upon the widow's right is two-fold, namely, in regard to the power of alienation, and also in regard to the persons who succeed to the property upon her death. And we should be bound upon the authority of this case, followed as it was by the Privy Council itself again in the case which is reported in the 11 Moore's Indian Appeals, p. 172,* to hold that notwithstanding the absence of an express enactment upon this point, so to speak, in section 2 of Chapter II. of the Mitakshara, still the same limitation in the power of alienation, and the same restriction with regard to the persons who succeed, exist in the case of a daughter as in the case of a widow.

But we have further the opinion of Sir William Macnaghten, p. 21 of Hindoo Law, who says: "In default of the widow, the daughter inherits, but neither is her interest absolute." In Strange's Hindoo Law, p. 138, the same doctrine is laid down. And the late Chief Justice Sir Barnes Peacock, in the case which is reported in 9 Weekly Reporter, p. 509, expressly stated that the same restrictions and peculiarities which attach to the widow's rights in her husband's property, also attached to the rights of the daughter and other female heirs. It is true that under para. 3, section 2, Chapter II. of the Mitakshara, the unmarried daughter takes solely when there is a competition between an unmarried daughter and a married daughter. And in the doctrine of the Bengal School, which has been evolved from Chapter XI., section 2, para. 30 of the Dayabhaga, the right of the unmarried daughter, who thus takes in preference to her married sisters, is held to resemble an absolute right in this respect, namely, that if she dies leaving a son and also sisters, the property goes to her son and not to her sisters. But the reason for this special course of descent in that case is to be found in special words in paragraph 30, section 2 of Chapter II. of the Dayabhaga itself—words which are introduced by the commentator, and which are not to be found in the Mitakshara, nor are any words equivalent to them. These words are simply parenthetical; and however good a foundation they may afford

* 2 W. R. (P. C.) 61.

* 10 W. R. (P. C.) 3.

for the doctrine of the Bengal School, they do not give any reasons for modifying or affecting the provisions of the Mitakshara in those districts where the Dayabhaga is not the governing text-book. And Macnaghten, after the passage which has just been referred to, goes on to say: "According to the "doctrine of the Bengal School, the "unmarried daughter is first entitled to the "succession." (And that is so also under the Mitakshara): "If there be no maiden daugh-"ter, then the daughter who has, and the "daughter who is likely to have, male issue, "are together entitled to the succession," and so on.

And in page 24, he says: "If one of "several daughters who had, as maidens, "succeeded to their father's property, die "leaving sons and sisters or sister's sons, "then, according to the law of Bengal, the "sons alone take the share to which their "mother was entitled, to the exclusion of "the sisters and sister's sons."

Afterwards he adds: "This distinction "does not seem to prevail anywhere but in "Bengal."

A decision of the Bombay High Court * was relied upon by the Lower Appellate Court, but it has already been held by this Court that that decision does not correctly express the law in regard to the daughter's succession to their father's property as it obtains in this presidency. See 20 Weekly Reporter 102.

On the whole, we have no doubt that although, under the Mitakshara law, as well as under the law of the Bengal School, the unmarried daughter takes the whole of the property in preference to her married sisters, if there be any, still, under the Mitakshara, she only takes in priority to them and not to the ultimate exclusion of their right to inherit from their father. Upon her death, we think that the property must go according to the ordinary rules which governs the descent of property on the decease of the female heir; that is, it goes to the next surviving heir of the last full taker of the property. In the present case it must go to the nearest heir of Jusoda Kooer's father, that is, her sister Dowlut Kooer.

In this view we are of opinion that the decision of the Lower Appellate Court is wrong in law, and that the plaintiff is entitled to a decree, and therefore the decree of the Lower Appellate Court must be reversed, and the decree of the first Court affirmed with costs in this Court and in the Court below.

* 1 Bombay H. C., O. C. J., 130.

The 12th May 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Ancestral Property—Liability for Debts—Execution-sale—Purchaser's Rights.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Girdharee Lall and another

versus

Kantoo Lall and others;

and

Muddun Thakoor

versus

Kantoo Lall and others.*

Ancestral property which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him, unless the debt is illegal or has been contracted for an immoral purpose, in which case the son may not be under any pious obligation to pay it.

A purchaser of joint ancestral property under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale in execution.

THIS is a suit brought by Baboo Kantoo Lall, the son of Bhikharee Lall, and by Mussamut Doolaro Koonwaree, on behalf of Mahabeer Pershad, the minor son of Lalla Bujrung Sahye, the said Kantoo Lall and Mahabeer Pershad being grandsons of Moonshee Kunhya Lall, deceased, against a number of different defendants, who are wholly unconnected with each other, to recover possession from them of certain portions of land which belonged to the ancestral estate. The first appeal arises out of the suit so far as it related to the first set of defendants, Baboo Girdharee Lall and Runjeet Pandey, to recover possession of Talooka Nawalgaman and Akha Amanut Sarcar in Pergunnah Chayen, and to set aside a deed of sale which was executed by the fathers of the two plaintiffs, dated the 28th July 1856. The

* From the judgment of Kemp and E. Jackson, JJ., in Regular Appeals No. 114 of 1867 and No. 44 of 1869, decided 16th April 1868, 9 W. R. 469.

fathers are both made defendants in the suit; and it is stated by one of the witnesses, and is probably the fact, that Bhikharee Lall, the father of Kantoo Lall, is in reality the person carrying on the suit. The suit was brought to set aside the deed of sale executed by the two fathers, and to recover possession of the whole property—not the particular shares of the sons, even if the sons could be said in a case like the present to have had distinct and separate shares. The Principal Sudder Ameen dismissed the suit. The High Court set aside that decision, and awarded to the plaintiff Kantoo Lall one-half of his father's share—that is, one-half of an 8-annas share; but as to the other plaintiff, Mahabeer Pershad, the minor son of Bujrung Sahye, they held that he was not entitled to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision no appeal has been preferred.

The property is situated in the Mithila district, and is governed by the Mithila law, which is very similar to the law administered under the Mitakshara. With reference to the Mitakshara upon this point, it may be well to read from the 11th Moore's Privy Council Cases, p. 89, a portion of the judgment which was delivered by Lord Westbury in the case of Appoovier *vs.* Rama Subba Aiyan* before the Judicial Committee. He says: "According to the true notion of an "undivided family in Hindoo law, no individual member of that family, whilst it "remains undivided, can predicate of the "joint and undivided property that he, that "particular member, has a certain definite "share. No individual member of an undivided family could go to the place of the "receipt of rent, and claim to take from the "collector or receiver of the rents a certain "definite share. The proceeds of undivided "property must be brought, according to the "theory of an undivided family, to the "common chest or purse, and then dealt "with according to the modes of enjoyment "of the members of an undivided family. "But when the members of an undivided "family agree among themselves, with regard "to a particular property, that it shall "thenceforth be the subject of ownership "in certain defined shares, then the character "of undivided property and joint enjoyment "is taken away from the subject-matter so "agreed to be dealt with; and in the estate "each member has thenceforth a definite and "certain share, which he may claim the "right to receive and to enjoy in severalty, "although the property itself has not been "actually severed and divided."

It is probable that on account of this case, and on account of a decision in the High Court, 12 Weekly Reporter, Full Bench Cases, p. 5, this suit was brought by Kantoo Lall and Mahabeer Pershad, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitakshara law, recover an undivided share of ancestral property sold by his father (12 Weekly Reporter, Civil Rulings, 478). But it is unnecessary to determine that question in the present case, because their Lordships are of opinion that, looking to the circumstances of this case, the plaintiff was not entitled to recover any portion of the estate as regards the first two defendants.

It appears that the deed of sale was executed on the 28th July 1856. At that time a decree had been obtained against Bhikharee Lall at the suit of Byjnath Chuckerbutty, upon a bond executed by Bhikharee in his favour, and an execution had issued against him, upon which his "right and share" in the dwelling-house belonging to the family had been attached. It was therefore necessary to raise money to pay the debt of Bhikharee Lall, the father, and to get rid of the execution, whatever the effect of it might be.

The property descended from Kunhya Lall, who died in the year 1250. The eldest of the two plaintiffs, Kantoo Lall, was not born until 1251. So that upon the death of Kunhya Lall, the property descended to Bhikharee Lall and Bujrung Sahye as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property, because in 1251, before the deed of sale was executed, Kantoo Lall was born, and, by reason of his birth, under the Mithila law, he had acquired an interest in this property,

* 8 W. R. (P. C.) 1.

Now, it is important to consider what was the interest which Kantoo Lall acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died and had left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been referred to in argument of Hunoomanpersaud Panday *vs.* Mussamut Babooee Munruj Koonweree (6 Moore's Indian Appeal Cases), Lord Justice Knight Bruce, who delivered the judgment of the Privy Council, says at page 421: "Though an estate be ancestral, "it may be charged for some purposes against "the heir for the father's debt by the father, "as indeed the case above cited from the "6th volume of the decisions of the Sudder "Dewanny Adawlut, North-Western Pro-"vinces, incidentally shows. Unless the "debt was of such a nature that it was not "the duty of the son to pay it, the discharge "of it, even though it affected ancestral "estate, would still be an act of pious duty "in the son. By the Hindoo law, the free-"dom of the son from the obligation to "discharge the father's debt has respect to "the nature of the debt and not to the "nature of the estate, whether ancestral or "acquired by the creator of the debt." That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts, because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce: "The freedom "of the son from the obligation to discharge "the father's debt has respect to the nature "of the debt and not to the nature of the "estate, whether ancestral or acquired by "the creator of the debt."

It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money, upon which an action was brought. The bond had been substantiated in a Court of Justice; there was nothing to show that it was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion either that the bond or the decree was obtained benamee for the benefit of the father, or merely for the purpose of enabling the father to sell the family-property, and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the contrary, it was proved that the purchase-money for the estate was paid into the bankers of the fathers, and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bond-fide* purchaser who gave value for the estate, and to recover possession of it with mesne-profits. This he is endeavouring to do after the purchaser has been in possession for a period of ten years; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase-money the sale would not be wholly void.

It appears, therefore, to their Lordships that the plaintiffs are not entitled to set aside the deed of sale; that the judgment of the Principal Sudder Ameen with regard to it was correct; and that the High Court were mistaken in upsetting that decision, and awarding to the plaintiff one-fourth of the estate, as being one-half of the share of his father.

In addition to the case in the Privy Council, there is a case in the Sudder Court of Mussamut Junnuk Kishoree Koonwar *vs.* Rughoonundun Sing, reported in the Bengal Sudder Decisions of 1861, in which it was held that it was necessary for the son, in order to set aside the sale of property for

the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose. The passage is at page 222. It is there said: "The sales for "the reversal of which the present suit is "brought divide themselves into three classes: "*first*, sales made by order of Court in exe-"cution of decrees; *second*, sales made "privately to satisfy decrees and bonds; "and, *third*, sales made simply in order to "raise money for some purpose or another. "Freedom on the part of the son, as far as "regards ancestral property, from the obli-"gation to discharge the father's debts under "Hindoo law, can be successfully pleaded "only by a consideration of the invalid "nature of the debts incurred. Now, we "are clearly of opinion that the plaintiff has "been unable to show that the expenses for "which those decrees were passed were, "looking to the decrees themselves (and we "cannot now look beyond these), immoral, "and such as under Hindoo law the son "would not be liable for."

It appears, therefore, to their Lordships that the plaintiff certainly is not entitled to set aside this deed; and if he were so entitled, it is very doubtful whether he has any particular share in this property of which he is entitled to recover possession. It is unnecessary, however, for their Lordships to decide anything with regard to that point, inasmuch as they hold that the plaintiff is not entitled to set aside the deed of sale.

The second appeal is by Muddun Mohun Thakoor. He is the fourth defendant in the suit which was brought against him to recover possession of 5-annas share in mouzahs Rajpore and Allinuggur, &c. It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers; that a Court of justice had given a decree against them in favour of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to in 6th Moore's Indian Appeal Cases, in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate. At page 423 of the report, Lord Justice Knight Bruce says: "The power of the "manager for an infant heir to charge an "estate not his own is under the Hindoo "law a limited and qualified power. It "can only be exercised rightly in a case of "need, or for the benefit of the estate. But "where in the particular instance the charge "is one that a prudent owner would make in "order to benefit the estate, the *bonâ-fide* "lender is not affected by the precedent "mismanagement of the estate. The actual "pressure on the estate, the danger to be "averted, or the benefit to be conferred "upon it in the particular instance, is the "thing to be regarded. But, of course, if "that danger arises, or has arisen, from any "misconduct to which the lender is or has "been a party, he cannot take advantage "of his own wrong to support a charge in "his own favour against the heir, grounded "on a necessity which his wrong has helped "to cause." The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the fathers' debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant. It appears to their Lordships, therefore, that the decision of the Principal Sudder Ameen as regards this portion of the case was also correct.

Under these circumstances their Lordships will humbly recommend Her Majesty that the judgment of the High Court, so far as it relates to the two portions of the estates purchased by the appellants in these two appeals, respectively, be reversed, and that the decision of the Principal Sudder Ameen with regard to them be affirmed, and that the respondents do pay to the appellants respectively their costs in the High Court and their costs of these appeals.

The 13th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble C. Pontifex, *Judge.*

Conveyance—Voluntary Gift or Settlement —27 Elizabeth, c. 4.

On Appeal from the decision of the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.

R. S. E. Judah (one of the Defendants), *Appellant,*

versus

Mirza Abdool Kurreem (Plaintiff), *Respondent.*

Mr. Kennedy and *Mr. Lowe* for Appellant.

The Advocate-General and *Mr. Branson* and *Mr. Evans* for Respondent.

Where a person who has made a voluntary gift or settlement of an estate sells the same to another for value, the conveyance operates as a conveyance of the estate which the settlor had before the voluntary settlement, the statute 27 Elizabeth, c. 4, putting the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser.

Words showing an intention, on the part of the person who made the voluntary gift, to convey to the purchaser all the interest or estate that he had, are sufficient to avoid such gift.

THIS was a suit for the recovery of a mortgage-debt. The plaintiff's case was that, by an indenture bearing date the 27th July 1861, made between C. S. Hogg, the then Administrator-General, P. J. Paul, and Sausone Ezekiel Judah, the two houses in dispute were, at the request of the defendant Sausone Ezekiel Judah, conveyed and assigned to the defendant and his heirs for ever, to hold to him, the said defendant, and his heirs to the only proper use of the defendant Rosa Sausone Ezekiel Judah, the wife of the said Sausone Ezekiel Judah, her heirs and assigns; that the entire purchase-money of the said houses were paid by the defendant Sausone Ezekiel Judah, who was then engaged in trade out of his own moneys and out of moneys obtained by him on loan; and that the declaration of use in favour of the wife was wholly voluntary and without consideration. By a subsequent indenture dated 1st August 1866, the defendant, Sausone Ezekiel Judah, conveyed the premises in question to Arratoon Carapiet, his heirs and assigns, to the use of such person and persons and for such estates as his said wife, Rosa Sausone Ezekiel Judah, should, whether covert or sole, and notwithstanding coverture by deed or will executed and attested as therein mentioned, appoint, in default, to the use of the said Rosa and her assigns for life, remainder to the said Arratoon Carapiet for his life in trust for her, in order to bar all courtesy of her husband, with remainder to the said Rosa, her heirs and assigns. The plaintiff submitted that the last deed was wholly voluntary, and was not made, nor did it purport to be made, for any valuable consideration whatsoever. The defendant Sausone Ezekiel Judah then borrowed from the plaintiff the sum of Rs. 30,000, which sum the said defendant and Rosa, his wife, covenanted, by a deed, dated 12th March 1867, executed between them and the plaintiff, to repay by the 1st June 1868, and by the same indenture the defendants conveyed to the plaintiff the premises in question, being two upper-roomed houses, one in Moorghyhatta Street, now called Canning Stree, and the other in Parsee Church Street, to hold the same to the plaintiff, his heirs and assigns, subject to a proviso for redemption, and in default of payment power was reserved to the plaintiff to sell the premises. The defendant Sausone Ezekiel Judah subsequently became an insolvent, but a judgment-creditor having obtained a decree against him before such insolvency, the houses in question were sold in execution of that decree, and were purchased by the third and fourth defendants respectively, who obtained certificates confirming the sales to them. No portion of the principal sum borrowed having been paid, and notices demanding payment having been disregarded by all the defendants, the plaintiff instituted this suit for an account, and he prayed that the defendants may be ordered to pay the sum found to be due on taking of such accounts, and that in default of payment the defendants may be foreclosed from all equity of redemption in the mortgaged premises, or that the premises may be sold and the plaintiff's debt discharged; that a receiver be appointed, &c.

The only defendant who appeared to the suit was the defendant Rosa Sausone Ezekiel Judah, who contended that one of the houses in question was her own property, having been purchased by her husband at her request from the proceeds of the sale of certain jewels which had been given to her at her marriage. The other house she admitted had once belonged to her husband; but she stated that by a deed of gift, dated 1st August 1866, her husband conveyed it to Arratoon Carapiet, to such uses as this defendant should by deed

or will appoint, and in default of appointment to her for life, with remainder to the trustee, to preserve contingent remainders, with remainder to this defendant in fee. She denied that, at the time of such gift, her husband was in indebted circumstances. She admitted that she signed the mortgage-deed to the plaintiff, but urged that she signed it at her husband's request, without having any advice, and while under the influence and compulsion of her husband, and without understanding what the meaning and effect of the mortgage was. This defendant further contended that the plaintiff, having taken a conveyance under the deeds of the 27th day of July 1861 and the first day of August 1866, could not be heard to allege that they are fraudulent or void.

The following were the issues in the case:—

1. *For the plaintiff.*—Whether the declaration of uses, under the indenture of 27th July 1861. in favour of the defendant Rosa Sausone Ezekiel Judah, was voluntary and without consideration; and, if so, whether she took any estate thereunder, except that of a trustee for her husband; and whether the premises in the indenture mentioned were purchased out of the money belonging to the defendant Rosa Sausone Ezekiel Judah?

N. B.—It is not admitted by the terms of this issue that defendant Rosa Sausone Ezekiel Judah had any property, money, &c., belonging to her as her separate estate.

2. Whether the indenture of the 1st August 1866 was a gift to the defendant Rosa Sausone Ezekiel Judah, or a mere trust in favour of her husband; assuming that the property in suit belonged to the wife, whether the husband had any, and what, right therein?

3. Whether, at or about the time of the execution of either of the two above-mentioned indentures, Sausone Ezekiel Judah was not a trader and in insolvent circumstances, and whether the two deeds were fraudulent and void?

4. Whether the mortgage-deed sued on is valid and binding on the defendant Rosa Sausone Ezekiel Judah?

5. Whether, if the said indentures of the 27th July 1861 and 1st August 1866 were gifts, the same were not defeated by the mortgage?

1. *For the defendant Rosa Sausone Ezekiel Judah.*—Were the houses in Canning Street mentioned in the plaint purchased with money of the defendant Rosa Sausone Ezekiel Judah?

2. Was that deed of 27th July 1861 fraudulent against subsequent purchasers from or against creditors of the defendant Sausone Ezekiel Judah?

3. Was the defendant Sausone Ezekiel Judah, at the time of the deed, indebted to a considerable, and what, extent?

4. Was there any, or what, consideration for the deed of 1st August 1866?

5. Was that deed fraudulent against purchasers from, or creditors of, the defendant Sausone Ezekiel Judah?

6. Was the deed of 12th March 1867 executed by the defendant Rosa Sausone Ezekiel Judah upon the representation that her execution thereof was a mere matter of form, in ignorance of its contents, under the influence of her husband, without consideration, or without independent professional advice?

7. Is the said deed, by reason of the premises or any of them, or by reason of the said deed not having been acknowledged by her before a Judge under Act XXXI. of 1854, valid and binding upon the defendant Rosa Sausone Ezekiel Judah to any, and what, extent?

8. Can the plaintiff, having taken a conveyance under the deeds of 1861 and 1st August 1866, be heard to allege that the same or either of them is fraudulent or void?

9. Is the defendant Mrs. Judah entitled to have any, and what, settlement made upon her out of the said houses or either of them in the event of the plaintiff's being held entitled to any relief in this suit?

The judgment of Macpherson, J., was as follows:—

As regards the circumstances under which the mortgage-deed, which is the foundation of this suit, was executed, I think it is proved that, before Mrs. Judah signed it, the purport of the deed was explained to her by Mr. Jenkins, the clerk who attended from the office of Messrs. Berners, Sanderson, and Upton; and further, that, when the Registrar of Deeds saw her and took her declaration for the purposes of registration, he also explained to her the general nature of the deed, and ascertained that she knew what she was about. I have no doubt whatever that, when she executed it, she knew perfectly well what she was doing, and that she intended to mortgage the whole of these properties as security for Rs. 30,000 lent to her husband. It is quite clear that she had no advice in the matter, save such as she got from her husband; but, beyond that, there is no indication of any fraud or compulsion or improper inducement being practised on her, or brought to bear on

her. The act which she did being reasonable enough in itself, I cannot decline to give effect to it simply on the ground of her not having had separate and independent advice.

The mortgage-deed having been executed by her with full knowledge of its effect, it appears to me unquestionable that her interest under the deed of gift of 1866 was well passed by it, because she having an absolute power of appointment, no acknowledgment before a Judge was necessary under Act XXXI. of 1854.

There is more doubt as to the effect of the mortgage upon the interest taken by Mrs. Judah under the deed of July 1861. By that deed the fee-simple was vested in her, although not, in my opinion, conveyed to her sole and separate use. Therefore, in order that she might effectually mortgage the fee-simple, an acknowledgment before a Judge would no doubt be necessary under the Act of 1854, if the conveyance to her were good at all as against the plaintiff. But the plaintiff contends that the conveyance to her in 1861 is voidable as against him, inasmuch as he is a purchaser for valuable consideration, and the deed of 1861 is a voluntary conveyance. For the defence it is asserted that the property was in fact purchased with Mr. Judah's money. I think, however, the defendants fail to prove this. The form in which the deed of 1861 is drawn up goes against such an idea, and there is, in truth, no evidence that the purchase-money was provided by Mrs. Judah, except the very vague and indistinct statements which have been made in the witness-box by her and her husband. These statements received no corroboration whatever from the books of the husband, for they are kept in such a manner that it is impossible to feel any certainty as to their being trustworthy, so that I repeat the matter stands solely upon the word of these two defendants, both of whom are interested in the highest degree in making out the defence they have set up, the object of which is to defeat the claim of the plaintiff.

On the evidence I find as a fact that the deed was a voluntary deed, and, as such, is voidable as against the plaintiff. It is argued that as in the mortgage-deed the plaintiff takes the appointment and conveyance from Mrs. Judah under the deeds of 1866 and 1861 respectively, he cannot now be heard to say that these deeds, or either of them, are voidable. But I do not see that the form of the plaintiff's mortgage is any bar. It conveys to him the interests of the husband and of the wife, whatever they may be; and if it be most to his advantage to do so, I think it is open to him to say that the deed of 1861 was a voluntary deed, and therefore bad as against him. I may say further that, if I considered that this deed was not voluntary, and therefore not voidable, I should hold that the plaintiff's mortgage, although the deed was not acknowledged by the wife under the Act of 1854, would be good for the life of the husband, because, supposing the property had been well conveyed to the wife by the deed of 1861, still the husband would have had the enjoyment of the estate during the joint lives of himself and his wife; and if he survived, he would have it, after the death of the wife, during his own life. There would be nothing to prevent the ordinary rights of a husband, according to English Law, from taking effect, the property not having been conveyed to the separate use of the wife.

There will be a decree for foreclosure. The costs will be taxed on scale No. 2.

The defendant Rosa Sausone Ezekiel Judah appealed from this judgment on the grounds following:—

For that the learned Judge erred in holding and finding that the said mortgage-deed was binding on this appellant, notwithstanding the same had not been acknowledged before a Judge as required by the provisions of Act XXXI. of 1854.

For that the learned Judge erroneously held that this appellant intended by the said mortgage-deed to mortgage the whole of the properties mentioned and described therein as security for Rs. 30,000 lent by the plaintiff to her husband, the defendant Sausone Ezekiel Judah.

For that the learned Judge ought, upon the evidence in the cause, to have held that, under any circumstances, the plaintiff, by his conduct, acts, and dealings with this appellant's husband, had discharged this appellant from any liability she might have incurred either as security or otherwise under the deed of mortgage to the plaintiff.

For that the learned Judge wrongly held that this appellant had failed to prove that the property in Canning Street was her own free-hold.

For that the learned Judge erred in finding that the deed dated the 27th of July 1861 was a voluntary deed voidable by this appellant's husband.

For that the learned Judge erred in holding

that this defendant's husband had or retained any interest in the said property which he could convey to the plaintiff.

For that the learned Judge erred in holding that the plaintiff who made out title under the conveyance of the appellant, reciting the deed of 27th of July 1861, could impeach that deed or the title of the appellant as fraudulent.

For that the learned Judge ought to have directed a settlement out of the estate for the benefit of the appellant and her children.

Mr. Kennedy, for the appellant, contended that inasmuch as the mortgage-deed of the 12th of March 1867 had not been acknowledged by the appellant before a Judge, as required by the provisions of section 5 of Act XXXI. of 1854, it was invalid and not binding on her, and should therefore be set aside.

Section 5 says: "No deed to be executed "by a married woman under the provisions "hereinbefore contained shall, so far as "regards the interest of such married woman, "be valid or effectual, unless her husband "concur therein, nor unless the deed be "acknowledged in manner hereinafter pre-"scribed before a Judge of one of Her "Majesty's Supreme Courts, or before a "Judge or other covenanted officer of the "East India Company," &c.

It is true that in this case the appellant executed the deed with the concurrence of her husband, but she did not acknowledge it as she ought to have done before a Judge, Officer, or Commissioner.

Section 8 says: "Every such Judge, "Officer, or Commissioner as aforesaid, before "he shall receive the acknowledgment by "any married woman of any deed to be "acknowledged by her under this Act "shall examine her apart from her husband, "touching her knowledge of such deed, and "shall ascertain whether she understands its "object, and freely and voluntarily consents "to the same, and unless she appears to "understand its object, and freely and "voluntarily to consent to such deed, he "shall not permit her to acknowledge the "same, and in such case such deed, so far as "relates to the execution thereof by such "married woman, shall be void."

The provisions of this section were not complied with, inasmuch as the appellant did not appear before a Judge to be examined apart from her husband.

Section 9 relates to the signing by the Judge of the memorandum of acknowledgment that the married woman was examined by him apart from her husband respecting her knowledge of the contents of the deed, which in this case was clearly not done.

And lastly section 10 says: "Every deed "executed by a married woman, and hereby "required to be acknowledged, shall, as far "as regards the interest of such married "woman, take effect only from the time of "the acknowledgment thereof."

Under the circumstances, therefore, as none of the provisions of this Act were complied with, the mortgage-deed was necessarily invalid, and should be set aside so far as the appellant's interest in it is concerned.

On the 1st of August 1866, Sausone Ezekiel Judah, the husband of the appellant, conveyed the house and premises in Parsee Church Street to one Arratoon Carapiet, his heirs and assigns to the use of such person or persons and for such estates as the appellant should by deed or will appoint—in default of appointment to the use of the appellant and her assigns for life, with remainder to the said Arratoon Carapiet to preserve contingent remainders, with remainder to the appellant in fee.

On the 12th of March 1867 Sausone Ezekiel Judah mortgaged the said house and premises to Mirza Abdool Kurreem, the plaintiff, for the sum of Rs. 30,000; the appellant being a party to this deed of mortgage.

Now it is contended by the respondents that, inasmuch as the deed of the 1st of August 1866 was a voluntary conveyance to the appellant without valuable consideration, it is in consequence fraudulent and void as against them, since they were the *bonâ-fide* purchasers of the property for valuable consideration. But, apart from the fact that the property purchased by the respondents was the property which was originally purchased by Sausone Ezekiel Judah with the jewels and ornaments of the appellant, there is the further fact that it was in consideration of the sale of these ornaments that the conveyance of the 1st of August 1866 to the appellant by Sausone Ezekiel Judah was executed. It cannot, therefore, be said that there was no valuable consideration for the execution of this conveyance, nor can it be said by the respondents that the deeds of the 27th of July 1861 and of the 1st of August 1866, or either of them, are fraudulent and voidable, inasmuch as the plaintiff took the appointment and conveyance from the appellant under these two deeds. The deed of the 12th of March 1867 recites the indentures of the 27th of July 1861 and

the 1st of August 1866, and on the face of that recital the plaintiff cannot call these indentures fraudulent and void.

In the case of Doe d. Newman *vs.* Rusham, 17 Q. B., p. 725, Lord Campbell, C.J., says: "The question, whether the Statute "of Elizabeth applies to a purchaser from "the heir or devisee of one who has made "a voluntary conveyance, is discussed in the "last edition of Sugden on Vendors and "Purchasers, p. 927 *et seq.*, 11th Edition, "and the authorities are there collected. "The learned author concludes by observing "thus (p. 928): 'Still the rule has never "'been carried to this extent, that a father's "'*bonâ-fide* conveyance of the fee or of any "'partial interest, although voluntary, can be "'set aside by a sale by the devisee or heir-"'at-law of the father. The rule properly "'confined to transactions really fraudulent, "'or fraudulently kept on foot, seems to be "'open to no solid objection, and it is not "'likely to be carried further.'"

In this case the evidence does not justify the respondents in saying that, at the time Sausone Ezekiel Judah executed the conveyance to the appellant, he had the intention of defeating the purchaser of his just rights.

Chief Justice Campbell further says in his judgment at p. 729: "The Lord Chief "Justice Jervis also in giving judgment in "the case of Richards *vs.* Lewis (reported "in the 15th Vol. of the Jurist, p. 512, and "in the 20th Vol. of the Law Journal, "N. S., C. P., p. 177) said: 'Burrell's case "'is misunderstood. It does not appear that "'the Courts at that time held mere volun-"'tariness a badge of fraud; they do not "'say that every voluntary deed is fraudu-"'lent.'"

Lord Coke says: "I acquainted "Popham, C.J., with this resolution, and he "allowed well of it, and said it was well done "to construe the said Act in suppression of "fraud; and (as he told me) it was adjudged "before him and his companions, Justices of "the King's Bench, that where a man in a "secret manner made an estate to the use of "his wife for her jointure by fraud and covin, "to defeat a purchaser, to whom he intended "to sell the land, that in such case, *if the "fraud be proved in evidence or confessed "in pleading*, the purchaser should avoid "such estate."

"It is clear from this" (Chief Justice Campbell goes on to say) "that cases of actual "fraud alone were in their consideration. "It is plain the deed was proved to be fraudulent *in fact* there, and not that the subsequent execution of a deed for a valuable "consideration was deemed to stamp a prior "voluntary deed with fraud. There was "fraud *in fact* there, and not merely *fraud "in law*."

Mr. Justice Williams also in giving judgment said: "As to the mortgage, Burrell's "case, if good law, shows that, where there "is *actual fraud* in a conveyance, a subsequent purchase from one not guilty of the "fraud is protected; but that case has no "application where the fraud is only constructive. I agree with the opinion of "Wigram, V. C., the consequence of holding "otherwise would be, that, if a father, wishing to disinherit an undeserving heir-at-law, "made in his lifetime a conveyance by way "of gift to his younger children, the heir "upon his death might nevertheless nullify "this deed by a sale, and pocket the purchase-money."

Again in the case of Blake *vs.* French, 5 Irish Chancery Reports, p. 259, the Lord Chancellor citing the case of Scott *vs.* Bell, 2 Levien, p. 70, said: "In that case, a wife "who was entitled to lands for her jointure "levied a fine of those lands, and the same "day the husband settled other lands to the "uses on which the first had been held. "The objection made was that there was no "agreement to make the settlement of the "second property in consideration of the "fine levied of the first, but the Court said "that it would not infer that the wife would "have given up her estate by the old settlement without consideration. Now here "we have Mrs. French giving up her right "to dower. It is true that there was no "express covenant by her to levy a fine; "but this was an instrument to which she "had put her hand and seal, making a contract which would have been sufficient "within the Statute of Frauds; and it appears, by this contract, Mrs. French was "to levy a fine, but that she had time, during "the whole course of her life, to accomplish "that. I think therefore that it is impossible to distinguish this case from Fitz "Maurice *vs.* Sadlier, 9 Irish Equity Reports, "p. 595, in which I held that a covenant by "a wife to levy a fine was a sufficient consideration for a settlement of other lands. "Counsel for the petitioners also contended "that there was enough, in the deed of 1830, "to show that it was based upon this instrument. The argument was certainly very "ingenious; but, if I were not satisfied that "the deed of 1807 was for a valuable con-

"sideration, I should have had much diffi-"culty in supporting it in that point of view, "though I think it is apparent that there is "language in the deed of 1830 that would "not have been found in it if it did not refer "to some anterior instrument; for example, "I think that the word 'portions,' in the "deed of 1830, does not mean portions "thereafter to be provided, but it is intended "to apply to pre-existent portions; but I "am not prepared to say that these indica-"tions would have been of themselves suffi-"cient to establish the deed of 1807, if a "voluntary instrument, against the parties "claiming under the deed of 1830." *Vide* also Gleaves *vs.* Payne, 1 De Gex, Jones, & Smith, p. 87; Smith *vs.* Mathews, 3 De Gex, Fisher, & Jones, p. 139; Ellibank *vs.* Montolieu, 1 White & Tudor's Leading Cases, p. 381; and *Ex-parte* Pearse, 1 Buck's Reports, p. 525.

In this case Sausone Ezekiel Judah having conveyed the whole of the property to the appellant, his interest in it ceased; and he had therefore no right whatever to mortgage it to Mirza Abdool Kurreem. But, under any circumstances, the appellant was clearly entitled to a settlement out of the estate of her husband. The life-estate ought to have been sold, and a half given to the appellant as a settlement upon her and upon her children. As the decree now stands, it entirely forecloses all right of the appellants and her heirs to the property, which ought not to be, since all that the respondents can legally be entitled to is the *quasi* life-interest of the husband.

The Advocate-General, for the respondents, contended that in this case no acknowledgment by the appellant before a Judge was necessary under Act XXXI. of 1854, inasmuch as the power of appointment which was given to her under the deed of gift of 1866 was duly exercised by her, by her having voluntarily and with full knowledge of its effect executed the deed of mortgage of the 12th of March 1867, thereby willingly passing away her interest in the deed of 1866. Moreover, besides being perfectly aware of what she was doing when she executed the deed, the evidence proves conclusively that she had the full intention of mortgaging the whole of the property as security for the Rs. 30,000 lent to her husband by Mirza Abdool Kurreem.

It was contended for the appellant that the houses and premises in Canning and Parsee Church Street were purchased by Sausone Ezekiel Judah, not with his own money, but with the jewels and ornaments of his wife, the appellant, and that it was in consideration of the sale of these ornaments that the properties were to be bought by Sausone Ezekiel Judah, and conveyed to her after their purchase. If it be true that the properties were purchased with the money of the appellant, it is singular why the conveyance to her was not executed immediately or, at all events, soon after the purchase. The conveyance was executed in 1866, and the properties were purchased in 1861—five years therefore had elapsed before they were conveyed. Apart from this suspicious circumstance, the form and the contents of the deed of 1861 repudiate such an idea, and go to strengthen the belief that it was with the appellant's husband's money that the properties were purchased. However the only evidence adduced at the trial to show that the houses and premises were purchased with the appellant's money was the evidence of the appellant and of her husband. Mr. Justice Macpherson rightly rejected their evidence, not only because their statements received no corroboration whatever either from the books of the husband or in any other manner, but also because being both interested in the highest degree, they made those statements in accordance with the defence which they had set up with a view to defeat the claim of the plaintiff, Mirza Abdool Kurreem.

Under the circumstances, therefore, as the proof of valuable consideration for the execution of the deed of gift of 1861 to the appellant falls to the ground, it now remains to be seen if the mortgage-deed of 1867 does or does not set aside the voluntary settlement of 1866.

The 5th paragraph of the Statute 27, Elizabeth, Chapter IV., enacts "that, if any person "or persons, &c., shall make any conveyance, "gift, grant, limitation of uses, &c., out of any "lands, tenements, &c., with any clause, pro-"vision, condition of revocation, &c., out of "the said lands, &c., or out of any part or "parcel of them contained in any writing, "deed, &c., so made or had, shall or do bar-"gain or sell, demise, convey, &c., the same "lands, &c., or any part of them to any person "or persons, &c., for *money or other good* "*consideration paid or given*, the said first "conveyance, gift, demise, &c., not by him or "them revoked, made void, or altered accord-"ing to the power reserved unto him or "them by the said secret conveyance, &c., "that then the said former conveyance, gift, "&c., as touching the said lands, &c., so

"after bargained, sold, conveyed, &c., against "the said bargainees, vendees, grantees, &c., "shall be deemed, taken, and adjudged to be "*void, frustrate, and of none effect* by "virtue and force of this present Act."

The Statute therefore clearly enacts that, when a person conveys, grants, or demises certain lands belonging to him to a party, not for valuable consideration, but that subsequently he conveys the same lands to another party for valuable consideration, that then the first conveyance "shall be deemed "taken, and adjudged to be void, frustrate, "and of none effect."

Mr. Story, in his book on Equity Jurisprudence, paragraph 426, p. 405, 8th Edition, says:—

"It was for a long period of time a much "litigated question in England whether the "effect of the Statute was to avoid all volun-"tary conveyances (that is, all such as were "made merely in consideration of natural love "or affection, or were mere gifts), although "made *bonâ fide*, in favour of all subsequent "purchasers with or without notice; or whe-"ther it applied only to conveyances made "with a fraudulent intent, and to purchasers "without notice. After no inconsiderable "diversity of judicial opinion, the doctrine "has at length been established in England "(whether in conformity to the language "or intent of the Statute is exceedingly "questionable), that all such conveyances "are void as to subsequent purchasers, whe-"ther they are purchasers with or without "notice, although the original conveyance "was *bonâ fide*, and without the slightest "admixture of intentional fraud; upon the "ground that the Statute in every such case "infers fraud, and will not suffer the pre-"sumption to be gainsaid. *Vide* Doe *vs.* Manning, 9 East., p. 58; Pulvertoft *vs.* Pulvertoft, 18 Vesey, pp. 84, 86, and 111; and Cotterell *vs.* Homer, 13 Simon, p. 506.

In Buckle *vs.* Mitchell, 18 Vesey, p. 110, the Master of the Rolls says: "It must, "I conceive, be assumed that the Statute "of the 27th of Elizabeth has now received "this construction—that a voluntary settle-"ment, however free from actual fraud, is, "by the operation of that Statute, deemed "fraudulent and void against a subsequent "purchaser for a valuable consideration, even "when the purchase has been made with "notice of the prior voluntary settlement. "I have great difficulty to persuade myself "that the words of the Statute warranted, or "that the purpose of it required, such a "construction; for it is not easy to conceive "how a purchaser can be defrauded by a "settlement of which he has notice before "he makes his purchase. But it is essential "to the security of property that the rule "should be adhered to, when settled, what-"ever doubt there may be as to the grounds "on which it originally stood. The Statute "must receive the same construction, and pro-"duce the same effect, in a Court of Equity "as in a Court of Law. The purchaser "of an equitable estate for a valuable con-"sideration ought no more to be affected by "a voluntary settlement than the purchaser of "a legal estate." *Vide* also Barton *vs.* Vanheythuysen and Stone *vs.* Vanheythuysen, 11 Hare, p. 126.

Furthermore, the appellant takes no "*interest*" whatever under the deed of 1861, inasmuch as she is not a "party" to that deed. Mr. Burton, in his book on Real Property at p. 160, No. 442, says: "It is neces-"sary, however, that all persons, who are "intended to take any *immediate* estate or "benefit by an indenture, should be *named* in "the beginning of it as *parties*." Under all the circumstances, therefore, the appeal ought to be dismissed.

Mr. Kennedy in reply.—With regard to the appellant's taking no "interest" under the deed of 1861 as stated by the Advocate-General, because she was no "party" to the deed, Mr. Burton in the note to No. 442, p. 161 of his book on Real Property, says: "This rule does not extend to "remainders (Co. Litt., 231*a*, 259*b*), nor, "it is commonly said, to uses created by the "indenture, 2 Prest. Conv., p. 394. But "Sammes's Case, 13 Co. 55, there cited, is "not directly in point, and it is now held "that a power-of-attorney may be given by "indenture to a person who is not named as "a *party*—Co. Litt., 52*b*: 3 M. & S. 323. "Also a person not named as a *party* may "enter into a covenant with one who is "named; but this covenant cannot be "mutual—Salter *vs.* Kidgly, Carthew 76; "Berkley *vs.* Hardy, 5 B. & C., p. 355."

Admitting, however, that the appellant's name had not been inserted as a "*party*" to the deed of 1861, yet, as it was with her money that the property was purchased, and it was subsequently conveyed to her, she had therefore an absolute *interest* in it. It may be that in law the property might be regarded as belonging to the person to whom it was conveyed, but in such a case it is clear that a Court of Equity would interfere and say that the property should not be considered as belonging to the person in whose name it

was conveyed, but to the person who advanced the money, and who was the actual purchaser of the property.

The judgment of the Appellate Bench was delivered as follows :—

Couch, C.J.—Several questions have been argued in this case, which, we think, it is not necessary for us to decide. Taking the transaction as a mortgage created by the deed of the 12th of March 1867, we think that the intention of the parties was to give to the mortgagee as a security for the money which he had previously lent, according to the evidence, to the husband—to give to him as a security all that either the husband or wife had power to give. The intention was to convey to him in mortgage whatever interest either of them might have in the property. The deed recites in the usual way the advance of the money, and witnesses that the wife, at the request and by the direction of the husband, as to the property which is the subject of this suit, grants, conveys, and releases, and as to the property which was the subject of the deed of 1866, appoints to the uses afterwards declared. Then follows: "And the said Sausone "Ezekiel Judah doth hereby, to the extent "of his interest (if any) in the premises, "grant, release, convey, appoint, and con-"firm unto the said Mirza Abdool Kurreem "and his heirs; first, all that upper-"roomed messuage," describing the property intended to be conveyed. The construction of this, we think, is that the husband did, so far as he had power to do—so far as he had any interest in the property described—convey it to the mortgagee. And there having been, as we will assume, a voluntary gift by him to his wife of the property described in the deed, the conveyance operated upon the estate which he had before the voluntary gift to the wife, so as to put the voluntary gift out of the way, so that it should not affect the mortgagee. It is not necessary to say on what ground or for what reason a voluntary conveyance, where there is no express intention to defraud, is within the Statute of 27, Elizabeth, c. iv. According to the construction which has been put upon it, when the person, who has made the voluntary gift or settlement, sells to another for value, the conveyance operates as a conveyance of the estate which the settler had before the voluntary settlement; the Statute puts the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser—Beavan *vs.* Earl of Oxford, 6 DeG., M., and G. 530. That is the effect of what was done in this case, and Barton *vs.* Vanheythuysen, 11 Hare 126, is an authority that words such as are used here, showing an intention on the part of the person who made the voluntary gift to convey to the purchaser all the interest or estate that he had, are sufficient to avoid it. The word "interest" appears to us to be equivalent to estate. He in fact professed to convey to the mortgagee this property, so far as he had power to do it. On that ground, therefore, we think the decision of Mr. Justice Macpherson ought to be confirmed. Assuming that this was a voluntary gift, and not deciding the other questions which have been raised, it appears to us that, notwithstanding the recital of the deed of the 27th of July 1861, the intention of this deed was to give to the mortgagee a complete charge upon the property, so far as the husband and wife could do so. We think we ought not by subtle distinctions to deprive the mortgagee of the interest which, it was intended, he should have as a security for the money which he had advanced.

The appeal must be dismissed. The respondent's costs of the appeal, on scale No. 2, will be added to the mortgage.

The 13th May 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Act VIII. (B.C.) of 1869, ss. 59 & 64—Sale for Arrears of Rent.

Case No. 2362 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 25th July 1873, affirming a decision of the Moonsiff of Gurbetta, dated the 20th August 1872.

Luchmun Ramonooj Doss Mohunt (one of the Defendants), *Appellant,*

versus

Ram Huree Roy (Plaintiff), *Respondent.*

Baboo Kumla Kant Sen for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

The Full Bench decision (21 W. R., p. 94), by which the right of a purchaser in execution of a rent-decree prevails over that of an earlier purchaser, has no application to the case of a sale under Act VIII. (B.C.) of 1869, s. 64, which provides for the sale, not of the tenure, but of the right, title, and interest of the judgment-debtors.

I THINK in this case the special appeal must be dismissed with costs.

The ground taken is this, that, although the defendant's purchase is subsequent to that of the plaintiff, yet, the defendant having purchased in execution of a rent-decree, his right ought to prevail over that of the plaintiff according to the Full Bench decision reported in the 21st volume of the Weekly Reporter, p. 95.

Looking at the rent-decree and the plaint upon which that decree was passed, it is quite evident that the Full Bench decision referred to has no application to this case. The tenure was sold under the provisions of section 64 of Act VIII. of 1869, and not under section 59 of that Act. It is, therefore, quite clear that what the defendant purchased was not the tenure, but the right, title, and interest of the judgment-debtors. This being the case, this special appeal fails. It is accordingly dismissed with costs.

The fourth ground taken in the petition of the special appeal has been abandoned.

The 13th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Act VIII. of 1859, s. 246.

Case No. 2261 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 26th July 1873, affirming a decision of the Moonsiff of Amtah, dated the 10th December 1872.

Kasheenath Shaha (Plaintiff), *Appellant,*

versus

Jogendro Nath Baboo and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy and *Mr. M. L. Sandel* for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondents.

Computation of the year mentioned in Act VIII. of 1859, s. 246.

Ainslie, J.—THE day on which the order under section 246 of the Civil Procedure Code was passed must be excluded in computing the period of year allowed by that section, and the case must go back to the first Court to be tried on the merits.

Costs will follow the result.

The 14th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble C. Pontifex, *Judge.*

Act VIII. of 1871, s. 34—Registration by Agent —Signature to Agreement by Agent.

Case stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction, under section 7 of Act XXVI. of 1864, by Mr. G. S. Fagan and Baboo Koonjolall Banerjee, Judges of the Calcutta Court of Small Causes.

Bissendoyal and Hurdoyal, *Plaintiffs,*

versus

Ferdinand Schlaepfer, who hath survived Albert Weylandt, *Defendant.*

Mr. Evans for Plaintiffs.

Mr. Stokoe for Defendant.

Where a document is executed by one of two parties on behalf of himself and the other, it is sufficient, for the purposes of Act VIII. of 1871, s. 34, that the person executing it appear before the registering officer. The other party is not required to appear.

An agreement to let premises may be made by an agent; there is no law that it shall be signed by the principal.

Case.—THIS was a new trial in which the plaintiff sued the defendant for the sum of Rs. 700, being the rent of certain premises and screws at Delhi, for the two months of September and October 1873, under the terms of an instrument forwarded herewith, and marked A. The document ran as follows:—

Memorandum of agreement between Bissendoyal and Hurdoyal of Delhi, and there carrying on business as merchants under the style of Bissendoyal Hurdoyal, of the one part, and Ferdinand Schlaepfer and Albert Weylandt of Calcutta, and there carrying on business as

merchants under the style of Schlaepfer, Putz & Co., of the other part, as follows: That the said Bissendoyal and Hurdoyal agree to let, and the said Ferdinand Schlaepfer and Albert Weylandt agree to take, all those tenements, buildings, and screw-houses containing three pairs of screws, together with the land on that whereof the screws are erected and built, and containing by estimation 3,000 square yards, and bounded as follows, on the north by the Hamilton Serai, on the south by the premises belonging to Lala Chunna Mul, and known as Topkhanna ka kutra, on the east by the premises known as the Delhi Bank, and on the west by the Government Road known as the Kouriapool Road in Delhi aforesaid, for the space of two years certain, to be computed from the date of these presents, at the rent of Rs. 350 per month, to be paid monthly on the 1st of every succeeding month for the month immediately preceding; and the said Ferdinand Schlaepfer and Albert Weylandt agree, at the expiration of the said term of two years, to deliver up the said premises and screws in as good condition as the same now are, reasonable wear and tear thereof excepted; and the said Bissendoyal and Hurdoyal agree to pay during the said term of two years all ground rent, superior landlord's rents, rates, and taxes, &c., of any nature and kind soever. The agreement between the said parties hereto being that the said Ferdinand Schlaepfer and Albert Weylandt shall pay no more for the said premises during the said term of two years than the monthly rent of Rs. 350, and that the said Bissendoyal Hurdoyal shall pay all other rents, rates, and taxes during the said term, and the said Bissendoyal Hurdoyal agree that the said Ferdinand Schlaepfer and Albert Weylandt shall have quiet possession of the said premises, and that they, the said Bissendoyal Hurdoyal, will execute, when called upon to do so, a regular and formal lease of the said premises containing all usual and reasonable clauses; the said Ferdinand Schlaepfer and Albert Weylandt keeping the said screws and screw-house in repairs during the said term. In witness whereof, the said parties hereto have hereunto set their hands the Nineteenth day of October in the Christian year One thousand eight hundred and seventy-two.

(On the back.)

Presented for registration between 2 and 3 P.M. on the 21st day of October 1872 at the Sub-Registrar's Office, Delhi, by Bissendoyal and Hurdoyal and Mr. J. J. Crawley, Agent of Schlaepfer, Putz & Co., executants. Execution admitted by the above-mentioned persons, who are identified by Hurgopal and Bukhtawur Singh, English writers in the Office of Mr. J. J. Crawley.

BUKHTAWUR SINGH. J. G. DELMERICK,
HURGOPAL. *Sub-Registrar.*

The defendant denied the contract as alleged, but also pleaded that there had been a contemporaneous verbal agreement by which it had been settled, as a condition precedent, that the premises should be repaired.

The new trial was heard before us (the First and Second Judges), and we found that there had been no such previous verbal arrangement as pleaded by the defendant. We also found that, under the instrument, the plaintiff was entitled to recover the sum claimed.

When, however, the plaintiff tendered the instrument A, Mr. Stokoe, Counsel for the defendant, objected to its being admitted in evidence, and asked that, if we admitted it, we would refer the question of its admissibility for the opinion of the High Court.

We did admit it, and did so under the terms of sections 60 and 85 of the Registration Act, and because the parties themselves had adopted and acted upon it, executed and registered as it had been, and based our judgment, a contingent one, upon it, and we have now the honor to request the opinion of the Honorable the Judges on the question, whether, under the circumstances stated by Mr. Stokoe, whose statement of the facts we accept as correct, the instrument A is admissible under the Registration Act.

The question is a nice one, and we think it desirable to submit Mr. Stokoe's objection to the Honorable the Judges in the words in which he has himself drawn it up. The two points Mr. Stokoe takes, however, amount practically, we think, to the one which we have referred.

The following are Mr. Stokoe's objections as stated by himself :—

1st.—On the instrument of 19th October 1872 being tendered in evidence on the part of the plaintiffs, Mr. Stokoe objects to its being received on the ground that it is a document required by section 17 of the Registration Act VIII. of 1871 to be registered, and which has not been registered in accordance with the provisions of the Act, and that it therefore cannot be received in evidence in the suit.

In support of his objection, Mr. Stokoe submits that the provisions of section 34 of the Act as regards the execution and registration of the document by or on behalf of the plaintiff Bissendoyal have not been complied with, and that the provisions of section 58 have also not been complied with. It appeared that the document was not signed by Bissendoyal; that it was signed at Delhi by the plaintiff in the following way :—

Bissendoyal Hurdoyal
by the pen of Hurdoyal,

and on or about the day it bears date; that Hurdoyal attended before the Registrar on the occasion of the document being registered; that Bissendoyal did not attend, but that he was at Benares at the time it was signed and registered.

It was not shown that any power-of-attorney from Bissendoyal, attested as required by the 33rd section, was produced to the Registrar, or that any such ever

existed. But Hurdoyal stated that he held the am-mooktearnama of Bissendoyal, but he did not produce it, nor was there any evidence of its terms or of its date; and, other than that statement and Hurdoyal's further statement that he and Bissendoyal were partners, there was no evidence of any authority on the part of Hurdoyal to execute the document for Bissendoyal.

It appeared that Bissendoyal is the father of Hurdoyal. There was no evidence of the extent or nature of the estate and interest of Bissendoyal and Hurdoyal respectively in the premises.

2nd.—Mr. Stokoe submitted that by reason of (1) the non-execution of the document by Bissendoyal, and (2) of the non-compliance with the provisions of section 34 of the Registration Act as regards the execution and registration of the document by or on behalf of Bissendoyal, there was such a failure of the consideration on which the defendant's promise to pay the rent was founded—such an absence of mutuality in the contract contained in the document—as rendered the promise to pay the rent contained in the document not binding upon the defendant.

The sum of Rs. 230 has been paid into Court as security for costs of reference under section 8 of Act XXVI. of 1864.

The judgment of the High Court was as follows :—

Couch, C.J.—The document referred to in the case as the document marked A purports to be a memorandum of agreement between Bissendoyal and Hurdoyal of Delhi, and there carrying on business as merchants under the style of Bissendoyal Hurdoyal, of the one part, and the defendant Schlaepfer and Albert Weylandt, described as of Calcutta, and carrying on business as merchants under the style of Schlaepfer, Putz & Co., of the other part. It says that Bissendoyal and Hurdoyal agree to let, and the other parties agree to take, the premises which are described, and that "the said Bissendoyal and Hurdoyal agree "to pay during the term of two years all "ground rent, superior landlord's rents, rates "and taxes, &c., of any nature and kind "soever." In the latter part of it the plaintiffs are described as the said Bissendoyal and Hurdoyal, the word "and" being omitted in one or two places. It is signed "Bissendoyal Hurdoyal by the pen of Hurdoyal;" and for the other parties by Mr. Crawley, who describes himself as agent.

We think, looking at the first part of the document, where it is said to be an agreement between Bissendoyal and Hurdoyal and the other parties, that we must consider the signature at the foot of it, although the word "and" is omitted, to be a signature by Hurdoyal on behalf of himself and Bissendoyal, and that it was an agreement made by Hurdoyal as the agent of the two.

As to the registration, the 34th section of Act VIII. of 1871 says that "no document "shall be registered under this Act, unless "the persons executing such document, or "their representatives, assigns, or agents, "authorized as aforesaid, appear before the "registering officer." Here Hurdoyal, the person executing the document, did appear before the registering officer. There is no provision which requires that Bissendoyal should appear before him. Bissendoyal had not executed the document, and it took effect as regards Bissendoyal by reason of the execution by Hurdoyal as his agent. If he had no authority to do so, and his act as agent was not afterwards adopted by Bissendoyal, the latter would not be bound. All that was necessary for registering a document of this description was done, and we think it was receivable as evidence.

If we looked only at the form of the question which is submitted to us, we might stop here and need not say anything upon the other questions which have been raised. We should say in answer to the formal question put to us that the document was receivable as evidence.

Then being so receivable, is it a document by which the plaintiffs are entitled to recover the rent which they have claimed in this suit? It is an agreement to let the premises, made by Hurdoyal professing to act as the agent both of Bissendoyal and himself. An agreement of this description may be made by an agent. There is no law that it shall be signed by the party himself. If Hurdoyal had authority to let, it is a good demise for the two years. It is not stated that before he executed the document he had Bissendoyal's authority to do so. But there is not much doubt what the result would be if that matter were to be inquired into. It is found in the case that Bissendoyal has adopted and acted upon this agreement which was made on his behalf. He is therefore bound by it, and the defendant has got that which was the consideration for the rent, *viz.*, a binding agreement to let the premises. The judgment which has been given for the plaintiffs will therefore stand, with the costs of suit and the usual costs of reserving the case and of arguing it in this Court.

The 14th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble C. Pontifex, *Judge.*

Suit by Co-heir—Joinder—Contract—Legacy—Intestacy—Act IX. of 1850, s. 32.

Case stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction, under section 26 of Act VII. of 1864, by Mr. G. S. Fagan, First Judge of the Calcutta Court of Small Causes.

Harran Chunder Mookerjee, *Plaintiff*,

versus

Nundogopal Muttyloll and Brojogopal Muttyloll, heirs and legal representatives of Nilmoney Muttyloll, deceased, *Defendants.*

Mr. Evans for the Plaintiff.

Mr. Bonnerjee for the Defendants.

K left two widows, M and C, and a will by which it was provided that each should receive Rs. 5,000 for expenses, and that any unexpended balance at the death of each should go to his heirs. M died in November 1862, when the heirs of K were plaintiff and his two cousins. Before her death, M had instituted a suit against the executors, and obtained Rs. 10,000, the major portion of which she placed with a firm, of which N was one of the partners, to be invested for her in N's own name on interest payable to her. On the dissolution of the firm, the money was made over to N alone, and, on his death, it came to the hands of his sons, who are sued as heirs and representatives of N by plaintiff for his share, with interest, of the balance of money deposited by M:

HELD that defendants have a right to have joined in the suit against them all the persons who claim any debt which may be due, after M's death, to the heirs of deceased husband:

HELD that they must sue upon a liability arising from the contract between M and the defendant, not on any liability to pay over the share of the property of the deceased, or to pay anything as a legacy.

Act IX. of 1850, s. 32, applies, in the case of intestacy, to a suit against the administrator, and, in the case of a legacy, to a suit against the executor or other persons liable to pay the legacy.

Case.—PLAINTIFF in this case sues the defendants as heirs and legal representatives of Nilmoney Muttyloll, deceased, for a third share of the balance of money deposited by Sreemutty Mongola Dabee, deceased, with Nilmoney Muttyloll, deceased, and interest on the plaintiff's share of the deposit.

The pleas principally relied on by the defendants were:—

1st.—That the plaintiff was not entitled to sue only for his own share, in the way in which he has sued in this action.

2nd.—That the plaintiff's cause of action is barred by limitation, it having accrued on the day when the money was paid, or at any rate on the day on which the final demand was made by Mongola Dabee for payment of principal.

I found the following facts, *viz.:* Kisto Mohun Mookerjee, the plaintiff's uncle, left two widows, Sreemutty Mongola Dabee and Sreemutty Chandermoney Dabee; and a will, by which it was, amongst other things, provided that each of his widows should receive Rs. 5,000 for her expenses, and that any unexpended balance of such sum should, at the death of each widow, go to his heirs. Mongola Dabee died on or about the 8th November 1862, and the heirs of Kisto Mohun at that time were the plaintiff, the only son of her elder brother, and the plaintiff's two cousins, Jodoonath Mookerjee and Ramanath Mookerjee, the two sons of Kisto Mohun's youngest brother. Before her death, Mongola Dabee had instituted a suit against the executors of her husband's will, which was eventually settled for Rs. 10,000, and the major portion of this sum she placed with a firm, of which Nilmoney Muttyloll was one of the partners. It was to be invested for her in Nilmoney's own name, and he was to pay her such interest as the investment yielded him. On the dissolution of this firm, the money deposited by Mongola was made over to Nilmoney alone; and on Nilmoney's death, the estate of Nilmoney, and with it the money deposited by Mongola, came to the hands of the two sons of Nilmoney, who are the defendants in the present suit. The payment of the balance of this deposit-money was never demanded by Mongola Dabee; but her last demand for payment of a portion of it was made so far back as thirteen years ago, that is to say, some time in the Bengali year 1267. On the 12th November 1862, however, Nilmoney Muttyloll presented to one Nobocoomar Bonnerjee, an agent of the plaintiff, and his cousins, for signature, the following receipt: "Received from Baboo Nilmoney Muttyloll "the sum of Rs. 500 out of Rs. 2,000 "remained in his hands, belonging to the "estate of the late Sreemutty Mongola Dabee, "for the purpose of performing her ceremo-"nies, &c., dated this 12th day of November "1862."

Nobocoomar Bonnerjee duly signed this receipt, and returned it to Nilmoney Muttyloll, who accepted and kept it.

I think the above are all the matters of fact on which it is necessary for me to record

a finding in order to come to a decision on the pleas; and on these facts I am of opinion, with reference to the first plea, that the plaintiff *is* entitled to sue alone for his own share in this Court. His claim is for a distributive share under his aunt's intestacy or under his uncle's will. In either case it is admissible under the 32nd section of Act IX. of 1850. Had it been simply a suit for a one-third share of a deposit made by himself and his two cousins, the argument of Mr. Bonnerjee against the jurisdiction of this Court to hear it would have been good, and the cases cited by him in point. But the deposit was made by the intestate aunt, and the claim to the unexpended balance of it might, if the sum deposited had been her *stridhun*, have arisen out of her intestacy; but did, in fact, in my opinion arise out of the provisions of the uncle's will, by which the money deposited was given to the aunt for her food and religious rites only, and the unexpended residue of it was reserved for the testator's heirs.

As to the second plea, I am also of opinion that it will not hold. The suit would, with reference to this plea, fall for decision under Act IX. of 1871 (the last Limitation Act, Schedule II., clause 147), and, no doubt, if the date of deposit were, as contended by the learned Counsel, the time from which the cause of action accrued, the suit would be barred; for the period of limitation is thirty years, and the deposit was made in 1839, more than thirty-three years ago. But I think the receipt which I have quoted is such an acknowledgment of the title of the depositor as comes within the meaning of the third column of the 147th clause; and as that receipt was presented by the defendant's father for signature, and retained by him in November 1862, only eleven years before the institution of this suit, it takes it out of the statute.

It further appears to me that there is an entire misapprehension on the part of the defendant's Counsel as to the cause of action in this suit, which has arisen perhaps from the ambiguous or, at least, indistinct wording by the plaintiff's Counsel of his client's claim. I think the word "deposit" should have no place in the discussion on either side. What is really in dispute is a certain sum left to the plaintiff under his uncle's will, and which did not become payable to him till his aunt's death on the 8th November 1862. This sum had no doubt been deposited with the defendant's father, and was, at the time of the institution of the suit, in the possession of the defendants themselves as a deposit. But the plaintiff's right to it in no way arises from, or passes through, the depositress, but takes its first inception from her death; and is based, not on the fact of deposit, but on the simpler fact of possession. The defendants are not called upon to surrender the money claimed, because it was once deposited with them, which would have been the case if the plaintiff claimed as heir to his aunt; but because it has become the property of plaintiff under his uncle's will from a certain date, and has been found in the defendant's possession. In this view of the matter, the claim would, I think, fall under Schedule II., clause 122 of Act IX. of 1871; and as the suit was instituted on the 17th day of November 1873, the period of limitation, *viz*, twelve years from the time when it became payable, which was the 8th November 1862, had not expired, and the suit is not barred.

As no dispute was raised as to the correctness of the amount and *primâ-facie* evidence of it was given, and as the other points raised were disposed of during the progress of the suit, and the two pleas stated were the only points reserved for consideration, and my opinion was in favour of the plaintiff on both of them, judgment was given for plaintiff, contingent, however, as had been requested by both parties, upon the opinion of the High Court as to the validity of those two pleas.

The sum of Rs. 217 has been paid into Court as security for costs of reference under section 8 of Act XXVI. of 1864.

The Chief Justice delivered the judgment of the High Court as follows:—

We think this is not a case where the demand is for part of a distributive share under an intestacy or a legacy under a will. What is intended by these words in section 32 of Act IX. of 1850 is where the person entitled to a share of property, in the case of intestacy, is bringing a suit against the person who has the administration of the property; or in case of a legacy, where the suit is brought for the legacy against the person who has the administration of the property, whether as executor, or, in this country, in some other capacity, and is liable to pay the legacy. Here the liability of the defendant is not a liability of this description. It arises from a contract which was made between him and Mongola Dabee when the money was deposited. There was no express contract, but there would be an implied contract, to repay the money. The defendant appears to have been in a capacity

similar to that of a banker to whom money deposited is considered as lent. It may be that, on the death of Mongola Dabee, the persons who became entitled to the money can have the benefit of the contract between her and the defendant, and sue the defendant to recover the money. But they will sue upon a liability arising from the loan, and not on any liability to pay over the share of the property of the deceased person, or to pay anything as a legacy. It appears to us that this is a case in which the defendant had a right to have joined in the suit against him all the persons who claim to be entitled to receive the debt, which debt may, after the death of Mongola Dabee, be said to be due to the heirs of her deceased husband. On that ground we think that the judgment should be for the defendant. It is not necessary for us to answer the other question which has been submitted to us. The judgment will be for the defendant, with costs of the suit in the Small Cause Court and the ordinary costs allowed of reserving the question and otherwise arising thereout or connected therewith.

The 14th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Encroachment—Acquiescence—Right of Action—Special Appeal—Pleas.

Case No. 2274 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 28th June 1873, affirming a decision of the Moonsiff of Alipore, dated the 24th July 1872.

Judoonath Mullick (Plaintiff), *Appellant,*

versus

Kalee Kristo Tagore (Defendant), *Respondent.*

Mr. W. Jackson and *Baboos Nil Madhub Bose* and *Jadub Chunder Seal* for Appellant.

Mr. C. Jackson and *Baboos Kalee Mohun Doss* and *Amarendro Nath Chatterjee* for Respondent.

A suit for the removal of an encroachment is maintainable without actual damage having occurred, or the immediate prospect of damage, if it can be shown that some damage may arise from the encroachment hereafter, when, from plaintiff's neglect to interfere for a series of years, the opposite party would possibly have acquired a right which would bar plaintiff's remedy.

A plea may be taken in special appeal, though not set out in the plaint, if the plaint did set out all the facts necessary to support the plea, and there was no omission calculated to mislead the Court.

Ainslie, J.—It appears that the plaintiff and the defendant were proprietors of land on opposite banks of a khal, and that the defendant has recently built a retaining wall which, according to the plaintiff, is an encroachment upon the bed of the khal. He accordingly has brought this suit to have that encroachment removed, and in fact to restrain the defendant from in any way going beyond the limits of his original occupation. It is found by the Lower Appellate Court that, "on the "whole evidence, there can be no doubt that "the defendant has encroached upon the khal, "though it is not proved to be to the extent "of 170 feet by 10 inches;" and the Lower Appellate Court adds: "And I must hold him to be in that respect a wrong-doer." The question which the Court then went on to discuss was whether such an encroachment by the defendant without proof of actual injury to the plaintiff's property would justify a decree for demolition of the wall, which the Lower Appellate Court finds was as necessary for the protection of the defendant's property as the plaintiff's wall was for his. The Lower Appellate Court says: "I should not be "prepared to decree the removal of the "defendant's wall, unless it was proved beyond "a doubt, if not that actual damage has "been caused by it, still that damage must "inevitably occur from it. But on the evi-"dence before me, I cannot say that I feel at "all certain that damage will be done to the "plaintiff's property. Skilled witnesses were "examined on both sides, and amongst them "were gentlemen whose opinions are entitled "to great weight; but while some foretell "serious injury to the plaintiff's property as "likely to be caused by the defendant's wall, "others think that there is no danger what-"ever." Further on the Judge says: "The "conclusion at which I arrive is that the "defendant has in fact committed an en-"croachment, though not upon the plaintiff's "property; but that it is not established "that damage to the plaintiff's property must "necessarily result from the encroachment. "The plaintiff, therefore, is not entitled to "have the wall removed."

The ground taken in this special appeal is that the plaintiff was not bound to prove that actual damage had occurred, or the immediate prospect of damage, to his property, but that it was sufficient to show that the defendant

had encroached upon the bed of the khal, and that some damage might hereafter possibly arise therefrom. In support of this position the case of Bickett *vs.* Morris was cited from the Law Reports, Scotch Appeals, p. 47, and that decision seems fully to support the contention. I think it is only necessary here to quote a few words towards the conclusion of the judgment of Lord Westbury. He says: "It is wise, therefore, to lay down "the general rule that, even though immediate "damage cannot be described, even though "an actual loss cannot be predicated, yet, if "obstruction be made to the current of a "stream, that obstruction is one which consti-"tutes an injury which the Courts will take "notice of as an encroachment which adja-"cent proprietors have a right to have "removed." Several other cases were also quoted to show that, independently of any damage immediately accruing, a person may be entitled to bring a suit in order to prevent a right being acquired by the opposite party from the neglect of the plaintiff to interfere with him for a series of years, lest, possibly, when eventually actual damage might arise, the plaintiff should be barred of his remedy.

The respondent in the first instance drew a distinction between this khal, in which the encroachment complained of is said to have taken place, and the flowing or tidal rivers referred to in the English cases cited, and it was said that this khal, though 40 feet wide at its mouth, is shown to be only 8 feet wide at a distance of 120 feet from the mouth, and that at high tide the depth of water is only 4 feet, while during a considerable portion of the ebb it is altogether dry. It is evident from the evidence of the witnesses that, whether this khal be something that may be taken to correspond with a running stream, or be only a creek of the Hooghly into which the tide flows at high water, the force of the water in it is considerable, and injury may possibly arise.

With respect to the argument that the plea of possible future damage ought not to be allowed to be taken in special appeal because it was not set out in the plaint, we think we must hold that the plaint really did set out all the facts necessary to support it, and that there was no omission calculated to mislead the Court, and we find that the Courts below have gone into the question. Although the plaint may contain, as plaints in this country frequently do, some false allegations, still there is no sufficient reason for throwing out this suit, and compelling plaintiff to go through a fresh course of litigation. The cases cited referring to the rights of individuals to institute suits to remove obstructions to public thoroughfares, and demolish buildings erected on lands jointly held by plaintiff and defendant, do not seem to us to apply at all to this particular case. It, however, appears that the Judge of the Lower Appellate Court, though finding as a fact that there was an encroachment, has abstained from finding the extent of that encroachment. As we are of opinion that the plaintiff is entitled to have any encroachment made by the defendant on the bed of the khal removed, it is necessary that the case should go down to the Lower Appellate Court for a finding as to the precise extent to which there has been an encroachment.

There is one point that we have omitted to notice above which, we think, is of some importance in this case, *viz.*, that the plaintiff has, from a very early stage of the proceedings of the defendant, given him notice of his intention to contest his right. This fact alone clearly distinguishes this case from the case cited in respect of ownership of joint property decided by the late Chief Justice Sir Barnes Peacock. The case is remanded, under section 354, to the Lower Appellate Court for a finding as to the extent of encroachment made by the defendant. The Lower Appellate Court will return its finding to this Court for final orders.

The 14th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Trespass—Right of Suit—Joint-Proprietorship —Co-sharer's Rights.

Case No. 1300 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 28th February 1873, affirming a decision of the Subordinate Judge of that District, dated the 28th August 1872.

Nundun Lall and another (Plaintiffs), *Appellants,*

versus

Mr. Lloyd (Defendant), *Respondent.*

Mr. J. H. A. Branson and *Baboos Hem Chunder Banerjee* and *Aubinash Chunder Banerjee* for Appellants.

The Advocate-General and *Baboo Bhowanee Churn Dutt* for Respondent.

If ryots are interfered with in the occupation of their land, they have a right to sue for an injunction restraining the trespasser from interference; but if they are ousted, the zemindar has a right to bring an action against the trespasser to recover possession.

Where land is held in joint proprietorship, an action to recover it from a stranger in wrongful possession must be brought in the name of all the proprietors jointly.

One shareholder alone in a joint estate, or his assignee, cannot claim to cultivate any portion of the property which is not his zerait, and without the consent of the other sharers, merely on the ground that he is willing to pay a reasonable rent for it.

Phear, J.—In this case the plaintiffs sue the defendant to prevent the cultivation of indigo on 30 beeghas of khoodkasht land belonging to the plaintiffs, and 25 beeghas 16 cottahs odd dhoors as kasht land in the occupation of ryots; in all 55 beeghas 16 cottahs 2 dhoors of land as per boundaries described in a separate paper annexed to the plaint.

The case of the plaintiffs is that they, with others, are joint proprietors of the mouzah in which the lands described in the plaint lie; and that they themselves are entitled to a 10¾ anna undivided share of the mouzah, the other proprietors being entitled to the remaining 5¼-anna share. The defendant was the ticcadar on behalf of all the shareholders from 1272 to 1278. But, on the expiration of the term of the ticca lease in 1278, the plaintiffs took their share of the mouzah into their own possession and enjoyment. The defendant Mr. Lloyd, however, obtained a ticca of 1¼-anna share from another co-proprietor, and under colour of this lease he has endeavoured to take into possession, and cultivate with indigo 30 beeghas of the khoodkasht land belonging to the plaintiffs without their consent and against their wishes; and also another 25 beeghas 16 cottahs of land held by the ryot-tenants of the joint proprietors against the will and without the consent and wish either of the plaintiffs or of the ryots; and he has prevented the ryots from cultivating *rubbee* crops, and otherwise interfered with the possession of the ryot-cultivator. And upon this ground the plaintiffs sought simply an injunction against the defendant restraining him from cultivating indigo either on the 30 beeghas of the khoodkasht land of the plaintiffs, or on the 25 odd beeghas of the kasht land in the possession of the plaintiffs' ryots.

In answer to this plaint, the defendant Mr. Lloyd stated a case at some length. But the principal features of it seem to be that he had all along, while he was ticcadar of the joint proprietors, been allowed to cultivate indigo; that indigo was not a new crop in the village; and that on the zerait lands, which were in the possession of the factory, he has always been accustomed to grow indigo. And further, that such land as he had taken into his possession from the ryots while he was ticcadar, and for the zerait land of the factory, he was willing to pay the plaintiffs their share of the rent.

In substance, he said that as to the land which he was occupying exclusively on the part of the factory he was willing to pay the plaintiffs their share of the rent, and as to the growing of the indigo crop, it was a crop which he might legitimately grow in the mouzah.

It appears to us that both in the plaint and in this written statement of the defendant there is a good deal of misconception of the relative rights of the parties. When the plaintiffs took their undivided share of the property into their own possession and enjoyment, as they had a right to do upon the expiration of the ticca lease which had been previously granted to Mr. Lloyd, they were entitled to ask from Mr. Lloyd as representative of their co-proprietors, or from their co-proprietors, to be allowed to enjoy their share of the property in any mode in which it could be enjoyed as an undivided share. And they had a right to insist that neither their co-proprietors nor anybody claiming through them should, without their consent, take exclusive possession of any portion of the joint property to which they had not at the time a subsisting right of exclusive possession. It was therefore competent to the plaintiffs in this suit to complain, if the facts were such as to justify the complaint, that Mr. Lloyd, in the mode in which he had acted, had interfered with their right of joint possession and enjoyment of the 30 beeghas, or of the 50 beeghas of the land mentioned in the plaint, and to ask from the Court such remedy as would insure to them that joint possession and enjoyment of the same which they had a right to insist upon. But this is not the case upon which they came into Court. The plaintiffs do not say that as regards any portion of this land "we wish to "till and cultivate it jointly with our co-pro-"prietors, or with our proprietor's assignee, "and we complain that in the matter "of sowing the crop of indigo we have "not been consulted; we have good "reasons as joint cultivators to object to its "being grown for us jointly with others on "these lands, and on that ground we ask to "have Mr. Lloyd restrained from growing

"it." Indeed, they could not well say this, for they do not pretend that they have any *immediate* possession of the joint land other than exclusive possession of 30 beeghas khoodkasht land. They simply say that because we were *joint proprietors* of this mouzah, and we don't wish that indigo should be grown, not on our behalf, but be grown by or for any one within the mouzah, therefore we ask for this injunction. Clearly, as we think, they have no right to the injunction upon this footing.

As to the particular 30 beeghas of land which they say is their zerait land, and from which they complain that Mr. Lloyd has in effect ousted them, the remedy which would be appropriate would be ejectment, not injunction restraining the trespasser from cultivating the particular crop. It seems to be obvious that by asking merely for an injunction against the cultivation of a particular crop, they admit the right of Mr. Lloyd to cultivate other crops, that is, they appear thereby to admit that Mr. Lloyd has a right to such possession of the land as is involved in the tilling and the cultivating of it. But so far as regards the alleged khoodkasht or zerait land of the plaintiff, this is inconsistent with the case which they themselves put forward. We need not, however, give any special attention to this part of the plaintiff's case, because both the lower Courts have come to the conclusion, which is not impeached on special appeal, that the plaintiffs have no zerait land, or at any rate, that the 30 beeghas of land described in the plaint as their zerait land are not their zerait land. In other words, the case of the plaintiffs with regard to this 30 beeghas of land, however put before the Court, and whatever the remedy asked for, is gone.

Then as regards the remaining 25 beeghas and odd, in respect of which the plaintiffs complain that Mr. Lloyd has disturbed the possession of the ryots, the facts must be either that the ryots are still in occupation of these lands, and only interfered with and embarrassed in that occupation by Mr. Lloyd's action, or they have been turned out of the occupation of the land altogether. If the first be the case, then the plaintiffs are not entitled to ask for a remedy; it is the ryots themselves who are in need of, and who ought to sue Mr. Lloyd to get, an injunction against him restraining him from interfering with them in the occupation of the land. If, on the other hand, they are, as the result of Mr. Lloyd's acts, ousted from the land, and the zemindar has a right to bring an action against the trespasser to recover possession of the land, then, clearly, it is not the plaintiffs alone who ought to bring that suit, but the whole body of the shareholders. It is the zemindar, *i.e.*, the whole body of proprietors collectively, not a portion of the proprietors alone, who has the right to recover the land from the stranger, when it has been wrongfully taken by him. The plaintiffs alone have no such right. They cannot claim to recover back from the hands of a stranger any portion of the zemindaree except in the name of all the proprietors jointly.

It thus appears to us that the plaintiffs' case has entirely fallen to the ground, and it is consequently not necessary for us to pass any opinion upon the defence which has been set up by Mr. Lloyd. But we think it right to draw attention to a case which was lately determined by this Court, and which has the effect of deciding that the position taken up by Mr. Lloyd in the passage which we last referred to is not tenable. One shareholder alone in a joint estate, or his assignee, cannot claim to cultivate any portion of the joint property, which is not his zerait land exclusively without the consent of the other shareholders, merely upon the ground that he is willing to pay a reasonable rent for it. It may, however, be the fact that Mr. Lloyd has all along been in possession of the land for which he says he is willing to pay rent to the plaintiff as the recognized tenant of the joint proprietors; and, if so, of course he cannot be turned out of that possession, except by service upon him of a reasonable notice on the part of the plaintiffs or other proprietors for the purpose of putting an end to the tenancy. And it would seem upon the facts which are alleged by Mr. Lloyd that he relied upon a long continued possession of some time in the character of a tenant. We refer to this merely to point out that the relations between the parties to this suit are not simple, and that the question as to Mr. Lloyd's right to cultivate any of the plaintiff's land may depend upon facts with which we are not now concerned; for in the view which we have taken of the case, it is sufficient for us to say that it appears to us that the plaintiffs' case has entirely broken down, and that therefore the decree of the Lower Appellate Court is a right decree. The appeal must be dismissed with costs.

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The 23rd April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Act XL. of 1858, s. 18—Guardian and Minor.

Case No. 1193 of 1873.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 13th March 1873, affirming a decision of the Moonsiff of Soodharam, dated the 30th August 1871.

Sreemutty Ahfutoonnissa (Plaintiff), *Appellant,*

versus

Goluck Chunder Sen and another (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Kalee Mohun Doss for Respondents.

A suit to recover possession of plaintiff's share of certain ancestral property, which had been pledged by her mother as guardian and other relatives during her minority for a sum of money lent on a bond, on which the obligee afterwards obtained an *ex-parte* decree decreeing the property mortgaged as liable in satisfaction thereof, having been dismissed by the first Court, the order of dismissal was upheld by the Lower Appellate Court. Plaintiff then came up in special appeal:

HELD that, although the guardian had not obtained the sanction of the Court under Act XL. of 1858, s. 18, the irregularity ought not to prevail where the mortgage-transaction was a proper one, and there was subsequently a decree in a suit in which the minor was represented under which the property was sold.

Markby, J.—WE think that the District Judge has disposed of this case rightly, and has given very clear and satisfactory reasons for his decision. The District Judge considers that there was an irregularity in consequence of the guardian not having obtained the sanction of the Court under section 18 of Act XL. of 1858 before this property was mortgaged. But we think he very rightly points out that inasmuch as the mortgage-transaction was a proper one, and there has been since a decree in a suit in which the minor was represented under which this property has been sold, the objection on the ground of that irregularity ought not now to prevail.

As regards the other point, namely, that the evidence of the debt for which the property was mortgaged was not admissible, we think that objection cannot prevail. But in saying this we must not be understood as expressing any opinion that that point is open for inquiry in this case. It was found (and no doubt rightly found) that the minor was properly represented in the suit in which a decree was obtained against the minor upon the mortgage, and such a decree under ordinary circumstances would be conclusive.

The special appeal will be dismissed with costs.

The 1st May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution—Act VIII. of 1859, ss. 206 & 207—Co-Judgment-creditors.

Case No. 399 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 15th September 1873.

Ranee Nyna Kooer and others (Judgment-debtors), *Appellants,*

versus

Doolee Chund and others (Decree-holders), *Respondents.*

Baboos Bama Churn Banerjee and *Huree Hur Nath* for Appellants.

Baboo Nil Madhub Sein for Respondents.

All the judgment-creditors except one (*H*) having applied for execution of a decree for costs against one of the judgment-debtors, the answer was that she (the judgment-debtor) had paid all that was due from her under the decree to *H*, who had, under Act VIII. of 1859, s. 206, certified the fact to the Court. The Subordinate Judge, without inquiring into the allegation, allowed execution to issue:

HELD that the applicants, not being the whole of the decree-holders, had no right to make the application without showing sufficient cause for such a course, *viz.*, either that they did not know of the alleged payment to *H*, and that, if made, it had been made to defraud them, and that the defendant was privy to the fraud.

Phear, J.—IN this case we are concerned with a decree for costs, which was passed against a considerable number of defendants, in favour of one Hookoom Narain and several other co-plaintiffs. The co-plaintiffs other than Hookoom Narain have applied for execution of the decree against one of the defendants.

The answer of the defendant is that she has paid all that is due from her to the plaintiffs under the decree to one of their number Hookoom Narain out of Court, and

that Hookoom Narain has, in accordance with the provisions of section 206 of the Civil Procedure Code, certified the fact to the Court. And this seems to be the case. But the Subordinate Judge before whom this application for execution was made was of opinion that the certificate of one of several co-judgment-creditors under section 206 was not a sufficient compliance with the section to bind the others. And therefore, without inquiring at all into the merits of the defendant's allegation that she had paid to the plaintiff Hookoom Narain all that was due from her under the decree, he has allowed execution for the full amount of the decree to issue in favour of the other plaintiffs excepting Hookoom Narain.

It seems to us that this is not a correct order. Section 207 of the Civil Procedure Code lays down that "if there be two or "more decree-holders, one or more of them "may make the application, if the Court "shall see sufficient cause for allowing him "or them to make such application; and the "Court shall in such case pass such order as "it may deem necessary for protecting the "interests of the other decree-holders."

It is plain, therefore, that the present applicants, not being the whole of the decree-holders, have no right to make the application for the execution of the decree until they have satisfied the Court to which the application is to be made that there is sufficient cause for their being allowed to take this course. And the Court must, under section 207, find that the cause put forward by the applicants is a good and a sufficient cause. But nothing of this kind has taken place in this case. And it is particularly important, regard being had to the admitted facts of the case which we have mentioned, that the Courts should be very careful in considering the ground upon which the present applicants desire to have execution of the entire decree in their favour without joining Hookoom Narain with them. The person who originally brought the suit was Hookoom Narain alone. And it was only when the suit was pending, for some reason which has not been explained to us, that the Court thought it right to add the present applicants to the record as co-plaintiffs with Hookoom Narain. And there seems to be no doubt that the cause of action, or causes of action, upon which the suit is based, did originally, at the time when the suit was instituted, belong to Hookoom Narain, and not to the applicants. It may, therefore, well enough be that defendant who says that she has paid Hookoom Narain out of Court, has in fact paid him honestly. He has certified to that effect in accordance with the provisions of section 206. And his certificate is at any rate very good evidence of the fact against himself. If the defendant has innocently paid Hookoom Narain, the person who may be termed the principal plaintiff in this suit, the amount which is due from her, then it would be most unjust that she should be compelled to pay over again to the plaintiffs other than Hookoom Narain. This is not a case in which the defendant objects to the execution on the ground that she has paid the plaintiff out of Court, and the plaintiff refuses to acknowledge the receipt of the money; for the principal plaintiff, to whom the defendant says she has paid the money, has in fact certified to the truth of that allegation in the manner provided for by section 206. And it seems to us that the present applicants, Hookoom Narain's co-plaintiffs, ought not to be allowed to make an application for execution of the entire decree in their favour until they satisfy the Court, not only that they know nothing of this alleged payment to Hookoom Narain, but also that if the payment had been made to Hookoom Narain, it has been so made with the intention of defrauding them, and that the defendant was privy to the fraud. And these matters ought to be taken into consideration when the present applicants ask the Court under section 207 to be allowed, being part only of the decree-holders, to execute the entire decree. No inquiry of this sort certainly has yet taken place; and therefore we think that the application for execution ought not to proceed.

In this view, we reverse the decision of the lower Court.

We think that both sides should pay their own costs in this Court, because we find that the ground on which we are of opinion that the present application for execution fails was not put forward or insisted upon before the Subordinate Judge. When the application, should it be repeated, is again made by the present applicants before the Subordinate Judge, and in the event of his thinking it right upon such application, after making the inquiry which has been suggested, to grant it, then we think further that he ought to treat the decree as this Court interpreted it in the case which has been quoted to us, namely, as being in fact several decrees in favour of the same set of plaintiffs against several distinct sets of defendants respectively. Each party ought to pay his own quota of costs.

The 2nd May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Review—Appeal—Limitation.

Lowazima Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 6th April 1874, affirming a decision of the Subordinate Judge of that District, dated the 17th February 1873.

Kuller Singh and others (Plaintiffs), *Appellants,*

versus

Jewan Singh and others (Defendants), *Respondents.*

Mr. M. L. Sandel and *Baboo Boodh Sen Singh* for Appellants.

No one for Respondents.

An application for review, if made within reasonable time and with due diligence, is a sufficient cause for delay in preferring an appeal, if the appeal is preferred as speedily as may be after the other proceedings.

Phear, J.—We are of opinion that we have the same discretion in regard to admitting an appeal out of time, in the event of sufficient cause being shown for not presenting the appeal within the time limited for that purpose, under the new Limitation Act as we had under the old. The clause giving this discretion is clause *b* of section 5. And we further think that, in the absence of special circumstances, the time which may have been reasonably consumed in the application for a review ought, for the reasons given in the Full Bench judgment reported in 7 Weekly Reporter, p. 529, to be excluded from computation of the period of limitation. In other words, we are of opinion that the application for review, if made within a reasonable time and proceeded with due diligence, is a sufficient cause for the applicant not presenting his appeal within the time limited for that purpose, if he prefers his appeal as speedily as may be after the termination of proceedings consequent on the application for review.

Let the appeal be admitted.

The 6th May 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Act VIII. of 1859—Jurisdiction—Cause of Action.

Case No. 129 of 1873.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 3rd June 1873.

Gopee Kisto Gossamee (Plaintiff), *Appellant,*

versus

Nilcomul Banerjee and others (Defendants), *Respondents.*

Mr. Evans and *Baboo Obhoy Churn Bose* for Appellant.

Baboos Unnoda Pershad Banerjee and *Rash Beharee Ghose* for Respondents.

Under Act VIII. of 1859, s. 5, an action may be brought either in the forum of the place where the contract was made, or in that where the performance was to have taken place.

(*Quære.*—Does this rule apply if *both* parties to the contract are at the time when it is made in a district in which neither of them has either a dwelling or any place of business?)

Where no place of performance is prescribed by the agreement or exacted by the necessities of the case, the Court must look to the intention of the parties, to be ascertained from their acts and the surrounding facts.

The ordinary rule is that an obligor is bound to seek the obligee, and tender the money due at the place where the engagement was entered into, or at the residence of the creditor; and failure to fulfil this obligation is a cause of action.

Markby, J.—In this case we directed the District Judge to draw up a decree in accordance with the provisions of section 189 of the Code of Civil Procedure, and he has now

done so. We did this in order that the matter might be properly before us on appeal. Had the case been one in which no appeal was necessary, the course taken by the District Judge, though, in my opinion, of doubtful legality, might not perhaps have called for our interference; but as the plaintiff, into whatever Court he went, was pretty sure to be met by an objection to the jurisdiction, it was obviously necessary to assist him, as far as possible, in getting a final decision upon this preliminary point.

The District Judge has not given any fresh reasons for his decision, and we may assume that his reasons are those stated in the order of 9th December 1873.

The case at its present stage must be decided upon the facts as found by that order. The District Judge says that, "accepting the "plaintiff's account of the agreement on "which the money was advanced to the "defendant, that is, that it was a loan, it is "clear to me that the cause of action arose "in Calcutta, where plaintiff's money came "into defendant's hands, and where the "repayments with the two exceptions noted "(if repayment they may be called) had "always been made." The District Judge states, however, that, in his opinion, the two so-called repayments also took place, not at Serampore, but at Calcutta.

Now the plaintiff's account of the agreement which the District Judge provisionally accepts is given at page 17 of our printed book, and it is in substance this: That defendant came to him at Serampore, and proposed to start a banian's business in conjunction with the plaintiff's son, whereupon an arrangement was made that whatever money the plaintiff should pay to the defendant, the defendant would repay to him with interest at 9 per cent., and that the defendant would give a 4-anna share of the profits to the plaintiff's son, Kristo Lall. No arrangement appears to have been made as to the manner or time, either of advance or of repayment. Nor does it appear where, at that time, the defendant lived; it only appears that he has now retired within the French territory at Chandernagore.

Assuming for the present that these facts are correct, I consider that the Subordinate Judge of Hooghly, in whose Court the suit was brought, had jurisdiction to try it.

The District Judge thinks the cause of action arose in Calcutta. Whether or no that could be truly said in any sense is a question I do not feel called upon to consider. I confine myself entirely to the above question—whether the Subordinate Judge of Hooghly had jurisdiction to try the case.

The ordinary jurisdiction of a Subordinate Judge is declared by section 19 of Act VI. of 1871 to extend to all original suits cognizable by the Civil Courts, subject only to the provisions of the Code of Civil Procedure, section 6, which have no application to the present case.

Whether, notwithstanding the special reference here made to section 6, and the omission of any reference to section 5, we must still consider that the Subordinate Judge's jurisdiction is subject to the limitations contained in both these sections, is a question upon which I need not now enter. This case has been argued on both sides on the assumption that section 5 still applies; and as I consider that even upon this view, which is that least favourable to the plaintiff, the Subordinate Judge had jurisdiction, I may decide this case upon the same assumption.

Upon this assumption the question to be decided is, what limits are placed upon the jurisdiction of the Court by the requirement that the cause of action shall have arisen within the district. The words "cause of action" have received a variety of interpretations. Most of these interpretations were, however, given upon the English County Court's Act; some were given upon the rules of English Procedure as to changing the venue; some upon the English Common Law Procedure Act of 1852, section 18; and some upon the Charters of the High Courts established since 1860.

The only decision distinctly applicable to this very provision of the law which was referred to on the argument, is the case in 8 Moore's Indian Appeals, p. 291;* and except some decisions of the Sudder Dewanny Adawlut which I will notice hereafter, I am not aware of any other.

Mr. Justice Holloway, in a very learned judgment delivered in DeSouza *vs.* Coles, 3 Madras Reports, says, that it follows from the decision of the Privy Council that "the "making of the contract is a matter perfectly "indifferent, and is no part of the cause of "action." Lord Chelmsford, however, who delivered the judgment of the Privy Council, certainly does not say so in so many words, nor can I bring myself to think it a necessary conclusion from that decision that he thought so: all I think that that learned Judge says is, that though the contract was made at Rutlam, yet the central place of

* 1 W. R. (P. C.) 35.

business, the partnership-books, and the place of payment being all at Muttra, for the purpose of giving jurisdiction, "the cause of action arose" in Muttra.

With regard to the elaborate discussion in DeSouza *vs.* Coles as to what was the strict rule of Roman Law, namely, whether under it every obligation could be enforced at the place at which it had its origin. or whether the very numerous cases in which it could be there enforced were either applications of a different principle, which was the real principle, or exceptional cases, I must say that I think it has no bearing upon the present inquiry. A great German Jurist, in opposition to most lawyers who preceded him, has maintained the first of these views. He has maintained that, under the Roman Law, in order to discover the forum, you must ascertain what he calls the "seat of the obligation," and that, generally, when the place of the origin of the obligation is referred to, it is because it is also the seat of the obligation, and that, unless it were so, the forum was not established; and having laid down this as the true principle, he, of course, maintains that the acknowledged departures of the Roman Law from this principle are to be treated as exceptions, and he will not allow that the place where the contract is made is the seat of the obligation.

But I think it is quite clear that this discussion is not now of any practical importance. Even in countries which have avowedly adopted the Roman Law as the basis of their system, the principle is firmly established that a contract may generally be enforced at the place where it was entered into. This is the law of Prussia, of Bavaria, of Hanover, and, I believe, of other German States. I may quote the law of Hanover: It declares that a contract may be enforced either in the district where it was concluded, or where it is to be fulfilled. The law of Italy (Proc. Civ., s. 90) is precisely to the same effect. Even in France, where, as is well known, jurisdiction has been made to depend chiefly upon domicile, the exception is allowed that, in matters of commerce, the suit may be brought where the promise is made, and the goods are delivered, although this may not be the place where the money is to be paid. The English Law on the question of jurisdiction in cases of contract is the very opposite of the French, allowing a defendant to be sued anywhere, if he can only be brought into Court. Yet, when restriction was put upon this latitude, it was the place where the contract was made that was fixed upon as the proper place in which to bring the suit. The statute of Richard II. prescribes that, in actions of debt and account, and all other such actions, the writs should be issued to the sheriffs of the counties where the contracts of the same actions did arise, and that, if, from thenceforth, in pleas upon the same writs, it should be declared that the contract thereof was made in another county than was contained in the original writ, then the same writ should be utterly abated. And the Common Law Procedure Act of 1852 also recognizes the principle that a Court may always enforce any contract made within its jurisdiction, wherever it may have to be fulfilled.

It seems to me, therefore, that the strict rule of the Roman Law has not been anywhere accepted as the practical rule of modern jurisprudence. And this may well be. The matter in hand is one of a purely practical character. In what Court shall a man bring his suit? The answer must depend entirely upon reasons of convenience, which, though to some extent applicable to all countries alike, may also vary according to differences in the constitution of the Courts, the means of communication, the manners of the people, and the state of commerce.

The practical rule as to jurisdiction (independently of the domicile of the defendant) which has gained the most general acceptance is that which allows the plaintiff to bring his suit, *either* in the Court of the place where the contract was made, *or* in that of the place where it was to be performed. And, if we turn from the law of other countries to that with which we are now especially concerned, we find a remarkable coincidence between the law adopted in India and that recognized elsewhere. The words of the Procedure Code now under consideration are identical with those of Regulation III. of 1793, section 8, and have long been the subject of judicial construction. A great deal of light is thrown upon the view taken of these words in the Courts of this country by a letter of the Judge of Furruckabad to the Court of Sudder Dewanny Adawlut, written on the 17th January 1834, in which it is stated that cases such as the following frequently arise:—

"A, an indigo-planter, resident in the "Mynpooree District, makes an advance of "cash to B, a zemindar, resident of Khan-"pore District, taking a bond and an agree-"ment to deliver a certain portion of "produce at C, another factory belonging

"to A, situated in the Furruckabad District, "the bond being written, and the advance "made, at A's permanent residence. B fails "in his contract, either by not delivering any "plant, or by delivering less than the stipu-"lated quantity, or of an inferior quality, at "factory C." In this case says the Judge: "Plaintiff A may sue B either in Mynpooree "or Khanpore; but the question is, can he "do so in Furruckabad? Can the cause of "action be construed to have arisen in that "district?"

The Court of Sudder Dewanny Adawlut replied:—

"The Court concur with you with regard "to the case in question, in which the "plaintiff A may sue B, either in Myn-"pooree, *where the cause of action arose*, "or Khanpore, where the defendant B "resided at the time of instituting the suit. "The failure of delivery at Furruckabad is "not a circumstance which, under the Regu-"lation, would give jurisdiction to the Court "in that district."

The Court of Sudder Dewanny Adawlut did not, however, consistently adhere to the opinion that the Court of the place of intended performance had no jurisdiction to try the suit, and the case in the Privy Council is in favour of that Court having jurisdiction. But, as far as I am able to discover, there was never any doubt whatever that (as the Judge of Furruckabad assumed, and as the Sudder Dewanny Adawlut agreed), under the Regulation, the Court would have jurisdiction, if the contract which regulated the rights of the parties was made within its local limits. And Mr. William Macpherson, summing up the law upon this point (Macpherson's Civil Procedure, Edition 1860, p. 168), says: "Probably the more con-"venient and the more liberal doctrine, and "that which harmonizes best with the deci-"sions of the Courts, is that which permits "an action to be brought either in the forum "of the place where the contract was made, "or in that where the performance was to "have taken place."

I think this is a correct statement of the law under the Regulation, and I think that I ought to put upon section 5 of the Code of Civil Procedure the same construction as had been put upon the same words under the previously-existing law. I do not pretend that the rule so arrived at is a scientific one, or that it is applicable to other Courts governed by other statutes. But, as applied to the Courts whose jurisdiction I am considering, I think it is a sensible and convenient rule, and I think there is ample authority to justify me in adopting it. I think that, looking to the construction which has long prevailed, the Subordinate Judge of Hooghly had jurisdiction in this case, either if the contract was made within that district, or the contract was there to be performed.

It remains to consider the facts of this case: That the agreement, which regulates all the subsequent rights of the parties, so far as they are in consideration in this suit, was made at Serampore, there is not the least doubt; and, therefore, I think the contract on which this suit is brought was made there. For the present purpose, I do not consider that it is necessary to take any notice of the fact that, until the money was paid to the defendant, the particular right which the plaintiff now seeks to enforce did not accrue, and that this payment took place in Calcutta. I think the practice has been, in applying the rule I have above laid down, to look to the place where the contract was made which regulates all the subsequent rights of the parties in respect of the matters contemplated by the contract. Out of almost every such contract, numberless obligations may arise, as the several events which the contract contemplates successively occur; and there is a sense in which some of these events, at any rate, such for instance, as the handing over the money to the defendant in this case, may be said to be part of the cause of action. But the contract now sued on was none the less made at Serampore in this case, because all the events contemplated by it did not happen there also; and in my opinion the cause of action arose where the contract was made.

I am indeed disposed to think that in this case *both* the conditions of the above rule are fulfilled, and that Serampore was both the place where this contract was made, and the place where the part of the performance which it is now sought to enforce was to take place, that is, that it is the place where the money was to be paid. But it was certainly the former, and therefore, in my opinion, the suit was brought in the proper Court, and ought to have been tried.

I wish to add that the rule I have adopted may possibly be held not to apply, if *both* parties to the contract were, at the time when it was made, in a district in which neither of them had either a dwelling or any place of business. I express no opinion on this. I merely point out that it is a matter of consideration.

It is also, perhaps, right that I should state why I have made no reference to the English Authorities in which the meaning of the words "cause of action" has been so frequently discussed. It is for this reason: The learned persons who have participated in that discussion have not arrived at any definition of the words "cause of action" which they can agree upon as applicable to all provisions of the law in which that expression occurs. And in my opinion it is hopeless to attempt to do so. The widest and the narrowest constructions that can be put upon these words only differ in this: That of all the events which precede an action, some persons insist on contemplating more, and some less, as the "cause" of that final event. The selection is an arbitrary one, and the purposes for which the selection has to be made are too various to admit of an agreement upon this point; which could only, indeed, be attained at a great sacrifice of convenience.

The case must be remanded to the District Judge of Hooghly to be heard and determined. Costs of this appeal and of the rule obtained by the plaintiffs, which we assess at Rs. 160, to abide the result.

Birch, J.—It appears to me that in a case of this nature, when no place of performance is prescribed by the agreement, or exacted by the necessities of the case, what we have to look to is the intention of the parties. If, from the surrounding facts and the acts of the parties, we can ascertain what place was in their contemplation the place of performance, the Courts of that place have jurisdiction. Three places of jurisdiction seem to be recognized—the place of domicile of the defendant or debtor, the place of origin, the place of fulfilment. Savigney, in discussing the forum of the obligation in the numerous class of cases in which no place of fulfilment is specified, gives the preference to the place of fulfilment thought of and expected by the parties as determining the forum; since that expectation implies a tacit appointment of the place of fulfilment, and a tacit submission of the defendant to the jurisdiction of that place.

In a case reported in the 8th volume of Moore's Indian Appeals,* the Judicial Committee held that the central place of business of the contracting firm being the place where the books were kept, the accounts would have to be balanced, and the payment of the balance, if any existed, made, was the place where the plaintiff's action lay. In that case, the defendant resided in an independent state. The Sudder Court, North-Western Provinces, had held that jurisdiction was to be determined by the place of the origin of the obligation, and this finding was reversed, the contemplated place of fulfilment being held to determine the forum.

I do not treat this case as laying down a rule of universal application; each case has to be decided upon the facts elicited therein, but it is useful as a guide in determining the test of jurisdiction. The ground of the special jurisdiction for obligations seems to favour the plaintiff, to facilitate for him proof and execution, enabling him to sue not merely at the domicile of the defendant, but at his own. In the present case, assuming at this stage the statements in the plaint to be correct, the agreement was entered into at Serampore, there payments were made, and meetings held between the contracting parties, and there it was intended that accounts should be finally adjusted. This being so, the Hooghly Court has jurisdiction.

We have had the English case of Jackson *vs.* Spitall* much discussed. I am not at all disposed on the appellate side of this Court to refer to discussions in the English Courts upon the construction of the words "cause of action," which have been on our Indian Regulations since the enactment of Regulation III. of 1793. The wording of section 5 of our present Code is taken from that Regulation; and I am the less inclined to do so when I find that in the most recent case in which the meaning of these words has been discussed, Cherry *vs.* Thompson, Law Reports, 2 B., Vol. XII., page 576, the Court of Queen's Bench dissented from Jackson *vs.* Spitall. In that case Mr. Justice Blackburn, after stating that he arrived at a different conclusion from that arrived at by the Court of Common Pleas, and quoting the cases in which the Court of Common Pleas, the Court of Exchequer, and the Court of Queen's Bench had arrived at different conclusions as to the interpretation to be put upon the words "cause of action," remarks: "As far, therefore, as the weight of authority goes, it may be considered nearly equal."

The ordinary rule is that the obligor is bound to seek the obligee, and tender the money due at the place where the engagement was entered into, or at the residence of the creditor, and failure to fulfil this obligation is a cause of action.

* 1 W. R. (P. C.) 35.

* Law Reporter, Vol. V., Common Pleas, p. 542.

The 7th May 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit for Possession and Declaration of Right—Limitation—Act XIV. of 1859, s. 1, cl. 3.

Case No. 113 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 29th March 1873.

Ram Kanth Chowdhry (Defendant), *Appellant,*

versus

Kalee Mohun Mookerjee and another (Plaintiffs), *Respondents.*

Baboos Sreenath Doss and *Okhil Chunder Sen* for Appellant.

Baboos Kalee Mohun Doss, Doorga Mohun Doss, and *Bykant Nath Doss* for Respondents.

Plaintiffs sue for possession of, and a declaration of, their right to a share of a zemindaree, and to set aside a collusive decree which defendant No. 1 obtained on the 13th of September 1867 against the defendants 2, 3, and 4, and to set aside the sale which was held on 16th December 1868 in execution of that decree. There is a further prayer that the names of the plaintiffs may be substituted for that of the defendant No. 1 on the Collectorate towjee:

HELD that this suit, although a portion of the prayer is for possession and declaration of right, is substantially to set aside the sale of 16th December 1868, in virtue of which, unless got rid of, the purchaser-defendant's title must prevail over that of the plaintiffs. Accordingly the suit comes within the purview of Act XIV. of 1859, s. 1, cl. 3, and, not having been brought within one year from the date of the sale, is barred by limitation.

Kemp, J.—THE defendant No. 1, Ram Kanth Chowdhry, is the appellant in this case; the other defendants in the Court below, Nos. 2, 3, and 4, the judgment-debtors, have not appeared in this Court. The plaintiffs, who are pleaders of the Zillah Court of Tipperah, bring this suit for obtaining possession of, and a declaration of, their right to a 7½-gundas share of a zemindaree set forth in the plaint, and to set aside a collusive, fraudulent, and illegal decree which the defendant No. 1, the appellant before this Court, obtained on the 13th of September 1867, in the Court of the Principal Sudder Ameen of Tipperah, against the defendants Nos. 2, 3, and 4; they also sue to set aside the sale which was held in execution of that decree, the said sale having taken place on the 16th December 1868 in execution of the decree obtained on the 13th of September 1867. There is a further prayer that the names of the plaintiffs may be substituted for the name of the defendant No. 1 on the Collectorate towjee. The suit is valued at Rs. 5,808-4-6, being ten times the sudder jumma of the aforesaid share of 7½ gundas. The plaintiffs allege that the late Roy Wooma Kanth Sen Bahadoor, Commissioner of Soonderbuns, obtained a money-decree, so far back as the 30th of June 1863, against the defendant No. 2; that they, the plaintiffs, purchased the rights and interests of the defendant No. 2 in satisfaction of that decree, on the 9th of March 1869, for the sum of one rupee; that the defendant No. 1 obtained mutation of his name on the Collectorate register without the knowledge of the plaintiffs; and that the cause of action to the plaintiffs has arisen from the date of the auction-purchase. They further state in their plaint that the defendant No. 1 took a dyesoodee ijara for 106 of the properties belonging to the judgment-debtors for the realization of the money due to the defendant No. 1 under a bond; that this dyesoodee ijara-transaction was a benamee one in the names of the servants of the defendant No. 1; that the defendant No. 1 has realized more from the profits of this ijara than was due to him under the bond; that substantially there was nothing due to the defendant No. 1; and that the said proceedings, namely, the decree obtained by the defendant No. 1, and the sale, which took place in execution of that decree, are all fraudulent and collusive proceedings between the defendant No. 1 and the judgment-debtors; that the plaintiffs came to know of this fraud in July 1871, when the defendant No. 1 brought a suit against the plaintiff No. 1, Kalee Mohun Mookhopadhya, being suit No. 55 of 1871.

The defendant No. 1, in his written statement, first takes objection to a person having been made a party to this suit long after his death; that objection was, however, got rid of by the plaintiffs, intimating to the Court that they had no claim against that deceased party. The next objection is that the suit of the plaintiffs is barred, inasmuch as it has not been instituted within three years from the 9th of March 1869, and that the allegation of the plaintiffs, that they found out the alleged fraud practised by the defendant No. 1 in July 1871, is false. The defendant then retaliates upon the plaintiffs, and alleges that the decree, under which the plaintiffs purchased, was also a fraudulent and

collusive decree, and that at the time the plaintiffs purchased the property, the judgment-debtors had no right left in the property in dispute. Then he goes into the question of the dyesoodee ijara not being a benamee transaction at very great length, but we do not propose to enter into that part of the case, inasmuch as there has been a finding by the Subordinate Judge, which finding is supported by the evidence that the ijara was a benamee transaction, and that the beneficial owner was the defendant No. 1 and not his servants; and Baboo Sreenath Doss, who appeared for the defendant No. 1, the appellant, stated to the Court that he is unable to support that portion of his appeal which refers to the dyesoodee ijara not being a benamee transaction. Then the defendant No. 1, in his written statement, refers to a bond which was executed by the judgment-debtors for a sum of Rs. 16,600: this bond, we may observe, is not disputed; it is dated the 29th of Assar 1272. The defendant No. 1 goes on to say that the judgment-debtors having defaulted in paying the instalments according to the terms of the bond, a suit was brought against them, No. 126, for three kists—namely, two kists of 1273 and one kist of 1274, the total sum claimed in that suit being, principal Rs. 3,984, interest Rs. 292; total Rs. 4,276. The defendant No. 1 obtained a decree for that sum against the judgment-debtors on the 19th of August 1867, corresponding with 4th of Bhadro 1274. Very shortly after his obtaining that decree, the judgment-debtors, on the 12th of Bhadro 1274, petitioned the Court, stating that, inasmuch as several of the properties which were mortgaged as security for the payment of the interest due, upon the principal sum of Rs. 16,600 had been sold by the zemindar for arrears of rent, and as there was a probability of other properties being sold in the same way, and as the interest was fixed at a very high rate, namely, 24 per cent. per annum; and as the security was from the above causes daily diminishing, the sum which would eventually be due to the defendant No. 1, under the terms of that bond, would amount at the end of the term of the dyesoodee ijara in 1277 to a very large sum, they prayed the Court to give the defendant No. 1 a decree for the sum due at the date when that petition was filed, receiving from the defendant No. 1 a remission of a sum of Rs. 2,500; and further stating to the Court that, if this were done, it would be for their benefit. The judgment-debtors, with the consent of the defendant No. 1, asked the Court to interfere, and to adjust their respective responsibilities in this matter.

The Subordinate Judge laid down five issues: The first issue was an issue in bar, namely, whether the suit was barred by limitation or not; and on the facts the issues were whether the decree, in execution of which the defendant No. 1 purchased the property in dispute, was based on fraud or not?

2nd.—Whether Brindabun and Kristo Doss, the ostensible owners of the dyesoodee ijara-case, were the benamdars of defendant No. 1 or not?

3rd.—What was the amount due, if any, to the defendant No. 1 prior to the decree and auction-sale in favour of the defendant No. 1, after taking into account all receipts, whether from the profits of the said ijara or from the sale-proceeds of other properties, or from any other sources; in other words, was there any balance due at the time the sale took place; and, if so, what amount?

And, lastly, which of the two auction-purchasers, the plaintiffs or the defendant No. 1, should have the preference?

On the issue in bar, the judgment of the Subordinate Judge is extremely vague. He says that, as the plaintiffs were not parties to the sale at which the defendant No. 1 purchased, the general law of limitation was, in his opinion, applicable to the case. He further finds that, from the document filed by the defendant No. 1, the plaintiffs were aware of the decree passed in favour of the defendant No. 1, and of the auction-sale which resulted from that decree previous to the time, namely, July 1871, at which the plaintiffs allege that they came to the knowledge of the fraud; but he says: "Be that as it "may, as the case is not governed by clause "3, section 1, Act XIV. of 1859, the one "year's limitation, but by the general limit-"ation of 12 years, it was immaterial whether "the plaintiffs discovered the fraud at the "time alleged or not." Then the Subordinate Judge goes very minutely into the question whether the dyesoodee ijara was a benamee transaction or not. We shall not touch on that part of his decision for the reasons already given. Then, with reference to the 1st and 3rd issues on the merits, namely, whether the decree in execution of which the defendant No. 1 purchased was based on fraud, and whether the whole amount of money due to the defendant No. 1 was realized by him previously to the auction-sale from the profits of the ijara or other sources, or what amount was due to him at that time, the Subordinate Judge came to the conclusion

that the decree obtained by the defendant No. 1, and the sale which followed that decree in execution, were fraudulent and collusive transactions. He also finds that the sum properly due under the decree which the defendant No. 1 obtained was 10,252 rupees 8 annas, from which must be deducted the various sums received by the defendant No. 1 on account of the surplus sale-proceeds, amounting altogether to 16,064 rupees 6 annas 9 pie; and thus, deducting from the latter sum the sum of 10,252 rupees 8 annas, which the Subordinate Judge considers to be the sum properly due under the decree to the defendant No. 1, he comes to the finding that the defendant No. 1, instead of being the creditor of the judgment-debtors, is their debtor to the amount of 5,811 rupees 14 annas 9 pie, and as, notwithstanding this fact of the judgment-debtors having 5,811 rupees 14 annas 9 pie due to them, they allowed the property to be sold without any objection, therefore it is clear to the Subordinate Judge that they were acting in collusion with the defendant No. 1. With reference to the fact that the property was purchased by the plaintiffs for the sum of only one rupee, the Subordinate Judge says that, as nobody else bid for the property, the plaintiffs, who were pleaders of the Court, bought in the estate for the sum of one rupee only; but it may have been also that nobody bid for the property, inasmuch as it had already been sold by auction in satisfaction of the decree of the defendant No. 1. The decree obtained by the defendant No. 1 and the sale in execution of that decree were therefore held by the Subordinate Judge to be void, the purchase of the plaintiffs was declared valid, and the names of the plaintiffs were ordered to be substituted in the place of the name of the defendant No. 1 on the Collectorate towjee; the defendants paying the plaintiffs' costs. We observe that there is no order as to possession, which was not given, although prayed for in the plaint.

The first point we have to decide in this appeal is whether the suit of the plaintiffs is barred, inasmuch as it was not instituted within one year from the date of the defendant No. 1's purchase. We have already said that the purchase of the defendant in execution of the decree of the 13th September 1867 took place on the 16th of December 1868. The present suit is instituted on the 6th of March 1872, and therefore, if the provisions of clause 3, section 1, Act XIV. of 1859 apply to suits of this nature, the plaintiffs' claim is clearly barred, unless they can show by satisfactory evidence that they discovered the alleged fraud within one year from the time of bringing the suit. We do not think that the plaintiffs are entitled to any time on the ground that they did not discover the alleged fraud until July 1871. In their plaint they admit that the defendant No. 1, after purchasing the disputed property, obtained mutation of his name on the Collectorate towjee on the 8th of August 1870. No objection was made to this proceeding on the part of the plaintiffs, although their purchase was more than a year prior to that proceeding. Then we have the fact that the plaintiffs are admittedly vakeels of the Court of the Subordinate Judge of Tipperah. Our attention has been called to a case in which one of the plaintiffs, Kalee Mohun Mookhopadhya, was the pleader for one of the judgment-debtors in the present suit. Both the plaintiffs' names are mentioned in the vakalutnama in that case, but it appears that only Kalee Mohun Mookhopadhya accepted the vakalutnama. This vakalutnama was filed in the execution-case connected with this very decree on the 14th of January 1868 on behalf of the widow of Prosunno Ghose, one of the judgment-debtors. Now this fact, in our opinion, fixes the plaintiff No. 1 at all events, with knowledge of the decree and sale in favour of defendant No. 1. Further, we have the fact that, at the time the property was sold and purchased by the defendant No. 1, or on the 16th of December 1868, the plaintiff No. 1, Kalee Mohun Mookhopadhya, bid at the auction-sale, bidding Rs. 2,700, or in advance of the previous bid. Therefore it appears to us clear that the plaintiffs' allegation that they discovered the fraud in 1871 is altogether false.

But it has been contended by Baboo Doorga Mohun Doss, who appeared for the respondents, that clause 12, section 1 of the Limitation Act applies to a suit of this description, it being a suit to obtain possession of land in which the reversal of the sale is merely incidentally mentioned, the prayer being for declaration of the plaintiffs' right and for possession, and, inasmuch as the plaintiffs were not parties to the proceeding in which the sale took place, and the defendant No. 1 purchased, the limitation of one year does not apply. On the other hand, it is contended by Baboo Sreenath Doss, for the appellant, that the plaintiffs sue to set aside a sale under which the defendant is admittedly in possession; that the suit is not on the footing that the plaintiffs had obtained possession, and had been dispossessed by the

defendant No. 1; that the sale is all that stands in the way of the plaintiffs' title, and that, if you take away the sale, the plaintiffs' title is established; and therefore the suit is substantially a suit to set aside the sale, and clause 3, section 1, Act XIV. of 1859, applies. Baboo Sreenath Doss has referred us in the first instance to a decision in Volume II., Bombay Reports, p. 18. Now, that was a case in which the plaintiff sued to recover possession; he had been in possession, and he alleged that he had been forcibly dispossessed by the defendant. The learned Chief Justice, who was then Chief Justice of Bombay, was of opinion in that suit that, as it was one to enforce the same right which could be enforced by the suit referred to in section 246, Act VIII. of 1859, he could come to no other conclusion than that the present suit, the suit before him, fell within the provision of clause 3, section 1, Act XIV. of 1859, and ought to have been brought within one year. That decision is alluded to in a subsequent decision by the same learned Judge, to be found in Volume V., Bombay Reports, commencing at page 139. That also was a suit to obtain possession of a shop from which the plaintiff had been ejected by the defendant. The defence in that action was that the suit was barred by lapse of time, as it had not been brought within one year from the sale of the shop. The Chief Justice in that case, after referring to the case of Ram Gopal Roy *vs.* Nund Gopal Roy, 4th Weekly Reporter, page 42, was of opinion that that decision laid down that, where a party is dispossessed by the Court in execution of an auction-sale, that party must sue within one year to reverse the sale-proceedings; but, if he is dispossessed by the purchaser otherwise than through the Court, he can sue within 12 years of his cause of action; that, in the case before him, namely, the case of Lall Chand Umbaidass *vs.* Sakha Ram Chunder Rai, the case for possession of a shop, it appeared that the plaintiff's tenant had been ejected from the shop by the Court in execution of the auction-sale, and the question was whether a suit to recover possession must be brought within one year under clause 3, section 1, Act XIV. of 1859. He then says that the object of the suit was to render the sale void and totally inoperative as regards the property in question, and that, though not in form to set aside the sale, it was virtually a suit to do so; that, in special appeal in a case in Volume II., the Court were of opinion that, as it was a suit to enforce the same right which could be enforced by the suit referred to in sections 246 and 269 of Act VIII. of 1859, it ought to be brought within 12 years. The learned Judge then goes on to say that, as there were contrary opinions by the High Court of Calcutta, he thought it right to re-consider the opinion given in the case in Volume II. He then says that clause 3 is in terms applicable only to suits to set aside the sale; that the concluding words appear to show that it is to be construed strictly, and that these concluding words are inapplicable to a suit where the dispossession is the cause of action; and that they appear to refer to a suit by a party to the suit in which the execution issued, or by a purchaser, who are bound by the confirmation of the sale, and not to a suit by a person not bound by it. Therefore he was of opinion that the conclusion arrived at in the case reported in Volume II. could not be supported, and that that decision must be considered as overruled.

Now, in this case, it is very clear that the plaintiffs when bringing their suit were under the impression that they would have to get rid of the one year's plea in bar, and, if they brought their suit upon the general law of limitation, it was necessary for them to introduce the element of the discovery of the fraud in 1871; for it is obvious that, dating either from their purchase or the purchase of the defendant, the suit, if governed by the 12 years' law of limitation, was amply within time. For that reason we find them attempting to prove their allegation of not having discovered the fraud until July 1871. If they could have established that to the satisfaction of the Court, their suit, being instituted on the 6th of March 1872, would have been in time. But, for the reasons already given, we hold that they have entirely failed to establish that allegation. This suit, although a portion of the prayer of it is for obtaining possession and declaration of right, is substantially a suit to set aside the sale of the 16th of December 1868, at which the defendant No. 1 became the purchaser of the property in dispute for Rs. 3,100, and, until that sale is got rid of by the plaintiffs, the title of the defendant must prevail over that of the plaintiffs. We therefore think that this suit comes within the purview of clause 3, section 1, Act XIV. of 1859, and that the suit, not having been brought within one year from the date of the sale, namely, from the 16th of December 1868, is barred. But, as the merits have been fully entered into in the argument before us, we propose also

to enter into them, and on the merits we entirely differ from the finding arrived at by the Subordinate Judge.

It appears, and this is admitted, that, on the 29th of Assar 1272, corresponding with the 12th July 1865, the judgment-debtors in this suit borrowed a sum of Rs. 16,600 from the defendant No. 1 to meet a decree in which their property had been lotted for sale. The bond was a joint one, but the liability of each of the judgment-debtors is set forth in the bond. Grish Chunder Bose's liability is Rs. 9,400, Kashee Chunder's Rs. 200, Juggodeshur's and Prosunno Chunder Bose's liability is set down at Rs. 6,900, and Doorga Churn Bhooya's at Rs. 100; total Rs. 16,600. On the same day on which the bond was executed, a dyesoodee ijara-lease was also executed by the judgment-debtors in the names of two servants of the defendant No. 1. We have already held, in concurrence with the Subordinate Judge, that there can be no doubt that it was taken by the defendant No. 1 in the names of his two servants, Brindabun and Kristo Doss. That ijara was for a term of five years, or from 1272 to 1277. It was provided by the terms of that ijara that, after paying the sudder rent, amounting to 4,286 rupees 14 annas 6 gundas and collection-charges Rs. 690, a sum of Rs. 3,984 remained, which was to be appropriated by the defendant No. 1, the creditor, to the payment of interest upon the Rs. 16,600 borrowed at the rate of 24 per cent. per annum. There is a kistbundee set forth at the foot of the dyesoodee ijara pottah from 1271 to Assar 1277, and the principal due was to be paid on the expiry of the term of the lease. The kists in payment of interest were three kists per annum, in Aughran, Falgoon, and Assar, which three kists amount to Rs. 3,994, as stated above. Now it is on the record that the judgment-debtors defaulted in the payment of the kists, and that a suit was brought, No. 126, for three kists, namely, two kists of 1273 and one of 1274, amounting to Rs. 3,984, with interest Rs. 292; total Rs. 4,277. So that at this early stage of the transaction the judgment-debtors had commenced to default in paying the kists, and this is accounted for by the fact that subsequent to the execution of this dyesoodee ijara-lease, several of the properties pledged were sold for rent due to the zemindar; notably the property No. 143 which was sold on the 15th of July 1867, or within about two years after the execution of the dyesoodee ijara, for arrears of rent due to the zemindar. The sum for which that property was purchased was Rs. 8,400. Now the jumma of this property alone is Rs. 600, so that, by the sale of this one property, and there were many other properties sold in addition to this, nearly one anna in the rupee of the security was diminished.

In this state of things, the judgment-debtors, on the 12th of Bhadro 1274, petitioned the Court to the effect that the properties which they had pledged to secure the punctual payment of the interest due on the principal sum of Rs. 16,600 at the rate of 24 per cent. per annum was being gradually diminished owing to sales for arrears of rent; and that although the principal was not due until the end of the lease, or in Assar 1277, if the interest in the payment of which the default had occurred be allowed to accumulate, and if suits were brought on every occasion of default, looking to the very high rate of interest they had to pay, and to the fact that they would eventually be liable at the end of the lease for the Rs. 16,600 principal, plus the lapsed kists and the interest on the lapsed kists at the rate of 24 per cent. per annum, with costs of the suits, their liability at that time would amount to a very large sum, they therefore applied to the Court to give the defendant No. 1 a decree for the sum then due; the judgment-debtors who were the petitioners receiving from him a remission of Rs. 2,500. The Court on receiving this petition passed an order that, without the consent of the defendant No. 1, the creditor, no order could be passed. Upon this the defendant No. 1 applied to the Court, and a decree was passed on the terms of the petition of the judgment-debtors, which was assented to by the defendant No. 1 on the 13th of September 1867. Now it has been said in the course of the argument by the pleaders for the respondent that this decree was executed within seven days of the date on which it was passed, namely, on the 20th of September 1867, and that attachment was taken out on the 21st of December 1867. This may be so, and no doubt it was to the interest of the defendant No. 1 after having come to terms with the judgment-debtors to lose no time in taking out execution of that decree. The bond on which that decree was based was a specially-registered bond; and the application of the judgment-debtors, which was consented to by the judgment-creditor, the defendant No. 1, was the basis of the decree passed in September 1867, in execution of which the defendant No. 1 purchased the property in suit. We think that, looking to the facts detailed above,

this transaction was one which was eminently beneficial to the judgment-debtors. By coming to this early adjustment of their debt they avoided the liability of having to pay 24 per cent. interest upon each of the lapsed kists, and at the time the petition was made they had already defaulted in paying several of these kists. They obtained a remission of Rs. 2,500, and on the whole we think that the transaction is not to be impugned in any way on the score of fraud. Then, with reference to the Subordinate Judge's opinion as to there having been a large sum due to the judgment-debtors at the time the defendant No. 1 purchased these properties, instead of a sum due to the latter, in the first place we have to observe that the calculations of the Subordinate Judge are altogether wrong, and this much has been admitted by the pleader who appears for the respondent, Baboo Doorga Mohun Doss. The Baboo in his argument stated that, assuming that the defendant No. 1 was entitled to charge interest at the rate of 24 per cent. per annum only up to date of that suit, the sum due would be 10,252 rupees 8 annas, and the Baboo wished to set off certain items, namely, 8,450 rupees 8 annas 9 pie, on account of the surplus sale proceeds of a zemindaree belonging to the judgment-debtors, a sum of Rs. 1,557, which we may observe the defendant No. 1 admits he received; a sum of Rs. 400, for which it is said that there is a receipt from the defendant No. 1; a sum of Rs. 52 and a sum of Rs. 2,110, for which also there are said to be receipts from the defendant No. 1; and a further sum of Rs. 1,795 said to have been realized on the day of the sale by the sale of other properties belonging to the judgment-debtors. These items aggregate Rs. 14,364, and deducting therefrom the sum which the Baboo says is all that the defendant No. 1 could under any circumstances have claimed from the judgment-debtors, there remains a sum of Rs. 4,112 due to the judgment-debtors. But we think that this argument is not tenable. Under the decree the claim made by the defendant No. 1 for which he obtained a decree, which decree has not been set aside, was 14,268 rupees 8 annas, namely, principal Rs. 14,000 and costs 268 rupees 8 annas; total 14,268 rupees 8 annas. Then there was the decree in suit No. 126, which was not satisfied. The amount due under that decree was Rs. 4,266 and Rs. 151 costs, so that the total sum due to the defendant No. 1 under the two decrees was 18,685 rupees 8 annas. Assuming, for the sake of argument, that all the items which Baboo Doorga Mohun Doss asks the Court to set off as against the claim of the defendant No. 1 were allowed, those items amounting to the sum of only Rs. 14,364, being deducted from the sum of Rs. 18,685 due under the two decrees, would still leave the defendant No. 1 a creditor to the amount of Rs. 4,321. We only use this illustration to show that the calculation of the Subordinate Judge below is incorrect, and that even if we admit all the items claimed to be set off by Baboo Doorga Mohun Doss, and which, we may observe, with the exception of the one for Rs. 1,557, have not been proved to our satisfaction, there would be still a sum due to the defendant No. 1, and not, as supposed by the Subordinate Judge, a sum of 5,811 rupees 14 annas 9 pie due to the judgment-debtors by the defendant No. 1.

Then it is said that this Court ought to take into consideration what sums were realized by the defendant No. 1 from the profits of the ijara, and that we ought to call upon him for an account. We think the Court is not bound to do anything of the kind. The judgment-debtors might possibly ask the Court to take an account from the ijaradar, if they were in a position to show that the debt with interest has been recovered from the profits of the ijara mehal, but, as already observed, they have not appeared in this Court. They moved the Court themselves to decree the suit brought against them by the defendant No. 1 on the terms of their own petition, and that suit was decreed on a specially registered bond and according to the terms of the petition of the judgment-debtors.

Lastly, it was said during the course of the argument that the decree obtained by the defendant No. 1 was illegal on the ground of want of jurisdiction. The Baboo who appeared for the respondent entered into an elaborate argument to the effect that inasmuch as the suit of the defendant No. 1 was on a stamp of quarter value when it ought to have been on full stamp, the suit does not come within the provisions of the Registration Act, and therefore the Subordinate Judge acted without jurisdiction in passing that decision. We may observe that this point was not raised in the Court below, and we cannot permit it to be taken now, even if there was anything in it, which we do not think there is.

On the whole case, therefore, we think the plaintiffs have entirely failed, first, because their suit is barred by the statute of limitation, not having been brought within one

year; and, secondly, because they have not proved that the decree obtained by the defendant No. 1 and the sale which followed it were fraudulent and collusive. We reverse the decision of the Court below and dismiss the plaintiff's suit with costs of both Courts.

The 7th May 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Mortgage—Foreclosure—Cause of Action—Limitation—Regulation XVII. of 1806.

Case No. 118 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 28th February 1873.

Dinonath Gangooly (Plaintiff), *Appellant,*

versus

Nursingh Pershad Doss (Defendant), *Respondent.*

Baboos Gopal Lall Mitter and *Grish Chunder Ghose* for Appellant.

Baboos Doorga Mohun Doss, Bhyrub Chunder Banerjee, Sham Lall Mitter, and *Tarucknath Dutt* for Respondent.

Proceedings in foreclosure are irregular and invalid unless a copy of the application accompanies the notice as required by Regulation XVII. of 1806.

A mortgagee by conditional sale has a right of entry immediately after default, and the Regulations do not debar him from the stipulated possession. Limitation runs from the date of such default; no new cause of action arising upon foreclosure.

Markby, J.—In this suit the plaint alleged that one Sookh Monee Dossee had obtained by gift from her husband two estates, Cossimpore and Nowparah, containing 26 mouzahs, and recorded in the Collectorate under the Nos. 196 and 193, respectively. The plaint states that Sookh Monee, being in possession of this property, borrowed from Jumna Doss and Kishen Doss the sum of Rs. 25,000, and as a security on the 27th of Srabun 1260 executed in his favour a mortgage of the property by way of conditional sale. The plaint also alleges that during Sookh Monee's lifetime the defendants purchased her rights at an auction-sale and got into possession; that the rights of the mortgagees were purchased by the plaintiff on the 18th of Bysack 1273; and that he issued notices of foreclosure to the defendants, who failed to pay the money within time, and so the conditional sale became absolute on the 23rd August 1868, whereupon the plaintiff brings this suit for possession.

The defendants call upon the plaintiff to prove his title as mortgagee; but that point has not yet been enquired into in the lower Court; the suit of the plaintiff having been tried and dismissed upon the two following issues only: (1) Whether or not notice of the *bybal* (*i.e.*, foreclosure) had been regularly served? (2) Whether the suit is barred by lapse of time, and whether the limitation in this suit should run from the date of realization of money prescribed in the *kul-kobala*, or from the date of the foreclosure proceedings, or purchase by the defendant?

The Subordinate Judge found that the notice of foreclosure had been properly served upon all the parties,—the purchasers of Cossimpore, the purchasers of Nowparah, and the original mortgagors.

Upon the other issue, relying upon a decision reported in the 14th Moore's Indian Appeals,* the Subordinate Judge held that a suit against a purchaser whose possession is *bonâ fide*, and without notice by a mortgagee founded on the title to enter into possession by reason of a default having occurred, ought to be brought within 12 years after the commencement of the purchaser's possession. The Subordinate Judge then goes on to say that there is no dispute in this case as to the purchasers from the mortgagor having been more than 12 years in possession, and having purchased *bonâ fide:* and with regard to their having purchased with notice of the mortgagee's title, he finds that an attempt which has been made to prove that notice was given through the Sheriff of Calcutta had failed; and, therefore, considering that the case falls within the decision of the Privy Council, he dismissed the suit as barred by limitation.

I deem it convenient first to dispose of the questions of fact which have been raised before us in the appeal. It has been contended for the plaintiff that notice of the mortgage is proved to have been given to the purchasers, but I see no reason to differ with the finding of the Subordinate Judge upon that point. All that is proved is that Mr. Gillanders, the attorney of the mortgagee, wrote and sent to the Sheriff the letter set out at page 26. From this we are asked to presume that the Sheriff gave notice of the mortgage at the time of sale. I do not think it safe to presume this: there is no

* 15 W. R. (P. C.) 24.

evidence whatever of the practice of the Sheriff's office in this respect.

With respect to the service of notice of foreclosure, I think there is no ground for disagreeing with the Subordinate Judge as to the service of notice in due form upon Nursingh Dass and the other purchasers of Cossimpore Even if the answers of Nursingh Dass at page 68 cannot be treated (as the Subordinate Judge would treat them) as an admission of service of notice, they certainly are not as clear and explicit a denial as I should expect. On the other hand, I think the evidence of Suheerooddeen, the peada who served the notice, is reliable. Of course, it is not improbable that he should forget having served this notice, but I think in a matter of this kind, the report which he made in the usual course of business to the nazir, and which he swears to be a true report, may be looked at. This report is on the record and should have been inserted in our printed book; and it appears from the nazir's evidence (which is also on the record and should also have been printed) that it was made according to the usual course of business in the office. I think, therefore, that in the absence of any very satisfactory contradiction, we may assume that a copy of the notice of foreclosure was affixed to the door of the house, together with a copy of the application; that the requirements of section 8 of Regulation XVII. of 1806 have been thereby complied with; and that therefore the foreclosure proceedings as against the purchasers of Cossimpore have been regularly taken.

With regard to the purchasers of Nowparah, I think it is proved that the notice of foreclosure was delivered at the house of Girish Chunder Banerjee, the auction-purchaser; but I can find no proof whatsoever that the notice was accompanied by a copy of the application to the Judge, as required by section 8 of the above Regulation. The words of the Regulation are express that the Judge shall cause the mortgagor or his representatives to be served with a copy of the application; and it has been, I believe, always considered that proceedings in foreclosure are not regular unless a copy of the application accompanies the notice. (See the Constructions of the Sudder Dewanny Adawlut, No. 604, June 24th, 1831.) It was said that it was altogether unnecessary that this should be done, and that in fact all the information which the purchasers could make any use of was given by this notice. But I do not feel justified in saying that the mortgagor or his representative loses his right of redemption, when one of the formalities expressly required by the Regulation has not been fulfilled.

Upon the evidence I do not think it possible to hold that a copy of the application was served with the notice. The notice recites that a copy of the application (in the notice called the petition) was sent therewith. But in the order of Mr. Justice Phear, in the return of the Sheriff, and in the deposition of Kristo Roy, only a notice is mentioned; and according to the practice of this Court on the original side, had the application accompanied the notice, it would have been so mentioned in the order of Mr. Justice Phear and the return of the Sheriff.

It seems to me, therefore, that if it be necessary for the plaintiff's case to show as against the purchaser of Nowparah that the mortgage had been foreclosed, this has not been done.

It remains to consider whether the suit should have been dismissed as against all the defendants on the ground of the statute of limitation. I will first take the case of the purchasers of Cossimpore, and as regards these defendants, the case stands in precisely the same position as it did before the Subordinate Judge. These persons acquired their title by a purchase in good faith without notice of the mortgage; they were in possession for more than 12 years prior to this suit, but within 12 years of their purchase proceedings for foreclosure were duly taken, and within the 12 years the year of grace expired. In the case in the Privy Council upon which the Subordinate Judge relied, the real facts were wholly different from the present case. The Privy Council, however, expressed their opinion as to what would be the effect of the statute of limitation, if the facts had been such as one of the parties unsuccessfully asserted them to be. These hypothetical facts were that a purchaser at a sale in execution of a decree against a mortgagor had got into possession and remained in possession for 12 years before the suit was brought. That is also the case here, but there is this distinction that in the hypothetical case which was being dealt with by the Privy Council, it is assumed that no proceedings by way of foreclosure had been taken against the purchaser, whereas in the case with which I am now dealing (that of the purchasers of Cossimpore) such proceedings have been taken.

The same distinction may be drawn between this present case, so far as it relates to the defendants who are the purchasers of

Cossimpore, and the later decision of the Privy Council in XIV. Moore's Indian Appeals, p. 144;* where also no proceedings by way of foreclosure had been taken which were effectual against the mortgagor. The only other difference which was suggested on the argument between these two cases in the Privy Council and the case of the purchasers of Cossimpore is, that in the second and apparently in the first also of the cases before the Privy Council, the mortgage was in the English form, and not in the form of mortgage under which the plaintiff here claims. In the two cases to which I have referred, the suit against the purchaser who had been 12 years in possession was held to be barred; so that as regards the purchasers of Cossimpore, our decision will depend upon how far these two distinctions affect those decisions.

Now, in order to enable us to appreciate the value of these distinctions, we must consider what the law of limitation is as applicable to a mortgagee seeking to recover possession of the mortgaged property. It is sufficient to advert to the law as laid down by Act XIV. of 1859 which governs the present suit. The only provision in that statute which is applicable is that contained in section 1, clause 12, which provides that in suits for the recovery of immoveable property, the suit should be instituted within 12 years from the date when the cause of action arose. Now the cause of action would arise when two things have occurred: that the plaintiff had a right to possession, and that the defendant was holding possession not permissively and acknowledging the plaintiff's right, but relying upon his own right, or adversely as it is called. If the plaintiff had not a right to immediate possession, or if, having a right to possession, the defendants were holding with the plaintiff's permission and acknowledging his right, no suit could be brought in the one case because the right to possession had not accrued, and in the other because it had not been disturbed or denied. Now it has been contended for the plaintiff that under a conditional sale in this form no right of entry accrued until foreclosure, but it seems to me impossible to hold that consistently with the provisions in the deed which is before us, and which is operative, except so far as the Regulations of 1793 and 1805 prevented its being so. The deed recites that the mortgagor had received Rs. 25,000; that the nett annual profits of the property are Rs. 3,000; that in liquidation of the interest, the mortgagee is to receive that amount from the ijaradar under the mortgagor; that the money borrowed is to be repaid on the 26th Assar 1262 (9th of July 1855); and then follows this clause: "If I do not repay the whole money "within the period, then this conditional bill "of sale will be reckoned as a true and "absolute bill of sale; my and my successor's "rights will cease to the said zemindaree; "the proprietary rights with the rights of "gifts and sale to it will accrue to you and "your successors; and registering your names "in the serishta of the Collectorate, you "will take possession of it in the mofussil; "and, on payment of revenue, you, your sons, "grandsons, &c., will continue to have feli-"citous occupation and possession thereof." Now the law has provided that if the mortgagee take possession, he is accountable to the mortgagor for the profits which he has received. The law has also provided that if the mortgagor desired to redeem the property, he may do so within the period specified in the statute of limitation, unless the mortgagee shall in the meantime have taken proceedings for foreclosure: and the effect of these provisions is no doubt greatly to curtail the rights which the mortgagee has stipulated for. But one of the rights here expressly stipulated for is the right to possession, and the law has nowhere provided that this right shall not be exercised by the mortgagee. There is indeed a case in which it appears to be laid down that the mortgagee under a conditional sale has no right of possession until foreclosure (Sudder Dewanny Adawlut Reports, 1857, p. 1818), but I cannot reconcile that with the two decisions of the Privy Council to which I have referred. In both these cases, the property was situate in the mofussil, and it would, I think, be impossible to hold that the mortgagee of property in the mofussil under a mortgage in the English form had a right to the possession, and a mortgagee by conditional sale had not. In both cases the mortgagee has contracted for the possession at a certain date, and, therefore, if he be debarred from his right to possession, it must be by reason of the Regulations. But the Privy Council has given a construction to the Regulations which is that they do not debar the mortgagee from possession, if he has stipulated for it after default. But, on the contrary, on default the right of entry immediately accrues. It seems to me, therefore, that the first distinction relied on avails nothing, and that the plaintiff under this deed of conditional sale had the same

* 16 W. R. (P. C.) 33.

right of entry after default as the mortgagees had in the two cases decided by the Privy Council.

But it is said that even if the plaintiff had a right to possession, he had no cause of action, because the possession of the purchasers was not adverse. This argument is, I think, also answered by the observations of the Privy Council in 14 Moore's Indian Appeals, p. 111,* where it is said: "Their "Lordships think that the title of a judgment-"creditor, or a purchaser under a judgment-"decree, cannot be put on the same footing as "the title of a mortgagor, or of a person claim-"ing under a voluntary alienation from the "mortgagor. They are of opinion that the "possession of a purchaser under such cir-"cumstances is really not the possession of "a person holding* *in "priority of the mort-"gagor*, or holding "so as to be an "acknowledgment of "the continuance of the title of the mort-"gagee. The possession which the purchaser "supposed he acquired was a possession as "owner. He thought he was acquiring the "absolute title to the property, and that he "was in possession as absolute owner."

* This is so printed in all the books, but *quære*, whether it should not be "*in privity with the "mortgagor.*"

That was a judgment upon the earlier Regulations. But at page 150 (a case under Act XIV. of 1859) it is said of a purchaser under similar circumstances, "that it is "impossible to hold that the defendant, the "purchaser, was holding, or supposed that he "was holding, by permission of the mortgagee, "and when both things concur—possession "by such a holder for more than 12 years, "and the right of entry under the mortgage-"deed more than 12 years old—it is impossi-"ble to say that such a possession is not "protected by the law of limitation."

I think, therefore, that there was a complete cause of action against the purchasers of Cossimpore on the 9th of July 1855; and that a suit founded upon that cause of action was therefore barred when the suit was brought.

But it is said, and was pressed strongly upon us by Baboo Gopal Lall Mitter in his very able argument for the appellants, that an entirely new cause of action arose when foreclosure became absolute by the expiry of the year of grace. Now, at first I was inclined to think that some of the decisions in India favoured this contention; but upon a careful examination of all the cases quoted and some others, I am satisfied that whilst there are some decisions expressly against it, there is no decision which countenances it. The doubt has been, not whether the mortgagee is wholly barred when 12 years have elapsed from the time when his cause of action first accrued, but when it can be first said that he has a cause of action. It has nowhere been said that upon foreclosure the mortgagee has a new cause of action, but it has been doubted in some cases whether before foreclosure he had any cause of action at all. This was the ground of the decision in favour of the mortgagee in the case reported in Sudder Dewanny Adawlut Reports, 1857, p. 1817. The Court there says: "The mortgagee's right to posses-"sion of the property does not become "complete till he has performed certain acts "prescribed by law; consequently as the "mortgagee's right to sue to enforce the "conditions of his bond is not complete till "those acts have been carried out, the date "of his cause of action must be considered "to arise from the time when those acts "are completed, and not from the date when "the money becomes due. The law, more-"over, does not compel a mortgagee to com-"plete his right within any fixed period." Clearly, the Court thought that in that case there was no right of entry at all until foreclosure. So, too, in the case decided by a Full Bench of the High Court of the North-Western Provinces on the 2nd May 1867. The Court say: "We cannot concur in the rule which "has been laid down in some of the author-"ities cited to the effect that as a mortgagee's "cause of action arises on the mortgagor's "making default, the mortgagee's suit for "possession must be instituted within 12 "years from the date of default, with allow-"ance for the year of grace, when foreclo-"sure-proceedings are instituted at the "earliest possible date. A default may be "made by the mortgagors, which may give "the mortgagee a right to sue or to enter "into possession (if he chooses to assert "such right), but which may notwithstand-"ing have no effect whatsoever in altering the "nature of the mortgage title. So long as "the mortgagor in possession, or those who "claim under him, assert merely a title "to redeem, advance no other title incon-"sistent with it, such possession must, *primâ "facie* at least, be treated as perfectly "reconcilable with, and not adverse to, the "title of the mortgagee, and the continuation "of the lien on the property pledged."

But this was a suit not between the mort-

* 16 W. R. (P. C.) 19.

gagee and a purchaser from the mortgagor, but a suit between the mortgagee and the mortgagor herself. There might, therefore, well be reasons for holding that the possession of the mortgagor was not adverse, and it appears that the Courts below had not found that it was so. But so far from saying that if the possession prior to the foreclosure had been adverse, a new cause of action would arise upon foreclosure, the High Court remanded the case with directions which seems to me inconsistent with this view. They say: "It will "be for the Courts to consider the effect "of the whole evidence, and whether it "tends to show possession by the mortgagors "for any, and what number of years adverse "to, and inconsistent with, the alleged mort-"gage title. It is well settled that fore-"closure-proceedings under the Regulations "give no efficiency to transactions not in "themselves valid. If there was really no "mortgage, the mortgagees having never "advanced the money, or if the mortgagors "have repudiated the mortgagee's right, and "have held adversely to them and without "recognition of their title for 12 years, "they can derive no benefit whatsoever in "this suit from the foreclosure-proceedings. "The mortgagors are entitled to put them "to the proof of a valid and existing mort-"gage title at the time of foreclosure, and "that such title has been finally and duly "foreclosed. If such a title is proved, this "suit to recover possession is brought within "the limited time," and the suit was accordingly remanded. But if foreclosure gives a new cause of action, there was no necessity to remand the suit at all, for the proceedings in foreclosure had only been recently taken.

The case of Preonath Roy Chowdhry *vs.* Rookhun Begum, in the 7th Moore's Indian Appeals, p. 311, is also consistent with the view that no new cause of action arises upon foreclosure. It was held in that case that the suit of the mortgagee was not barred, but the ground of the decision is stated at page 354. After observing that it cannot be laid down, as a rule universally true, that under Regulation III. of 1793, section 14, a mortgagee is barred after 12 years from the date of redemption fixed by the deed, the Privy Council say: "The "possession of those who claim under the "mortgagor, so long as they assert a title to "redeem, and advance no other title incon-"sistent with it, must, *primâ facie* at least, "be treated as perfectly reconcilable with, "and not adverse to, the title of the mort-"gagee, and the continuation of his lien on "the thing pledged. It is by no means the "essence of such a title there, any more "than it is here, that it should be accom-"panied by an actual continuing possession "of the lands. The pledgee may from "various causes be reluctant to assume "possession of the pledge, or to shorten the "period of its redeemable quality." The Privy Council then, after observing that "it "by no means follows as a consequence that "a mortgagee foreclosing will be able in a "suit for possession to make good against all "occupants a title to possession," proceed to inquire whether the mortgagee's title to enforce possession was barred; but this enquiry would have been wholly unnecessary if the proceedings in foreclosure gave a new cause of action; for the mortgage in that case was not finally foreclosed until the 25th June 1849, and the suit for possession was brought immediately afterwards.

The decisions which lay down directly that a mortgagee is barred altogether after 12 years' adverse possession are Sudder Dewanny Adawlut Reports (North-Western Provinces), 1853, p. 100; Sudder Dewanny Adawlut Reports (Bengal), 1859, p. 1495; Sudder Dewanny Adawlut Reports (North-Western Provinces), 1854, p. 234, where also previous cases of the like nature are referred to.

So, too, if foreclosure gave a new cause of action, the law of limitation would be thrown into much confusion. No safe title could ever be acquired against a mortgagee in the mofussil; for as to mortgages in the mofussil, no time is prescribed for taking proceedings in foreclosure, and the provision contained in section 6, Act XIV. of 1859, would not (as is generally supposed) be an exception to the general law in favour of the mortgagee, but it would be a restriction upon the rights of the mortgagee in favour of the parties in possession. This is certainly not the view taken by the Privy Council of this section at p. 150 of 14th Moore's Indian Appeals. The Privy Council clearly treat this provision as an exception made in favour of the mortgagee, and consider that where this exception does not apply, the only resource for the mortgagee would be to prove that the possession of the mortgagor or his assignee had not been adverse. It seems to me, therefore, that upon the whole, there is nothing in the decided cases to warrant us in holding that a new cause of action arises upon foreclosure.

It has been contended that the mortgagee is at any rate not barred if he commences

foreclosure-proceedings within 12 years of the date when the possession first became adverse; and brings his suit for possession within 12 years of the expiration of the year of grace. No doubt this suggestion avoids some of the inconveniences which would arise if the right of the mortgagee to foreclose and take possession were wholly unlimited. But it does not seem to me to rest on any foundation in law. If foreclosure does give a new cause of action, the question whether foreclosure took place within 12 years of default will be immaterial. If, on the other hand, it does not, then the operation of the statute can only be prevented by the institution of a suit. But to take proceedings in foreclosure, in the mofussil at any rate, cannot be called the institution of a suit. There is no writ of summons; the mortgagor and his representatives are not summoned and cannot be heard; and the action of the Court is purely ministerial. Such a proceeding cannot be called the institution of a suit within the meaning of Act XIV. of 1859 without a straining of language, for which I see no justification.

I have considered this case with reference only to the provisions of the statute law and the decided cases, and not upon any general principles. The relation of mortgagor and mortgagee, being the result of an interference by the Legislature with the expressed intention of the parties, is an anomalous one, and therefore a deduction from general principles cannot always be safely made with regard to it. It is for this reason that I have not considered when the mortgagee becomes the owner of the property mortgaged. It seems to me that where the relation between the parties is so anomalous, it is impossible to fix this date so as to justify any conclusion from it upon the matter now under inquiry. If it be said that the mortgagee only becomes owner of the property after the expiration of the year of grace, and not before, still I do not think he can be said to *acquire* the property at that date, and thus to acquire a new title to possession.

The result is, that as regards the purchasers of Cossimpore, I hold, first, that upon default of the payment of the mortgage-debt, the mortgagee had a right to possession; secondly, that the possession which these purchasers obtained upon their purchase was not held by them under the permission of the mortgagee, but as absolute owners; and, thirdly, that no cause of action arose upon completion of the foreclosure-proceedings. I therefore hold that the purchasers of Cossimpore can successfully set up the bar of limitation.

With regard to the purchasers of Nowparah, they stand in somewhat more favourable position than the purchasers of Cossimpore. As against them the mortgage has not been foreclosed. The question, therefore, as to whether any new cause of action arises upon foreclosure has no bearing upon the suit as against them; *à fortiori*, therefore, as against them, the suit is barred.

The result is, that in my opinion the decree of the Subordinate Judge dismissing the suit should be affirmed, and the appeal dismissed with costs.

Miller, J.—I concur in holding that the decree of the lower Court ought to be affirmed with costs. Out of the many issues which arose from the allegations of the parties to this suit, the decision of the lower Court mainly dealt with two of them only, *viz*, (1) Whether or not notice of foreclosure had been regularly served? and (2) Whether or not the plaintiff's suit was barred by limitation? The lower Court has decided the first of these issues in favour of the plaintiff, and the second against him. I propose to consider the second question first.

The *kut-kobala*, or the conditional bill of sale on which this suit is based, was executed on the 27th Srabun 1260 (10th of August 1853), and the amount taken upon it was promised to be repaid on the 26th Assar 1262 (9th of July 1855). The rights and interests in the mortgaged premises of Sookh Monee Dossee, who executed this document, were sold at a Sheriff's sale in the execution of a decree of the Supreme Court of Calcutta on the 18th December 1856, and purchased by the ancestors of some of the defendants in this case. And ever since their purchase, they and their heirs have been in possession. The plaintiff alleges that he has acquired the entire rights of the original holders of this *kut-kobala* by purchase, and that he has caused the notices of foreclosure to be served upon all the defendants, and that the year of grace expired on the 23rd of August 1868.

For the purposes of the adjudication of this issue, I shall assume that all these allegations of the plaintiffs have been proved, although the defendants have joined issue with him upon every one of them. The material portion of the deed of conditional sale which bears upon the question is the following: "If I do not repay the whole "money within the period, then this con-"ditional bill of sale will be reckoned as a

"true and absolute bill of sale; my and my "successor's rights will cease to the said "zemindaree; the proprietary rights with the "rights of gifts and sale to it will accrue to "you and your successors; and registering "your names in the serishta of the Collec-"torate, you will take possession of it in "the mofussil, and on payment of revenue, "you, your sons, grandsons, &c., will continue "to have felicitous occupation and possession "thereof."

The first question that arises in determining this issue is when did the cause of action in this suit arise? The plaintiff contends that it arose on the expiry of the year of grace, and if that contention be correct, the suit having been instituted within 12 years from that time, is not barred by limitation. But I do not think that this contention is correct. From the terms of the conditional sale set forth above, it is evident that on default of payment within the stipulated time, the mortgagee was entitled to take possession of the properties sold unless restrained by any legislative enactment. It is said that he was so restrained by Regulation XVII. of 1806. This argument entirely proceeds from a misapprehension of the provisions of that law. It is quite clear that parties are ordinarily bound by the terms of their contract, unless by legislative interference one or both of them are set at liberty to modify or annul any of its provisions to which they have mutually consented. The *kut-kobala* in question expressly reserves to the mortgagee the right of entry upon the mortgaged premises on default of payment within the stipulated time. Regulation XVII. of 1806, or any other law, does not render such a stipulation inoperative between the parties. I am therefore of opinion that the mortgagee in this case immediately on default of payment, which occurred on the 9th of July 1855, was entitled to take possession of the properties mortgaged. Whatever distinction there may be between this case and the Privy Council decision reported in 14 Moore's Indian Appeals, p. 144,* it is an authority in support of this conclusion, *viz.*, that there is no legislative bar to the exercise of this right of entry by the mortgagee. Therefore it is clear that the right to assume possession of the properties in dispute accrued to the mortgagee so far back as the 9th of July 1855, and unless the plaintiff can make out that his present suit for possession is not based upon that right, but upon some other right which came into existence at a more recent period and within 12 years, his suit must fail as barred by limitation.

Baboo Gopal Lall Mitter with some plausibility has urged that the plaintiff is not now suing for possession on the right of entry which had accrued to the mortgagee on the 9th of July 1855, but upon the right which arose on the day the sale became absolute, the mortgagees not having repaid the mortgage debt within the year of grace allowed by Regulation XVII. of 1806. He further contends that conceding that the mortgagee in this case might have assumed possession immediately after the default in payment had been made, still that possession would have been as a mortgagee, and the plaintiff now seeks to recover not as a mortgagee, but as an absolute owner; therefore the present suit is not based upon the right of entry given by the conditional bill of sale, but upon the right to possession, which is a necessary incident to the right of absolute ownership which has been vested in the plaintiff by the foreclosure-proceedings. But is it a correct proposition to assert that a holder of a conditional bill of sale invariably acquires an absolute right to the mortgaged premises as soon as the proceedings laid down in Regulation XVII. of 1806 (usually called foreclosure-proceedings) have been duly carried out? If it is not, the whole argument must fail. I do not think that this proposition is universally correct. The effect of the proceedings laid down in the Regulation in question is simply to bar the right of redemption. That is to say, when the right of ownership in a particular property is divided between two persons standing to each other in the relation of mortgagee and mortgagor, these proceedings when duly carried out have the effect of terminating the right of the one, *viz.*, of the mortgagor, and perfecting that of the other, *viz.*, of the mortgagee. But this pre-supposes the existence of valid and subsisting rights in both of them, and these proceedings are quite ineffectual when this is not the case. For example, under Act XIV. of 1859, which is the law of limitation governing this case the mortgagor's right of redemption is barred after the lapse of 60 years from the date of the mortgage (see section 1, clause 15). In a case where a mortgagee has been in possession for more than 60 years of the mortgaged property, it is not necessary for him to have recourse to the foreclosure-proceedings. On the other hand, where

* 16 W. R. (P. C.) 33.

rights of a mortgagee have been extinguished by lapse of time, these proceedings, if taken by him, would be quite ineffectual. Therefore, if, on the day of the expiry of the year of grace, a valid subsisting right of a mortgagee exists in a holder of a *kut-kobala*, the omission of the borrower to repay the mortgage-loan before that date has the effect of transferring the remaining rights of the latter to the former, who acquires from that date absolute ownership in the property mortgaged. But if, on the other hand, the mortgage rights of a holder of a *kut-kobala* have been extinguished by lapse of time or other causes, previous to that date, the foreclosure-proceedings, even if duly carried out, are entirely ineffectual, and do not affect any person's right in the least. This view of the law is supported by the following observations which occur in a Full Bench decision of the High Court Reports, North-Western Provinces, p. 108: "If there was really no mortgage, "the mortgagees having never advanced the "money, or if the mortgagors have repudiated "the mortgagee's rights, and have held "adversely to them and without recognition "of their title for 12 years, they can "derive no benefit whatever in this suit "from the foreclosure-proceedings."

Let us see what are the facts of this case connected with this question. I find that the mortgagee's right to demand possession accrued on the 9th July 1855. It is not shown that since that date possession has not been withheld from him "in breach of the contract." It is not suggested, far from being proved, that the original mortgagors and the subsequent purchasers have been allowed to remain in possession with the mortgagee's consent, either express or tacit. Notices of foreclosure are alleged to have been served upon one set of defendants in December 1866, and on the other set of defendants in February 1867. Therefore, before the expiry of the year of grace in either case, *i.e.*, on 9th of July 1867, all rights of the mortgagee had been extinguished by lapse of time. In this view of the law, I hold that the plaintiff is not entitled to a fresh start from the date of expiry of the year of grace, and his present claim is therefore barred by limitation.

With respect to the other issue, I agree with my learned colleague, for the reasons given by him, in holding that the service of notice upon the defendants has been proved, but that the plaintiff has failed to establish that the notice upon Grish Chunder Banerjee was accompanied by a copy of the application to the Judge, as required by Regulation XVII. of 1806. I am also of the opinion that this omission has the effect of rendering the foreclosure-proceedings against the heirs of Grish Chunder Banerjee invalid and ineffectual.

The 7th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Religious Endowment—Shebaits—Alienation—Right of Suit—Additional Party—Act VIII. of 1859, s. 73.

Case No. 2204 of 1873.

Special Appeal from a decision passed by the Officiating Judge of the 24-Pergunnahs, dated the 27th May 1873, reversing a decision of the First Subordinate Judge of that District, dated the 23rd September 1872.

Biddia Soonduree Dossee and others (Plaintiffs), *Appellants,*

versus

Doorganund Chatterjee and others (Defendants), *Respondents.*

Baboo Nil Madhub Bose for Appellants.

Baboo Juggut Chunder Banerjee for Respondents.

Case.—Plaintiffs, as shebaits, sued for declaration of the rights of two idols in certain property and for possession by setting aside an execution-sale, alleging that their late father-in-law dedicated the property to the service of the idols, and by his will appointed his adopted son *R* (their husband) to be the shebait of the said idols; that plaintiffs were performing the service from the profits of the endowment; and that their husband had mortgaged the property to the defendant *A*, who had subseqnently caused it to be sold in execution:

HELD that the plaintiffs having no right as shebaits against R could not maintain the suit, and having omitted to make him a defendant, the Court could not make him a party under Act VIII. of 1859, s. 73, without a material variation of the plaint.

Ainslie, J.—IT seems to us that the Lower Appellate Court was right in holding that the plaintiffs could not maintain this suit. Before they could set themselves up as shebaits with a legal right to proceed against the present defendants, it was necessary for them to show that they had in some way acquired a right as shebait against Rama Pershad, who was the shebait properly appointed under the will of Radha Mohun Chowdhry, the founder of the endowment. They have not made Rama Pershad a party in the present suit, and we think that, looking to the form of the plaint, the Court ought not to make him a

party under section 73. The plaintiffs have deliberately chosen, not only to omit to make Rama Pershad a defendant in this suit, but also to state their claim in sufficiently wide terms. If we add Rama Pershad as a defendant on the record, we must also add a prayer to the effect that it be declared that he has, by his misconduct, forfeited his right, so as to give the plaintiffs a right to represent the idol as against third parties, and maintain this suit. This is such a variation of the plaint that we do not think the provisions of section 73 should be applied in this suit. The special appeal will be dismissed with costs.

The 11th May 1874.

Present :

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Attachment—Act VIII. of 1859, s. 270—Mortgage-bond—Lien of Mortgagee.

Case No. 2231 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 9th July 1873, affirming a decision of the Officiating Subordinate Judge of that District, dated the 23rd December 1872.

Raj Chunder Shaha (Plaintiff), *Appellant,*

versus

Hur Mohun Roy (Decree-holder), *Respondent.*

Baboos Kalee Mohun Dass, Mohinee Mohun Roy, and *Lall Mohun Dass* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Plaintiff obtained a decree under Act XX. of 1866, s. 53, on a specially registered bond, and in execution attached and sold the property which had been mortgaged thereunder. As this property, however, had been previously attached by defendant, the Court ordered the proceeds to be paid to defendant. Plaintiff sued defendant to recover these proceeds :

HELD that Act VIII. of 1859, s. 270, lays down a mere rule of procedure for determining questions between rival decree-holders, which was never intended to alter or limit rights secured by contract independently of the Code of Civil Procedure :

HELD that, in selling the mortgaged property, plaintiff sold the whole interest of his debtor, and his lien was transferred from the property to the purchase-money. Plaintiff was accordingly declared to be entitled to the sale-proceeds sued for.

Ainslie, J.—ONE Emam Buksh, on the 30th July 1869, mortgaged certain property to the plaintiff by a specially registered bond as security for a debt of Rs. 4,273. On the 30th July 1870, the plaintiff obtained a decree under section 53, Act XX. of 1866. In execution of that decree he attached the mortgaged property on the 1st December 1870, and, on the 18th April 1871, this property was sold at the plaintiff's suit. It appears that, prior to the attachment by the plaintiff, the defendant, on the 17th July 1870, attached the same property, and the Court, by an order of the 25th July 1871, directed, under the provisions of section 270 of the Civil Procedure Code, that the sale-proceeds be paid over to the defendant by right of his prior attachment. The plaintiff sues to recover those sale-proceeds from the hand of the defendant, and the only question before us is whether his right, by reason of the contract-lien he had obtained on the property, is to take precedence of the right of the defendant by prior attachment. We are of opinion that the rule in section 270 is a mere rule of procedure by which the Courts are to be guided in determining questions between rival decree-holders, but that it was never intended to alter or limit the rights to which a party may have by contract independently of the rules embodied in the Code of Civil Procedure. This case may be disposed of by reference to a judgment delivered by Mr. Justice Pontifex, reported in 19 Weekly Reporter, p. 255. In that case it was held that the decree was a simple money-decree; that the form of the mortgage or charge created by the bond did not vest any estate in the mortgagee, but only established a lien as incident to the money-debt; and that, when the contract-debt passed into a judgment-debt, the lien continued; that, inasmuch as the debtor had done nothing whatsoever to discharge the lien, it could not of itself cease to exist, and, if it did exist, it only existed as incidental to the judgment-debt. The judgment then goes on to state that the creditor attached the property in execution of his decree, and Mr. Justice Pontifex says: "It seems to me "clear that an attachment under a money-"decree on a mortgage-bond and the mort-"gage-lien cannot co-exist separately in the "property hypothecated, and that such an "attachment must be treated, when existing, "as an attachment enforcing the lien; and as "the property was sold pending such attach-"ment, the lien was transferred from the "property to the purchase-money, and there-"upon the property became thenceforth dis-"charged from the lien," and it is then said that the purchaser of the decree in that case "after the rejection of his application with

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"respect to the purchase-money, might have "instituted a regular suit to establish his "title to it under section 270."

We think where there is a simple mortgage and a money-decree obtained on the bond, if the creditor chooses to proceed against the mortgaged property, and to sell it, he must be taken to sell the whole interest of his debtor. The interest of the debtor is in no way reduced by the hypothecation, and no part of his estate passes from him to the creditor. The property is simply pledged as a security. As the plaintiff in this case must be taken to have sold the whole property mortgaged under his decree, he has nothing to fall back upon except the proceeds which represent that property. There is no possible reason that we can see for supposing that, by proceeding in this way to realize from the security, he loses the security. In this view we think that the judgments of both the Courts below, in so far as they concern the present respondent, must be set aside, and the plaintiff must be declared entitled to recover from the respondent the amount of the sale-proceeds paid over to the latter, and also to recover costs in all the Courts.

The 12th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Conveyance by Party not in Possession—Right of Suit—Objections—Special Appeal.

Case No. 1507 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 29th April 1873, affirming a decision of the Subordinate Judge of that District, dated the 12th July 1872.

Bikan Singh and others (Defendants), *Appellants,*

versus

Mussamut Parbutty Kooer and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Bama Churn Banerjee* for Appellants.

Baboos Chunder Madhub Ghose and *Judoo Nath Sahoy* for Respondents.

Where a conveyance of property was made by a son who had been in possession and enjoyment for years before she was wrongfully ousted, the conveyance was held to give a right to sue for immediate possession.

An objection against the decision of the lower Court ought not to have effect in special appeal, unless it is of such a kind as to indicate probable failure of justice.

Phear, J.—We think that we ought not to interfere with the decision of the Lower Appellate Court.

We were first asked, on the part of the appellant, not to entertain the appeal on the ground that Parbutty Kooer, in favour of whom jointly with others the decree appealed from had been made, when the appeal was called on, presented a petition to the Court asking that a compromise, which she alone had entered into with the present defendant, be carried into effect; and we were further asked to pass a decree between the parties according to the terms of that compromise.

Now, clearly this petition did not of itself afford any sufficient ground why the appeal should not be proceeded with. Parbutty Kooer and those persons who, under the decree which is now appealed from, are jointly judgment-creditors with her, in due course, jointly retained a pleader of this Court, and by him have appeared in this appeal. If Parbutty Kooer has any good reason for withdrawing her vakalutnama which she gave jointly with her co-judgment-creditors, she ought to have done so before the appeal came on to be heard. Undoubtedly, if the learned gentleman who appears for her with a separate petition to-day had given us any ground for supposing that, by postponement of the appeal, and so giving Parbutty Kooer an opportunity to withdraw her vakalutnama before the appeal came on to be heard, right and justice would be promoted, we should feel ourselves bound to postpone it for that purpose. But nothing has been brought before us tending to make us suppose that this would be the case. Even if Parbutty had, from the beginning, declined to take any part in defending the appeal, her co-judgment-creditors would certainly have a right to be allowed to do so without her, unless prevented by good cause arising out of their own conduct. And, even if no one appeared on the appeal on behalf of the plaintiffs respondents, still the appeal would have to be heard and determined on its merits, unless it was withdrawn. In which case the appellant would have the decree of the lower Court against him. The compromise made with

one of the co-judgment-creditors could only be taken into consideration, if at all, in the execution-proceedings.

When the appeal was called on, the only ground upon which it was maintained before us, was the objection that the plaintiffs, Nos. 3, 4, and 5, that is, the judgment-creditors, other than Parbutty Kooer, had no right of suit jointly with Parbutty Kooer in this case; and therefore that the decree which has been made in their favour jointly with Parbutty Kooer was a bad decree, and ought not to be allowed to stand.

It seems that, according to the statement of facts made in the plaint, the cause of action accrued to Parbutty Kooer herself some time before the suit was brought, and that, while she was out of possession of the property which she now seeks to recover (probably for the purpose of obtaining necessary funds to carry on the suit), she sold a share in that property and certain rights of suit to the plaintiffs who have been spoken of as plaintiffs 3, 4, and 5, and it is urged that, according to decisions of this Court and of the Privy Council, persons in the situation which these last-mentioned plaintiffs thus came into do not thereby obtain a right of suit for the recovery of the immediate possession of the land. We have been referred on this point to the case reported in the 21 Weekly Reporter, p. 101, and to the cases decided in the Privy Council and in this Court which are cited in that report. But, in all those cases, we find that the property which was the subject of conveyance had never, before the date of the conveyance, been in the possession and enjoyment of the person who professed to convey it. And the Courts held that, under the circumstances of those suits, the conveyance did not of itself operate to pass a right to sue alone for the immediate possession of the property, and that it was at least essential to such a right that the vendee should be in a position to claim specific performance of the contract of conveyance from his vendor. The facts of the present case are different, because both the Courts below have found that Parbutty Kooer had been in possession and enjoyment of the property which is the subject of suit for some four years before she was wrongfully ousted from the property by the defendants in the way she alleges in her plaint, and she herself in her plaint states that she has effectively given a share of the property to her co-plaintiffs. And we have, in the decisions reported in the 11 Weekly Reporter, p. 134, and in the same volume, p. 80, precedents tending to show that a conveyance of property, under circumstances similar to those alleged in the present plaint, give the person, to whom the conveyance is made, a right to sue for the immediate possession of the property.

In our opinion the present case does not fall within the principle which was laid down by the Privy Council, and followed in the cases reported in the 21 Weekly Reporter, p. 101. But, even had we thought otherwise, it still would be a question here whether we ought to interfere upon special appeal, because we ought not, on special appeal, to give effect to an objection made against the decision of the lower Court, unless that objection be of such a kind as to satisfy us that there has probably been a failure of justice consequent upon the decision passed by the lower Court.

Now it must be borne in mind that in the present appeal no objection whatever is made to the decision of the Lower Appellate Court upon the merits of the case. And the finding of that Court is that the defendants wrongfully ousted the plaintiff Parbutty Kooer from the possession of the property in suit to which she was of right entitled, and of which she had been previously in the quiet possession and enjoyment. This being so, and the decree for recovery of possession as against the defendants having been made in her favour, it can be in no way, so far as we can perceive, of any prejudice whatever to the defendants that the persons to whom Parbutty Kooer has, by her own account, conveyed a share of this property should be joined with her as co-plaintiffs. We must take it that she has an undoubted right under this decree as against the defendants to have the possession and dominion over this property. And this being so, the co-plaintiffs, who, by her own solemn affirmation made in the plaint, are persons to whom she has conveyed a share of this property, are entitled as well against her as against the defendants to obtain a specific performance of their contract with her. And it would serve no end of equity or good conscience, as far as we can see, to interfere with the decree which has been made by the lower Court by excluding from that decree the names of Parbutty Kooer co-plaintiffs as judgment-creditors.

On the whole, we are of opinion that there is no good ground shown to us on this appeal for our disturbing the decision of the Lower Appellate Court. And accordingly the appeal is dismissed with costs.

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The 13th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Jurisdiction—Special Appeal.

Case No. 2262 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 30th June 1873, reversing a decision of the Moonsiff of Serampore, dated the 30th September 1872.

Koylash Chunder Ghose (one of the Defendants), *Appellant,*

versus

Shaikh Ashruf Ali (Plaintiff), *Respondent.*

Messrs. G. Gregory and *C. Jackson* and *Babco Bhowanee Churn Dutt* for Appellant.

Baboos Mohinee Mohun Roy, Hem Chunder Banerjee, and *Kash Beharee Ghose* for Respondent.

A Moonsiff having returned a plaint under Act XXIII. of 1861, s 3, and dismissed the suit as being in value beyond his jurisdiction, the plaintiff appealed to the District Judge, who, on 14th June 1872, pronounced the decision wrong, and ordered the Moonsiff to try the suit. The suit was accordingly tried and dismissed; but on appeal it was decreed by the Subordinate Judge. Subsequently a special appeal was preferred in which objection was raised on the score of jurisdiction:

HELD that the objection could not be taken at this stage, as defendant had not chosen to appeal against the District Judge's order of 14th June 1872.

Ainslie, J.—THE objection as to jurisdiction cannot be taken at this stage of the case. The appellant had a right to come up here in special appeal from the order passed on the 14th of June 1872. He did not choose to do so, although the orders of the lower Courts were against him, but he now wishes to take this point on the authority of the decision in the Weekly Reporter, Volume V., p. 91, which does not appear to us to apply to this case.

The matter of limitation is one which affects the plaintiff's right to recover at all, whereas this question of jurisdiction has no bearing upon the merits, and simply refers to the form in which a suit should be brought.

Of the other objections taken by the appellant, the one in respect of the necessity for the creation of the putnee by Oma Moyee cannot be admitted. We must take it that the Subordinate Judge's finding is a finding of fact upon that point. But with respect to the confirmation of the putnee by Aubinash Chunder after the death of Oma Moyee, the judgment of the lower Court seems to us defective in several respects. The Subordinate Judge says that "the dakhilas and "the hookoomnama are full of fraud, because "they were filed in Court after the putnee "had been granted to the plaintiff; and as "the defendant Koylash did not venture to "file the three papers, the two dakhilas "were filed through one named Bama "Churn, who was the gomashta of Koylash, "and the hookoomnama through one "named Shama Churn, who was a servant of "Koylash." The fact that the papers were not filed in Court before the granting of the putnee to the plaintiff may or may not be material according as it appears that there was occasion to file them or not. The fact of Bama Churn and Shama Churn having filed the hookoomnama and dakhilas, they being servants of Koylash, does not appear to us to be material Such proceeding would not relieve Koylash of any responsibility in respect of those papers, if it should turn out that they are forgeries.

Then there is this further objection that the Moonsiff says in his judgment: "Be-"sides these there are certain other dakhilas "granted by Aubinash which have been pro-"duced and proved by the defendant." These other dakhilas have not been considered in any way by the Subordinate Judge.

It is alleged that payments of rent have been made by the defendant to the reversioner after purchase by the plaintiff, and that the plaintiff has been standing by silent. If this is so, it is a most important fact in the case, and one which cannot fail to influence the judgment of the Court below.

We think that on the question of the ratification of the putnee grant created by Oma Moyee, the case must go back for re-consideration.

Costs will follow the result.

The 15th May 1874.

Present:

The Hon'ble W. Markby, *Judge.*

Execution of Privy Council Decree—Affirmation of Decree by Appellate Court.

Case No. 111 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 27th April 1874.

Joy Narain Giree (Judgment-debtor), *Appellant,*

versus

Goluck Chunder Mytee (Decree-holder), *Respondent.*

The Advocate-General and *Mr. R. T. Allan, Baboos Kalee Mohun Doss* and *Ram Churn Miller* for Appellant.

Baboos Bhowanee Churn Dutt and *Hem Chunder Banerjee* for Respondent.

Where application for execution of an order of Her Majesty in Council has been made elsewhere than in the High Court, the proceedings are invalid.

Where a decree is simply affirmed by the Appellate Court, it is the decree of the Appellate Court which is to be executed.

THIS case was heard by me sitting alone by consent of the parties. I think it is impossible to get over the objection now taken by the appellant. Although it is in one sense an objection of form only, still I think the form is one which it would not be desirable to dispense with. Section 19 of Act VI. of 1874 expressly directs that any person desirous to obtain execution of an order of Her Majesty in Council is to commence proceedings by an application to this Court. There were very good reasons for introducing that practice, and I think it is one which ought to be adhered to. Therefore if this is an application to obtain execution of an order of Her Majesty in Council, the proceedings were commenced in the wrong Court, and are consequently invalid The only question therefore is whether this is an application to execute the order of Her Majesty in Council. It is quite true that the appeal was simply dismissed by Her Majesty in Council, and there were no costs given. Therefore there is no part of that order which is of a mandatory character. But the cases in this Court and in the Madras Court appear to have decided that where a decree is simply affirmed by the Appellate Court, it is the decree of the Appellate Court which is to be executed, and not the decree of the Court below which has been affirmed; and although in a decision reported in the 17 Weekly Reporter, p. 292, the Privy Council expressed some doubt as to how they would decide that matter if it had been *res integra*, they expressly said that they would not dissent from the decisions of the Courts of this country which so laid down the law. It seems to me that I am bound to follow those decisions. Under these circumstances, I think that execution-proceedings must be stayed.

The order will be that further execution be stayed, and that possession which has already been taken be given up; the judgment-debtor undertaking that no suit should be brought in respect of anything that has been already done in execution. The appellant is entitled to his costs in this Court and in the Court below.

The 15th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Certificate of Administration—Act XXVII. of 1860.

Cases Nos. 64 and 66 of 1874.

Miscellaneous Appeals from an order passed by the Judge of Gya, dated the 12th February 1874.

Gouree Byjnath Pershad and another (Objectors), *Appellants,*

versus

Mussamut Lochun Kooer (Petitioner), *Respondent.*

Messrs. J. H. A. Branson and *R. T. Allan* and *Baboos Unnoda Pershad Banerjee* and *Umbika Churn Banerjee* for Appellants.

The Advocate-General and *Baboo Kalee Mohun Doss* and *Moonshee Mahomed Yusuf* for Respondent.

A certificate under Act XXVII. of 1860 gives no title to the property in succession to the deceased, neither does it authorize the holder to sue for and collect debts which have accrued due after the death of the deceased to persons who have subsequently become owners of his property.

Phear, J.—WE are of opinion that we ought not to interfere with the grant of the

certificate which has been made by the Court below. The certificate authorizes Lochun Kooer, under the provisions of Act XXVII. of 1860, to collect the personal debts of Joy Kurun Lall, deceased. Both parties who appear before us seem to agree that there are such debts still outstanding and unpaid, notwithstanding that Joy Kurun Lall died some seven or eight years ago; and that his estate and the property which was his has, in the intervening period, been in the possession and management of his widow Jusoda Kooer; and, if there are these debts, then it seems perfectly plain that Lochun Kooer is, on the state of the family which has been disclosed to us, the proper person to collect them in the name of her deceased father. No one else can have that right unless he has acquired it by conveyance or transfer for good consideration.

On the part of Gouree Byjnath, who opposes the grant of the certificate to Lochun Kooer, and who asks to have the certificate granted to his son, it has been argued that Lochun Kooer did in fact assign all her right to collect these debts to Gouree Byjnath, or, at any rate, executed a deed which on the events which have happened now operates as an assignment by her of these rights to Gouree Byjnath. But we find that, at the time when the deed of compromise thus referred to was executed by Lochun Kooer, she had no rights of any kind to these debts; she was then at most the reversionary heir to her father's property, expectant upon the death of her mother Jusoda Kooer, and had no immediate rights to either the property of her deceased father, or to interfere in any way with the collecting of his assets. Consequently this deed, if it was executed by her as Gouree Byjnath maintains it was, could only now be used against her in the way of estoppel. And, upon a matter such as that which is now before us, we need hardly say that the Court is not, strictly speaking, called upon to go into a question of estoppel of this nature. The certificate, which has been granted, cannot by any possibility give Lochun Kooer any proprietary right. The only serious question which might occur to the Court under the circumstances is whether or not the certificate has been unnecessarily granted. And, inasmuch as both parties agree there are debts outstanding due to Joy Kurun Lall, deceased, then Lochun Kooer is the proper person to collect them, unless the estoppel should be put in force against her. But the compromise has been read to us. And, so far as we can judge upon a cursory consideration of it, there seems no ground in equity or good conscience why, in a matter of the present kind, that document should be used against Lochun Kooer to estop her from asking for the certificate.

There seems to have been some misapprehension in the Court below as to the operation of a certificate of this kind, and even as to the effect of the decision of the High Court which granted a certificate on a former occasion to Jusoda Kooer. The words of section 2 of Act XXVI. of 1860 ought to make the matter clear. The certificate is merely an authority to the person who obtains it to represent the deceased person for the purpose of collecting the debts due to him or payable in his name, and serves to protect every debtor of the deceased who pays his debt to the holder of the certificate. It gives no title to the property in succession to the deceased, neither does it authorize the holder to sue for and collect debts which did not accrue due to the deceased, but have accrued due, after his death, to persons who subsequently thereto became the owners of the property which originally belonged to him. We think that the appeal of Gouree Byjnath against the grant of the certificates, and the application of Gouree Byjnath's son for a certificate to himself, should be dismissed with costs.

We assess costs in each appeal at Rs. 80.

The 15th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, s. 230—Ouster.

Case No. 1578 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 5th May 1873, reversing a decision of the Subordinate Judge of that District, dated the 1st August 1872.

Ruttun Kooer and others (Plaintiffs), *Appellants,*

versus

Syud Tussuduck Hossein (Defendant), *Respondent.*

Baboo Doorga Doss Dutt for Appellants.

Mr. R. E. Twidale for Respondent.

A suit initiated under Act VIII. of 1859, s. 230, cannot be tried as a regular suit without a proper plaint and stamp, unless the plaintiffs or petitioners complain of actual ouster.

Phear, J.—We think that the Judge is wrong in his interpretation of the decree which was passed on the 21st December 1866, and affirmed by the High Court in 1868. No doubt the words that were used in that decree, and indeed the language of the parties in their petitions, is not quite so precise as might be desired; but, regard being had to the facts—of which the first is that the suit itself between the parties initiated in petitions preferred under section 230 of the Civil Procedure Code—we think there can be no doubt that the dispute between the parties was in substance whether the defendants had dispossessed the plaintiffs of the specified property or not; for, unless the plaintiffs or petitioners complained of actual ouster, they could not rightly have been allowed to have their case tried as a regular suit under section 230 without the filing of a proper plaint and on a proper stamp. And the decree in its terms speaks, as we understand it, not of confirmation of an actual existing possession, but directs that the plaintiffs should be retained and continued in their former possession. Also we find that two years afterwards the Court, upon notice to the judgment-debtors, issued an order for giving possession of the property to the plaintiffs. Taking all these facts together, we think that there cannot be any substantial doubt that the plaintiffs did at the outset complain of being out of possession; that the decree of Court was in fact a decree that they should recover possession; and the Court itself did, after the lapse of two years, formally put them into possession.

This being so, the Judge was wrong in holding that the plaintiffs never were out of possession of this property.

We are, therefore, of opinion that the decree of the Lower Appellate Court must be reversed, and the case sent back for re-trial. On re-trial it will be for the Court to assess the damages sustained by the plaintiffs by reason of their dispossession, and also to apportion the damages between the different defendants.

The appellant must have his costs in this Court.

The 15th May 1874.

Present:

The Hon'ble J B Phear and G. G. Morris, *Judges.*

Execution—Attachment—Procedure.

Case No. 31 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Purneah, dated the 11th February 1874.

Dhunput Singh Bahadoor (one of the Judgment-debtors), *Appellant,*

versus

Alexander John Forbes (Decree-holder), *Respondent.*

The Officiating Advocate-General and *Mr. R. T. Allan* for Appellant.

Mr. C. Gregory for Respondent.

Where a judgment of the Privy Council ordered execution for mesne-profits to be taken out first against one defendant (*J*), and only on failure to obtain satisfaction from him against the others:

HELD that, before the assets of the former (*J*) had been exhausted, attachment could not issue against the property of the latter, even by way of a preliminary and protective step.

The inquiry in such a case, whether or not the assets of J have been exhausted, should be made by calling upon the other judgment-creditors to show cause why execution should not proceed against them

Phear, J.—There can be no doubt that in this case the judgment-creditor was not entitled to take out execution for mesne-profits against the present petitioners until he had failed to obtain satisfaction of his decree from Johur Ali. And it was, therefore, not competent to the Subordinate Judge to issue any process in execution until he had determined, after giving both parties the opportunity of being heard, that the judgment-creditor had failed to obtain satisfaction from Johur Ali.

It appears to us, regard being had to the petition and the order of the Subordinate Judge made upon it, that he was of opinion that, although execution could not be completed by sale until all had been realized from the property of Johur Ali which could be realized, still attachment of the petitioners' property might be made by way of a preliminary and protective step. The petitioners expressly objected that the Court had not as yet finally determined whether the assets of Johur Ali were exhausted or not. And it appears to us that the Subordinate Judge advisedly declined to give effect to that objection, because he thought the attachment might

issue whether the objection was correct or not. In this view we are of opinion that the order of the Subordinate Judge which is appealed against must be set aside, and the Judge must be directed to inquire whether or not the property of Johur Ali has been exhausted by the judgment-creditor before he issues any process of execution in this case.

The proper mode of making the inquiry is by calling upon the present petitioners to show cause why the execution should not proceed against them on the ground that the judgment-creditor has exhausted all the assets of Johur Ali.

The appellant must have his costs in this Court.

The 15th May 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Private Butwarra—Annulment by Decree—Cause of Action.

Case No. 2498 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Beerbhoom, dated the 9th August 1873, affirming a decision of the Moonsiff of Bolepore, dated the 28th December 1872.

Pooroosottum Chunder (Plaintiff), *Appellant,*

versus

Nitye Soonder Pandey and another (two of the Defendants), *Respondents.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

In a suit to recover possession of a share in an estate on the ground that a private partition of the estate had been annulled by a decree, where defendant alleged that plaintiff was still in possession, HELD that plaintiff could have no cause of action unless he proved that he had been actually evicted from possession consequent upon the decree.

I THINK this special appeal ought to be dismissed with costs.

The plaintiff sues to recover a 3-gundas 1-cowrie share of two mouzahs, Meerbund and Kharijah Darka, appertaining to talook No. 19.

The facts found and not disputed are these: The plaintiff was entitled to a 3-gundas 1-cowrie share of this talook. There was a private partition by which the plaintiffs were assigned a 2-annas share of Mouzah Shah Allumpore and 1-anna share of Mouzahs Manpore, Babladanga, and Sonajoolee in lieu of their share in the whole talook. The precise date of this partition is not known, but, from the finding of the Lower Appellate Court, it is clear that it must have taken place some time previous to 1838.

The principal defendants in this case, who were the owners by several purchases of 9 annas and 1 pie of this estate, brought a suit in the year 1854 to cancel the private butwarra, and to obtain possession of 1-anna share of the whole mehal, namely, the share which belonged to one of their vendors—Maffea Bibee. They obtained a decree, and, in execution of that decree, in 1865, obtained possession of their shares. The plaintiff alleges that, as the private partition has been thus annulled, he is entitled to recover his share in the Mouzahs Meerbund and Kharijah Darka, which had been assigned to Maffea Bibee in lieu of her 1-anna share, and which came into the possession of the defendants.

The Lower Appellate Court, by its decision dated the 25th of June 1872, remanded the case to be tried on the question whether or not the defendants' allegation, as to the plaintiff's being still in possession of the several shares assigned to him in the three mouzahs mentioned above, is true. The Court of first instance to whom the case was remanded found that the plaintiff was in possession; and that finding has been affirmed by the Lower Appellate Court, which has accordingly dismissed the plaintiff's suit.

It is contended in special appeal that, notwithstanding this finding, the plaintiff is entitled to a decree, because the private butwarra having been annulled at the instance of the principal defendants, the plaintiff is entitled to his particular share in the mouzahs in the possession of the defendants. Whether he is still in possession of the particular share of the mouzahs assigned to him or not is immaterial. I do not think that this contention is valid. The Lower Appellate Court, before remanding the case, held that the plaintiff could have no cause of action, until it was proved that any portion of the shares of the mouzahs assigned to him had been taken away. I think that this is a correct view of the law applicable to this case. It is not sufficient for the plaintiff to establish that the private butwarra has been annulled by a decree, but that he has been actually evicted from the possession of

his share consequent upon that decree. If it were not so, the plaintiff would be entitled to retain possession of his proper share as well as to a share in the mouzahs assigned to Maffea Bibee.

For these reasons I think that the Lower Appellate Court was right in holding that the plaintiff would not be entitled to a decree, until it was established that his possession in the shares of the mouzahs assigned to him by the private butwarra had actually been disturbed. Upon the question of fact, both the Courts below have come to a finding against the plaintiff. I am therefore of opinion that the plaintiff's suit has been rightly dismissed. This special appeal will accordingly be dismissed with costs.

The fourth ground of the memorandum of special appeal has been abandoned.

The 18th May 1874.

Present:

Government Promissory Note—Renewal—Transfer—Allonge.

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble C. Pontifex, *Judge*.

On Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Sreemutty Monmohinee Dabee (Plaintiff), *Appellant*,

versus

The Secretary of State for India in Council (Defendant), *Respondent*.

Mr. Lowe and *Mr. Evans* for Appellant.

Mr. Advocate-General and *Mr. Kennedy* for Respondent.

The holder of a Government promissory note cannot arbitrarily insist upon having the note renewed; but, when the back of the note has become covered with endorsements of the receipt of interest so that there is not room to write an endorsement of the note distinctly, the holder is entitled to have it renewed.

Where the legal holder of a Government promissory note transfers the note, the Government is bound to act in accordance with such transfer, unless it has notice of an order of Court restraining the holder from parting with the note.

An *allonge* is a slip of paper annexed to a bill on which the supernumerary endorsements may be written when there is not room to write them all distinctly on the back of the bill. The term does not legally or properly apply to a paper annexed by the officers of Government to a Government promissory note, on which further endorsements of the receipt of interest may be made after the note itself is covered by such endorsement.

THE plaintiff, the holder and endorsee of a Government promissory note for Rs. 18,400 of the 5½ per cent. loan, sued the Government under the following circumstances:—

She alleged that, before the promissory note in question was given, the Government advertized and notified, in the *Calcutta Gazette* of the year 1859, that a loan of five crores of rupees was required, and that he would receive subscriptions for the same, half in 5 per cent. promissory notes of the Government of India, and half in cash, and that the practice and rules theretofore in use in regard to the renewal, sub-division, and consolidation of promissory notes of the Government of India would be adhered to in respect to the promissory notes granted to the subscribers of the above loan of five crores of rupees; such practice being to renew, consolidate, or sub-divide on application of the proprietors of such notes and the payment of the established fees free of all further expenses, unless the defendant was restrained by an order of a competent Court; that, in pursuance of the defendant's said notification and advertizement, the sum of Rs. 18,400 was subscribed, and the promissory note in question was granted to the Collector of the 24-Pergunnahs, who, together with the other subscribers to the said loan of five crores of rupees, relied on the terms contained in the said notification and advertizement of the defendant being faithfully carried out.

She further alleged that it had always been the practice of the defendant to insist on the production of a promissory note upon interest due thereon being applied for, and

to endorse the payment of such interest upon the back of the promissory note, and the plaintiff had, in consequence of this practice of the defendant, been compelled, from time to time, to send to the defendant this promissory note for the payment of interest as the same accrued due, and the promissory note had been endorsed as aforesaid according to the defendant's practice, by reason whereof the promissory note had become so covered with such endorsements and receipts that no space was left on it for the endorsement of interest or for transfer, and the note had thereby become less in value and incapable of being transferred. The plaintiff charged that the defendant refused to renew the note, although no competent Court had passed any order preventing him from renewing it. She accordingly submitted that the defendant was bound to renew the note according to the rules and practice observed in regard to the promissory notes of the Government of India prior to the year 1859, upon application being made to him by the plaintiff in that behalf and the payment of the established and customary fees, and she prayed that the defendant may be ordered to renew the promissory note according to his undertaking as advertised in the *Calcutta Gazette*, as is the practice, and that, in default thereof, the defendant be decreed to pay the amount of the promissory note with interest at the rate of 5½ per cent. per annum till decree, together with the further sum of Rs. 4,000 as damages, being the difference between the market-price of this promissory note and the sum of Rs. 18,400, and that she may have such other and further relief as the nature of the case required.

The Government, the defendant, put the plaintiff to proof of having the right as holder or endorsee of the note to have the note renewed, and the terms on which it was issued, and the practice of renewal. They denied that there had been any promise or practice whereby the plaintiff, as a matter of right, was entitled to renewal, and alleged that, as a matter of favour, and not of right, they usually allowed the renewal, sub-division, and consolidation of Government promissory notes, when the endorsements thereon were in regular order, and no notice had been given of any claim by any other person in such note. He further stated that, even when there was space on the back of a Government promissory note for giving receipts for interest accrued thereon, it was not the practice to allow renewal of the note when notice is received from a third party that the holder has not power to alienate the note; and that, when it appears, either by endorsements on the note or otherwise, that the holder has but a limited interest therein, renewal is not allowed, save under the terms of a sufficient bond of indemnity being given for the protection of the defendant, or an allonge is attached to such note for the purpose of having receipts for interest written thereon. They stated that the plaintiff's title to the note had been impugned by her co-widow and also by persons who claimed to be entitled in reversion, who maintained that the plaintiff had only a childless Hindoo widow's interest in the note, and gave notice to Government not to renew the note, or take it as a security for any loan which the plaintiff might take from the Bank; and they, therefore, not only denied the plaintiff's right to renewal and the existence of any practice whereby she was so entitled, but also alleged that they were justified, under the circumstances, in refusing to renew, whether or not the plaintiff established any rule or practice of renewal.

The judgment of Macpherson, J., in this case was as follows:—

This cause is somewhat peculiar, and of very considerable importance as bearing on the question of the renewal, and thereby, in some degree, on the question of the ready transfer of Government securities. The suit is brought by the present holder, the last endorsee, of a piece of Government paper of the 5½ per cent. loan. The plaintiff seeks to compel the Government to give her a new note by way of renewal of the note which she holds, which has become so covered with endorsements as to be now practically unnegotiable. The plaint states that, in advertizing and inviting subscriptions to the 5½ per cent. loan of 1859, the Government "promised that the practice and rules theretofore in regard to the renewal, sub-division, and consolidation of promissory notes of the Government of India would be adhered to in respect to the promissory notes granted to the subscribers to the 5½ per cent. loan; such practice being to renew, consolidate, or sub-divide on application of the proprietors of such notes and the payment of the established fees free of all further expenses, unless the defendant was restrained by an order of a competent Court." The defence raised by the Government is shortly stated in the 2nd and 11th paragraphs of their written statement. In the 2nd paragraph it is stated: "The defendant does not admit any

"promise, practice, or custom whereby the "plaintiff, as a matter of right, is entitled to "renewal of the said note. For convenience "and as a matter of favour, but not of right, "the defendant, through the Comptroller-"General, usually allows the renewal, sub-divi-"sion, or consolidation of Government "promissory notes, when the endorsements "thereon are in regular order, and no notice "has been given of any claim by another, or "interest on such Government promissory "notes has been received. But, when there "is space on the back of such Government "promissory notes for giving receipts for "interest accrued thereon, and notice has been "received from another that the holder has "not power to alienate such Government "promissory notes, renewal is refused; as, also, "when it appears, either by endorsement on "such Government promissory notes or "otherwise, that the holder has but a limited "interest therein, renewal is not allowed, save "under the terms of a sufficient bond of "indemnity being given for the protection of "the defendant, or an allonge is attached to "such Government promissory notes for the "purposes of having receipts for interest "written thereon; the defendant being "anxious that dealings in and with Govern-"ment promissory notes should be facilitated, "and that, whilst endorsements appear in good "order, and there is no notice of claim by "others, and there are no circumstances tend-"ing to create suspicion of the holder's title." This last sentence is incomplete and, in itself, unintelligible. After setting out the correspondence and other particulars relating to the refusal to renew this note, the defendant (in para. 11) says he does not admit that the plaintiff is or can be entitled as of right to renewal of the said Government promissory note, or the existence of any such rules and practice as are alleged in the plaint whereby the plaintiff can be so entitled. However, the defendant submits whether, under the circumstances of this case, he was not justified in refusing to renew the said Government promissory note, whether or not the plaintiff establishes any rules or practice of renewal. The special defence taken is that, although the plaintiff is the simple endorsee of the paper, it was in truth endorsed to her as the widow and representative of her husband; and it is argued that the Government, having notice of this nature of the plaintiff's title to the note, cannot renew it, or do anything which will facilitate her dealing with it, without incurring responsibility to the reversioner. But the real issue to be decided is whether the Government is under any legal obligation to renew its notes. The Government contends that it has the right of exercising its discretion in each case, and that it may grant or refuse renewal according to its discretion.

The plaintiff comes into Court stating that, according to the rules and practice subject to which the note was originally granted, the holder of it is entitled, as a matter of right, to renewal. It is therefore necessary that she should prove the existence of the right on which her claim is based. She has proved that, as a matter of general practice, Government does renew notes on the application of the holder, when the endorsements appear to be (as, in the present case, they appear to be) in order, and there is nothing on the face of the note or the endorsements to indicate any defect of title in the holder. She has proved this by the evidence of Mr. Mackenzie, who is the head of the office in which renewals are granted. Mr. Mackenzie has spoken to what has been the practice of the office for many years; and in addition he has spoken to a book of rules used in the office, which book was compiled by himself, and gives a substantially correct statement of the rules and practice of the office, subject to alterations (not affecting the matter now before me) which have been made since its publication in 1861. The result of the evidence is that it is clear to me that, in ninety-nine cases out of a hundred, these renewals are granted very much as a matter of course, but that, nevertheless, the Government Officers have considered themselves entitled to exercise a discretion in the matter, and have refused to renew when they thought it necessary for their own protection to do so. Mr. Mackenzie states that it has all along been his habit to refuse renewal in cases in which he considered that renewal would impose any new responsibility upon himself or the Government, and he says that in fact he has refused to renew in other cases besides this one, in which no order of Court had been obtained prohibiting renewals.

The plaintiff proves that, in the notification under which the 5½ per cent. loan was originally opened, it was stated: "The practice and rules heretofore in use in regard to the renewals, sub-division, and consolidation of promissory notes will be adhered to in respect to the promissory notes of this loan." But, unfortunately for her, she has no evidence that, according to the rules and practice in use prior to the issuing of this notification, renewal was a matter of absolute right. She

has no evidence on the subject except what has been given by Mr. Mackenzie. The plaintiff refers to the 9th and 10th rules laid down by Mr. Mackenzie in his book, which, he states, still represent the practice usually followed in the office. The 9th rule tells us how the "stoppage" of notes in the Government Loan Department is to be effected. The 10th rule is, "on presentation at the department "of any of the notes so stopped, notice of "presentation is promptly given requiring "the production of an order of a competent "Court within ten days from date of notice "for the further detention of the notes by "the department; failing which, the stoppage "is removed against the notes presented, "which are then dealt with as though no "stoppage had been entered against them." The plaintiff contends that, as in the present case on these notes being stopped, the parties at whose instance they were stoppped received notice from the defendant requiring them to obtain an order of Court, and as no such order was produced, the defendant, according to the ordinary practice of the office, should have removed the stoppage, and dealt with the note as though no stoppage had been entered. But Mr. Mackenzie deposes that, although rules 9 and 10 state correctly what is the general practice, that practice has never been strictly followed; and he says that a discretion has always been exercised in the matter. The plaintiff further contends that Mr. Mackenzie's book shows throughout that renewal is a matter of course, and there is no doubt that this is so to a certain extent, and that the refusal to renew is an exception to the general rule. I nowhere find any positive statement of the circumstances under which renewal is to be granted, nor do any of the several loan-notifications say what those circumstances are. Substantially the same words relating to renewal which occur in the notification as to the 5½ per cent. loan are used in the notification (para. 12) of September 1864 under which the first 4 per cent. loan was issued. But, in both instances alike, there is an entire absence of information as to what the previous practice was. The plaintiff's case is in some degree based on the fact that an absolute necessity for renewal is created by reason of Government insisting that every payment of interest shall be endorsed on the note. Renewal of a note ordinarily takes place when the note has come to be so covered with endorsements, chiefly those acknowledging the payment of interest, that there is no room left for any further endorsement. Whenever this state of things has arisen, the practice has been for the old note to be delivered up to the Government, which has thereupon issued a new note containing, on the face of it as payee, the name of the last endorsee—the holder of the note. The new note so issued bears upon it a reference to the old note of which it is a renewal, so that there is no difficulty in referring back to the old note, if occasion should arise.

It does certainly seem that the plaintiff has some reason to complain if the Government, after insisting on each payment of interest being endorsed on the paper, and thereby rendering the note practically unnegotiable, refuses to grant a renewal, which is the only means by which the unnegotiability can be removed. Those who have subscribed to the Government loans, or who hold these Government securities, may have acquiesced in the practice of having every payment of interest endorsed. But they have done so in the belief that they were entitled to renewal when necessary. If renewal is not to follow as a matter of right when the paper is covered with receipts for interest, it becomes a question how far the Government ought to insist on those receipts being endorsed on the note. It may be doubted whether the Government has any legal right to refuse to pay interest on its promissory notes without endorsement. The endorsing these receipts does not seem to be provided for in the notes themselves, or in the contract originally entered into with subscribers to the loans, though it is possible that subscribers and holders of notes may by acquiescence be bound by the practice. The same may be said of the practice occasionally adopted by which the Government Officers add what is called "an allonge," which is simply a sheet of paper pasted on to the end of the original note so as to give room for more endorsements. If the Government insists on an endorsement in respect of each payment of interest, it would appear that it ought to provide means for protecting holders against the injury which, in course of time, comes to be caused to them by those endorsements. There is nothing on the face of the note, which is the subject of this suit, to render the note unnegotiable, except its being covered with endorsements chiefly of payments of interest. But the note has an "allonge" annexed, and it is covered with endorsements, and consequently is practically not negotiable, as is admitted by Mr. Mackenzie himself.

Though, however, there may be some hardship in a case in which renewal is refused,

it does not follow that there is a legal right of renewal which can be enforced by the order of this Court; and, though Mr. Mackenzie's book shows that renewal becomes necessary sometimes, and that it becomes necessary when the note is covered with endorsements, it also indicates that in renewing the officer who renews is to exercise some discretion in the matter. In rule 92 the following passage occurs as regards renewing where there is specific notice of a trust in the endorsements: "When renewal "becomes unavoidable, it is only permitted "under a full indemnity." Again, in the circular of July 1854 (p. 17 of the Circulars), it is said: "As the multiplication of "entries thus required on the reverse of "promissory notes will, if carelessly made, "tend to necessitate the frequent renewal "of promissory notes, and thereby to impose "additional renewal-fees on the proprietors, "care should be taken to see that every "entry is made to take up as small a space "as possible." On the other hand, rules 32, 33, and 34 all show that some discretion is to be exercised in renewing. Rule 32 says: "Notes endorsed to *A*, *B*, *C*, *and D*, *or any two of them*, may be transferred under the signatures of any two of the endorsees. *Their renewal, however, will not be permitted in the terms of such endorsement*, but simply in the names of all the endorsees, omitting the words, *or any two of them*, under this rule. A discretion is exercised in not renewing the note in the terms of the last endorsement." So rule 33 says: "When a note is endorsed to *A*, "*as attorney of B*, it is treated as the sole "property of the principal *B*, transferable "only under his endorsement or under his "power-of-attorney. In the renewal of a "note so endorsed, the notice of attorneyship "is dropped, the name of the principal *B* "only appearing as the payee of the renewed "note;" and under rule 34 there is a distinct exercise of discretion. It is as follows: "But the endorsement of a note to *A*, *as* "*executor of B*, vests the title to it absolutely in *A*, so that *in renewing the note* "*it will be issued in favour of A simply*, "*without reference to the executorship*." Again rule 71 is: "A husband by transferring "Government securities into his wife's name "gives her implied authority to dispose of "them by her own endorsement, so long as "no revocation of such authority exists;" and rule 72 says: "The renewals, however, of "notes so endorsed will not be permitted in "the wife's name alone, but in the joint names "of husband and wife, or of the husband only." In this last case, the wife being the last endorsee, and recognized as such by Government by the payment of interest to her, it certainly is an exercise of discretion on the part of the renewing officer, when he declines to renew in the name of the endorsee, and insists on adding the name of her husband.

On the whole. I have come to the conclusion that the plaintiff has no absolute right of renewal which she can enforce as against the Government, Both parties have treated this case as one in which the plaintiff's application to Government was for renewal only. But the only applications for renewal which I find on the note are applications to renew the note, and sub-divide it into a number of small notes. As the question has not been raised, it is not necessary to decide whether the fact, that the application was for sub-division, also would affect the issue as to the right to insist on renewal. But the fact, that she applied for sub-division also, certainly would not strengthen the plaintiff's case.

On the ground, that the plaintiff fails to prove any legal right to insist on renewal, I dismiss the suit; but I think the case is not one in which the defendant ought to press for costs.

No order as to costs as between party and party; costs as between solicitor and client will be taxed on Scale No. 2.

The plaintiff appealed from this judgment on the following grounds:—

1st.—For that the learned Judge erred in holding that the plaintiff had not an absolute right to have the Government promissory note in the plaint mentioned renewed by the defendant.

2nd.—For that the learned Judge erred in holding that the Government has an absolute or an arbitrary discretion in renewing promissory notes of the 5½ per cent. loan of the years 1859 and 1860, and that, in the exercise of that discretion, the defendant had a right to refuse to renew the promissory note in the plaint mentioned.

3rd.—For that the learned Judge ought to have held that, even if the Government had a discretionary right to renew, or to refuse to renew, promissory notes of the above loan, the defendant was precluded, by his own conduct and that of his agents, from refusing to renew the promissory note in question, and that the plaintiff was now entitled to have the same renewed by him.

4th.—For that the learned Judge ought

to have held that the discretion claimed by the defendant as to the renewal of Government promissory notes of the above loan must, if exercisable at all, be exercised by him in a reasonable manner, and on sufficient grounds, and that, upon the evidence in this cause, the defendant had not so exercised that discretion, and that the plaintiff was entitled to the relief in the plaint prayed.

5th.—For that the learned Judge ought to have held that the defendant had no right to refuse, and could not refuse, to renew the aforesaid promissory note in favour of the plaintiff, unless he were restrained therefrom by an order of a competent Court obtained for that purpose.

6th.—For that, upon the evidence in this cause, the learned Judge ought to have made a decree as prayed against defendant.

Mr. Lowe, for the appellant, contended that the Government had no right to refuse the renewal of the note, inasmuch as the appellant is the *bonâ-fide* holder and the last endorsee of the note. In the Government Notification dated the 20th April 1859, on opening the 5½ per cent. loan, the Government promised that the practice and rules "theretofore in use in regard to the renewal, "sub-division, and consolidation of promissory "notes of the Government of India would "be adhered to in respect of the promissory "notes granted to the subscribers to the 5½ "per cent. loan; such practice being to "renew, consolidate or sub-divide on appli-"cation of the proprietors of such notes and "the payment of the established fee free "from all further expenses, unless restrained "by an order of a competent Court."

The note in this case was so covered by endorsements and receipts as to leave on it, not only no space for the further endorsement of interest, but also no space for the further endorsement of *transfer*, thereby rendering the note utterly unnegotiable. It was in consequence presented to the Bank of Bengal for the purpose of being renewed, but Mr. Mackenzie, the renewing officer, refused to renew it on the ground that he had received instructions from two reversioners, Bisto Chunder Bannerjee and Bamasoondery Dabee, to stop its renewal; which he accordingly did. But as Bisto Chunder did not in his lifetime, nor did Cally Chunder, who is now the reversionary heir of the appellant's husband, nor did Bamasoondery, ever obtain an order from a competent Court restraining the Government from renewing this note, the Government have therefore no right to refuse its renewal any longer, especially as the plaintiff has proved a clear title to its possession.

Rule 10 of the book published by Mr. Mackenzie says: "On presentation at the "department of any of the notes so stopped, "notice of presentation is promptly given "requiring the production of an order of a "competent Court within ten days from date "of notice for the further detention of the "notes by the department; failing which, "the stoppage is renewed against the notes "presented, which are then dealt with as "though no stoppage had been entered "against them."

The reversioners, at whose instance the present note was stopped, had received notice from the respondent requiring them to obtain an order of Court; but, as no such order was produced, the respondent ought, according to the practice of the office, to have removed the stoppage, and to have dealt with the note as though no stoppage had been entered.

It has been said by the respondent as a further ground for refusing to renew the note that the appellant is a childless widow, and that she has therefore only a life-interest in the note, and has no power to dispose of it without the consent of the reversioners. But, in the case of Kasinath Bysack and Ramanath Bysack *vs.* Hurrosoonduree Dossee and Kamalmoney Dossee, cited in Baboo Shama Churn Sircar's "Vyavastha Darpana," p. 104, it was held that a widow who takes from her husband is entitled to a life-interest in the whole of the husband's property, and that she has also, as long as she lives, an absolute right to the possession of the property. If, therefore, in this case the appellant is absolutely entitled to the possession of the note during her lifetime, she can clearly dispose of it as she pleases, provided that such disposition be not considered, according to the Hindoo Law, as a commitment of waste. In the first place there is no proof whatever that the appellant is desirous of renewing the note for the purpose of selling or otherwise transferring it; and in the second place, there is nothing shown that any such transfer on her part must necessarily be regarded in this case as waste. Supposing she wished to change the note into some other security, and such might be her intention, would the change be regarded as waste? It clearly could not. Under all the circumstances, therefore, the appellant is fairly entitled to have a renewal of the note by the respondent.

Mr. Evans, on the same side, contended that, under the circumstances of the case, the respondent ought to have renewed the note.

It has always been the practice of the respondent, not only in the 5½ per cent. loan, but also in the previous loans of Government, to insist on each payment of interest being endorsed on the back of the promissory note.

Rule 103 says: "All notes presented for "the realization of interest due thereon "must be receipted on their reverse." But in this case this note (through no fault of the appellant) is so covered with endorsements as to leave no space whatever for the future endorsements of receipts of interest; the appellant is therefore fully justified in claiming a right, according to the existing practice and rules of the office, to have the note renewed. It has been said that, when in a case like the present the back of the note is covered with endorsements, it is discretionary on the part of Mr. Mackenzie either to renew the note, or to attach an allonge to it, when there is some doubt as to the holder's power of disposition or alienation. The attachment of the allonge to the note is merely done for the purpose of acknowledging on it further receipts of interest; but it has the effect, as Mr. Mackenzie stated in his evidence, not only of depreciating the value of the note in the market, but also of rendering it almost incapable of being transferred. In this case the allonge ought not to have been attached to the note, inasmuch as it was not shown that the appellant held it under a defective title, nor was any order ever obtained by any person from any Court of competent jurisdiction to restrain its renewal. Mr. Mackenzie had furthermore no right to assume that the appellant had only a limited interest in the note, and that she could not therefore alienate it except under certain urgent circumstances. It is not within Mr. Mackenzie's province to consider as to what the appellant will do with the note after it has been renewed; that question does not arise in the present case. The sole question is, being the *bonâ fide* last endorsee and holder of the note, is or is not the appellant entitled to have a renewal of the note, when it is found to be so covered with endorsements as to make it impossible, not only to acknowledge further endorsements of interest on it, but also to render it totally unnegotiable?

It has been further asserted that an allonge becomes part and parcel of the note when attached. It is true that in the last sentence of paragraph 3, p. 145 of Byles on Bills, 9th Edition, an allonge when attached is considered as part of the note; but it is a question whether or not it is attached for the sole purpose of acknowledging receipts of interest on it. If, however, being part of the note, it can be transferred over to another by an endorsement on it, then the Government have no reason whatever in refusing to renew the note, since the allonge, as far as the negotiability of the note is concerned, would give it the same effect (with the exception, of course, of lessening its value in the market) as a renewal of the note would. But it is clear from Mr. Mackenzie's evidence that, instead of facilitating or allowing the transfer of the note, the Government in attaching an allonge do it expressly with a view utterly to destroy the negotiability of the note. An allonge is attached for the sole purpose of making the holder acknowledge receipts of interest thereon. It is true Mr. Mackenzie has certain discretionary powers given him, but he must use it wisely and prudently, and not arbitrarily, as he has done in the present case.

The Advocate-General, for the respondent, contended that the respondent had a perfect right to refuse to renew the note in this case. In the first place, the back of the note is not, as a matter of fact, so entirely covered with endorsements as to render it unnegotiable. There is plenty of room left on the note to enable the appellant to part with it if she pleases. Moreover, Mr. Justice Byles, in his book on Bills, p. 145, says: "It is not "essential to the validity of these transfers, "though called endorsements, that they be on "the back; they may be on the face of "a bill of exchange or promissory note." *Vide* also Regina *vs.* Bigge, 1 Stra., p. 18; *Ex-parte* Yates, 27 Law Journal, Bankruptcy, p. 9; and Yarborough *vs.* Bank of England, 16 East, p. 6. So that, as far as the question of the negotiability of the note, it appears clear that the appellant has no right of complaint, inasmuch as there is abundant room on the paper to enable her to part with it if she desires to do so.

In the second place, Mr. Mackenzie has the right of exercising his discretion in each case, and he has the power of granting or refusing renewals according to his discretion.

Rule 32 says: "Notes endorsed to *A*, *B*, *C*, "and *D*, or any two of them, may be trans-"ferred under the signatures of any two of "the endorsees. Their renewal, however, "will not be permitted in the terms of such "endorsement, but simply in the names of all "the endorsees, omitting the words *or any* "*two of them*." Under this rule there is clearly an exercise of discretion given in not renewing the note in the terms of the last endorsement. So likewise, in rules 33 and

34 a distinct exercise of discretion is given to the renewing officer. But, under any circumstances, the respondent denies that there is a promise, practice, or custom in the office which entitles the appellant as a matter of right to have the note renewed. Renewals of notes are usually allowed through the Comptroller-General, merely for the convenience of the public and as a matter of favour, but the holder cannot claim any right whatever to insist on the renewal of the note. The discretionary power that is by the rules given to the renewing officer in refusing to renew certain notes is given merely for his self-protection. When reasonable objections are taken as to the validity of the holder's title to possession of the notes, the discretionary power is exercised by the renewing officer. An allonge is then attached to the note upon which acknowledgments of future receipts of interest are to be made. Mr. Justice Byles, in his book on Bills, p. 145, 9th Edition, says: "There is no legal limit to the "number of endorsements, and, if there be "not room to write them all distinctly on the "back of the bill, the supernumerary endorse-"ments may be written on a slip of paper "annexed to the bill, called in French an "*allonge.*"

If the note is sold to a third party when an allonge is attached to it, the purchaser holds it thenceforth at his own risk. The attachment of the allonge by the renewing officer ought to make the holder suspicious of his title to its possession, and this is done by the renewing officer, in cases like the present, when there is a reasonable doubt as to the power of the holder to dispossess herself of the note.

There is another point, and it is a most important one, as to whether or not the appellant in this suit has shown the necessity for having a renewal of the note. It is a matter of fact that she has been paid interest on the note since the attachment of the allonge, and that she has acknowledged receipts of interest on the allonge. If, therefore, she receives her interest regularly on the note, she has no just cause of complaint. She could, perhaps, rightfully complain, if, after having shown the absolute necessity for her selling the note, she was prevented from doing so by the refusal on the part of the renewing officer to give her a fresh paper, where it was so covered by writing as to make it unnegotiable. She has, however, not only shown no such necessity, but the mere fact of her wishing to renew the note, when no necessity is shown, is of itself a matter of great suspicion; it shows clearly that she is anxious to part with the note on her own account, and thus deprive the reversioners of their interest in, and ultimate right to, the note.

In the case of Kasinath Bysack and Ramanath Bysack *vs.* Hurrosoondery Dossee and Kamalmoney Dossee, reported in Shama Churn's "Vyavastha Darpana," p. 99, the Privy Council held that a Hindoo widow, who succeeds to the moveable property of her husband dying without male issue, though she holds possession of the property, takes only a life-interest in it. She has not an uncontrolled interest in the property, nor can she do anything with it of her own authority. In page 101, citing the same decision of the Privy Council, it is clearly laid down that "a Hindoo widow has no authority whatever "to dispose of the property by gift and so "forth for worldly purposes, unconnected "with religious purposes, without the con-"sent of her husband's kinsman; if she "does, such act is invalid. Religious pur-"poses include a portion to a daughter, "building temples for religious worship, "digging tanks, and the like," &c.

The appellant has entirely failed to show that, for religious purposes, she is compelled to convert the note into money. Having shown no necessity whatever, the only rightful presumption then is, that she is desirous of disposing of this note for some purpose of her own; which disposition being contrary to Hindoo Law would be clearly regarded as being invalid, if the note was transferred over to another. Under the circumstances, therefore, this Court must come to the conclusion that the renewing officer, in this case, above all cases, was perfectly justified in refusing to facilitate the negotiability of the note by renewing it.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C.J.—The plaintiff in this suit is the endorsee and holder of a promissory note of the Government of India, dated the 31st of May 1859, and No. 013430 of 1859-60, for Rs. 18,400, and interest at 5½ per cent.; and the suit was brought to obtain from the Government a renewal of the note according, as the plaintiff alleged, to the undertaking in the notification and advertisement in the *Calcutta Gazette* of the loan for which this promissory note was given. The notification was in the *Calcutta Gazette* of the 30th April 1859, and stated that, upon receiving the money, which was to be borrowed by the

Government, promissory notes would be prepared and issued to the parties entitled thereto in a form which is given. In that form the note is payable to the person named, his or her or their executors or administrators or his or her or their order, on demand at the General Treasury of Fort William, after the expiration of three months' notice of payment to be given by the Governor-General of India in Council in the *Calcutta Gazette*, and the interest is payable half-yearly.

The notification, in a paragraph which comes after the form of the note, states that the "promissory notes shall not be renewed, sub-divided, or consolidated except by the Accountant-General of Fort William. The practice and rules heretofore in use in regard to the renewal, sub-division, and consolidation of promissory notes will be adhered to in respect to the promissory notes of this loan."

The evidence of what the practice and rules thus referred to were is contained in a book published in 1861 by Mr. Mackenzie, who was an officer in the department from which the notes were issued, and in which the business of the renewal would be transacted; and Mr. Mackenzie, who was called as a witness, proved that the rules and practice in the book were the rules and practice in 1859, when the note was issued, We consider that what appears in this book is what the Government undertook to be adhered to in respect to the promissory notes of which this was one. The note is transferable by endorsement, and cannot be legally transferred without one. The rules provide for the renewal of the notes, and the 92nd shows that it was contemplated that a renewal of a note of this description would become necessary. This rule, after speaking of there being a notice of trust in the endorsement, as, "Pay to *A* and *B*, trustees to the marriage-settlement of *C D* and *E F*," says that the holder of the note "is called on to effect, if possible, the cancellation of the endorsement and substitution under the signature of the endorser of another, favouring the endorsees in their individual character without any allusion to the trust." It then contains these words: "And when renewal at last becomes *unavoidable*, it is only permitted, under a full indemnity, to be entered into by sureties as well as by the principal applying for the renewal." Thus it recognizes a case in which the renewal of a note would become necessary or unavoidable. But the more important rule to be considered in this case is the 103rd. By that it is provided that "all notes presented for the realization of interest due thereon must be receipted on the reverse," giving the form of the receipt. And in the circulars, which are also published in Mr. Mackenzie's book, there is one, the 23rd, which says: "As the multi-"plicity of entries thus required on the "reverse of promissory notes will, if care-"lessly made, tend to necessitate the frequent "renewal of promissory notes, and thereby "to impose additional renewal-fees on the "proprietors, care should be taken to see that "every entry is made to take up as small "space as possible."

In this case the note, of which plaintiff is the holder, had become covered with endorsements of the receipt of interest in accordance with this rule. The Government was authorized to make the endorsements, and the holder was not at liberty to object to it. The note having been so covered by endorsements, the officers of the Government annexed to it a paper on which further endorsements of the receipt of interest were made. They have called this an allonge. But in truth it is not legally or properly so called. An allonge is a slip of paper annexed to a bill upon which, there being no legal limit to the number of endorsements, when there is not room to write them all distinctly on the back of the bill, the supernumerary endorsements may be written. It is annexed by the holder in order that he may write the endorsement. Here the paper was not annexed by the holder for making an endorsement of the note, but by the officers of Government for writing the receipts of interest. I do not find any rule which authorizes this. It seems to be the practice; but I have not found any rule which specially authorizes it. This paper so annexed to the note, although not legally an allonge, might, if the holder of the note had thought fit to adopt it as such, and to write an endorsement upon it, have become an allonge. I do not say that, if the holder had written an endorsement upon the paper which had been annexed it would not be a good endorsement and sufficient to transfer the note; but the holder is not obliged to do this. There is nothing in the rules which obliges him to adopt this mode of endorsing the note; and looking at those that I have referred to, which speak of the renewal of a note becoming unavoidable, and authorize what I may describe as the defacing of the back of the note by the officers of the Government, I think the fair construction of the rules is that, when the back of the no

has become covered with endorsements of the receipt of interest, so that there is not room to write an endorsement of the note distinctly on the back of it, the holder is entitled to have it renewed. He cannot arbitrarily go to the Government and say, "I desire to have this note renewed"; but when, by the acts of the Government authorized by the rules, a note can no longer be transferred in the ordinary way, it is, I think, a proper case for renewal, and the Government, by the notification in the gazette, bound itself to renew.

The plaintiff is the legal holder of this note. If any person has a right to prevent her from parting with it, that person ought to take proper legal proceedings to obtain an order of Court restraining her from doing so. If such an order were obtained, and the Government had notice of it, it would be bound to act in accordance with it. The plaintiff could not insist upon having the note renewed, if, by the renewal, the order restraining her from parting with the note would be disobeyed. Here, in the absence of any decision or order of a Court that the plaintiff should not be allowed to negotiate this note, I think all that the Government can do, or has a right to do, at present, is to see that the person who receives the interest upon the note is entitled to receive it. The note is not payable at present, and will not be for a long time. When it becomes payable, the Government will have a right to see that the person seeking payment is really entitled to it. All the liability the Government is under now is to pay the interest. No doubt the refusal to renew was made in good faith, but it appears to me that the putting an obstacle in the way of the plaintiff by refusing the renewal is not justified by the engagement which the Government entered into at the time when the loan was contracted and the notification was published in the *Calcutta Gazette*. Therefore the decree of Mr. Justice Macpherson will be reversed, and the plaintiff will have a decree for the renewal of the note. But, as the word "widow" would be, and is properly, after the name of the plaintiff as endorsee of the note, the Government is at liberty to put the same word in the renewed note after the name of the plaintiff as the payee, so that she may not appear to be the payee in a different character from that in which she was an endorsee.

We think the plaintiff ought to have the costs of this appeal, and the costs of the suit before Mr. Justice Macpherson, to be taxed in scale No. 2.

The 18th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, s. 2—Ejectment—Notice to Quit.

Case No. 1128 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 18th February 1873, affirming a decision of the Additional Moonsiff of that District, dated the 4th March 1872.

Heera Rawut (Defendant), *Appellant,*

versus

Racha Rawut (Plaintiff), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Huree Hur Nath for Respondent.

A suit for ejectment, on the ground that defendant had entered plaintiff's land wrongfully and forcibly, having been dismissed by the Court, which found that defendant was not a trespasser, but a tenant, plaintiff now sues again on the allegation that defendant is now a trespasser, though lately a tenant:

HELD that the suit, though not prohibited by Act VIII. of 1859, s. 2, must nevertheless be dismissed, as plaintiff had not terminated the tenancy by giving defendant reasonable notice to quit.

Phear, J.—WE think it is clear that the decrees of the lower Courts are wrong.

The plaintiff sues to eject the defendant from possession of certain land upon the allegation that he is now a trespasser, although he was lately a tenant thereof. It appears that a suit was recently brought against the defendant by the present plaintiff with the same object as that of the present suit, namely, to eject him from this same land, but in that suit the plaintiff contented himself by saying that the defendant had entered the land wrongfully and forcibly, and was a trespasser. The Court, however, decided, by a decree passed on the 25th August 1871, that the defendant was not a trespasser, but a tenant rightly holding possession of the land.

It is true that the present suit is not brought upon precisely the same ground of action as the former suit, and is therefore not prohibited by section 2, Act VIII. of 1859. But, although the possession of the land by the defendant which is now complained of as a trespass is possession at a later date than that which was the cause of complaint in the former suit, still it is possession under precisely the same circumstances

and under the same relations between the defendant and the plaintiff as subsisted in August 1871, when the Civil Court by its decree declared that the defendant was a tenant to the plaintiff. The defendant's present possession of the land is a continuation of the possession which was then declared to be justified by the relation of landlord and tenant, and the plaintiff has done nothing since that time to put an end to the tenancy. If he had been so minded—if the facts of the case be true upon which he relies—he probably might, at any time, have terminated the defendant's tenancy by giving him reasonable notice to quit the possession of the land. This, however, has not been done. And there seems to have been no alteration whatever in the state of things as between the defendant and the plaintiff since the decree of August 1871 was passed. The consequence is that the plaintiff has no better ground now than that which he had then to evict the defendant as a trespasser. The plaintiff's suit ought to be dismissed. We therefore reverse the decisions of the lower Courts, and dismiss the plaintiff's suit with costs in all the Courts.

The 18th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution-sale of a Share of Joint Property—Onus Probandi—Auction-purchaser's Remedy.

Case No. 1647 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 2nd May 1873, reversing a decision of the Moonsiff of Arrariah, dated the 30th January 1873.

Baboo Lall Jha and others (Defendants), *Appellants,*

versus

Shaikh Juma Buksh and another (Plaintiffs), *Respondents.*

Baboo Tarucknath Sen for Appellants.

Mr. C. Gregory for Respondents.

The auction-purchaser, at an execution-sale of the property of a member of a Hindoo family living, under the Mitakshara Law, in commensality and joint enjoyment, if he sues to obtain possession of his purchase, is bound to rebut the presumption of that law in regard to such property, and show that it was acquired by the member in question for himself alone.

Failing to prove separate acquisition, plaintiff's remedy would lie in a suit for partition.

Phear, J.—The plaintiff sued to obtain possession from the defendants of certain 51 beeghas of land which, he says, was the sole and separate property of one Sree Lall Jha, and was bought by him, the plaintiff, at a sale held in execution of a decree against Sree Lall Jha on the 2nd July 1867.

The plaintiff by his evidence discloses that Sree Lall Jha was one of several brothers living together in commensality and in joint enjoyment of property; also, that the 51 beeghas for which the suit was brought were acquired in the name of Sree Lall Jha while he was living in commensality with his brothers.

And, upon this state of facts, inasmuch as the Mitakshara Law applies, the presumption is that the property was acquired for all the members of the joint family together, and that no one of them therefore had any disposable share in it.

It thus became incumbent upon the plaintiff, in order to lay a foundation for his plaint, to add other facts which would serve to rebut the just-mentioned presumption, and to show that the property was not in fact acquired in the name of Sree Lall Jha for the joint family, but by Sree Lall Jha for himself alone. Unfortunately, however, for the plaintiff's case, he has failed to do this. And it therefore seems to be very clear that he cannot in this suit recover the land which is the subject of his plaint.

The first Court gave the plaintiff a decree for $\frac{1}{6}$th share of the property on the ground that Sree Lall Jha, although the family was joint, was himself personally entitled to a share in the property to that extent. This no doubt would be so, if he chose to exercise the right of claiming a partition—either a partition by actual metes and bounds or a partition by ascertainment of undivided shares. But it does not appear that anything of this kind has been done, and therefore Sree Lall Jha is not entitled to a share in the property, and the plaintiff cannot, strictly speaking, on the evidence, even succeed in this suit to the extent of the $\frac{1}{6}$th share which the Moonsiff gave him.

We are of opinion, on the whole, that the decree of the Lower Appellate Court is wrong, and that it must be reversed, and the plaintiff's suit dismissed.

But, inasmuch as it seems quite clear that the defendants allowed the plaintiff to

purchase at this auction-sale without any remonstrance, and to pay a very substantial amount of money as consideration for a property which they knew did not exist, we think that they ought not to have the costs of this litigation. The plaintiff's suit will be dismissed, but each party will bear his own costs in all the Courts.

The plaintiff's remedy to recover a share which his vendor might insist upon obtaining in the property would be properly sought by a suit for partition, and not by a suit such as this which has been brought.

The 21st May 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Suit for Arrears of Rent—Plea of Abatement.

Case No. 2850 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Beerbhoom, dated the 15th September 1873, modifying a decision of the Moonsiff of Bolepore, dated the 30th June 1873.

Gour Kishore Chunder and others (Plaintiffs), *Appellants,*

versus

Bonomalee Chowdhry (Defendant), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Kalee Kishen Sen for Respondent.

In a suit to recover arrears of rent, it is competent to a Court to adjudicate upon a plea of abatement.

I SEE no reason to interfere with the judgment of the Lower Appellate Court in this case.

The plaintiffs brought this suit to recover arrears of rent of a putnee talook. The defendant, amongst other pleas, raised the objection that a portion of the property leased had gone out of his possession in execution of a decree passed in favour of one Kristo Bullub, both against himself and his landlords, the plaintiffs. On this ground he claimed *proportionate* abatement. The Court of first instance, finding in favour of the defendant that such a decree had been passed, refused to allow the abatement upon the ground that it was not made out to its satisfaction that possession had been taken by the decree-holder, Kristo Bullub.

Upon appeal, the Subordinate Judge differed from the first Court with reference to this question of fact, and came to the conclusion that the defendant had been actually put out of possession of the share decreed. Having found that fact, the Lower Appellate Court allowed the deduction claimed by the tenant.

In special appeal it has been contended that, as the tenant has not established his right to an abatement in a suit brought expressly for that purpose, the Lower Appellate Court is not competent to go into that question in a suit for arrears of rent.

I do not think this contention is valid. A plea of abatement can be adjudicated upon in a suit for arrears of rent with as much facility as in a suit for abatement of rent. There is no reason suggested or shown why the Lower Appellate Court should have left this question to be tried in a future suit for abatement. Apart from this, this question has been set at rest by several decisions of this Court.

It has been further contended that the Lower Appellate Court was not right to deduct Rs. 25 and odd annas, because the proper amount that should have been deducted is Rs. 18-10 annas. I do not find that this question of the *amount* of the rent to be deducted was raised in either of the Courts below. In the Court of first instance, the defendant, after having alleged in his written statement that he had been ousted from the particular share of the leased property, stated that the rent for that share was Rs. 25-10 annas. The issue that was laid down by that Court with reference to this matter is whether the defendant can justly claim abatement of rent. This issue clearly shows that the plaintiff accepted the amount of rent mentioned by the defendant, and that he simply joined issue with him upon the question of law whether the defendant was entitled to this abatement in this suit or not. I also do not find that this question of fact was raised before the Lower Appellate Court.

For these reasons I do not think that the special appellant is entitled to raise the question of fact for the first time in special appeal.

This being so, the special appeal will be dismissed with costs.

The 21st May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Dower—Mahomedan Widow—Co-heirs.

Case No. 1713 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 1st May 1873, affirming a decision of the Additional Moonsiff of Buxar, dated the 25th January 1873.

Bibee Tajim (Defendant), *Appellant,*

versus

Syud Wahed Ali and others (Plaintiffs), *Respondents.*

Mr. Ameer Ali and *Moonshee Abdool Baree* for Appellant.

Moonshee Mahomed Yusuf for Respondents.

A widow rightfully in possession of her husband's estate is entitled, under the Mahomedan Law, to hold it until she is paid any dower which may be due to her.

Phear, J.—It appears to us that the lower Court has omitted to try an essential issue in this case.

The plaintiffs, as some of the heirs of one Madar Buksh, deceased, a Mahomedan, seek to recover their share of his property from the defendant, his widow.

The defendant said that her husband, a few days before his death, had given her possession of his property in lieu of her dower of Rs. 40,000 and two gold mohurs then due to her; and upon this defence, amongst other issues, the two following issues were raised:—

1st—"Whether the defendant has been in "possession of Sheobursheu Chuk, the "estate of her husband, from the lifetime of "her husband and with his permission, owing "to non-payment of her dower; or whether "she has, on her own authority, held possession after the death of her husband, owing "to her dower not being paid."

2nd—"In case no permission was given "by the husband, whether the defendant "herself had the right to take possession of "her husband's estate, owing to non-payment "of her dower."

Both the Courts, upon the evidence before them, appear to have arrived at the conclusion that the defendant's husband did not, before his death, give possession of the property to his wife in lieu of dower. But this finding did not dispose of the two issues which we have just now mentioned, which were rightly raised between the parties in the first Court, because, by the very case of the plaintiffs, the defendant as well as themselves are the heirs to the deceased; and the property came rightly into her hands upon the decease of her husband, subject only to this condition that she must account for it to the persons entitled to claim shares in it, or to be paid debts out of it. And the plaintiffs, as co-heirs with the defendant, are only entitled to recover their share of the property from her upon paying her any debts which may be due to her from her husband. She is, therefore, unquestionably entitled to hold the property until she is paid her dower, if dower is due to her.

The Courts appear to have committed error in this case by not trying the second issue, namely, the issue whether dower was due to the defendant as she alleged, and was unpaid at the time of her husband's death. That is the issue which is involved in the not very felicitous phraseology of the two issues which we have read, particularly in the latter part of issue first, namely, "whether she has, on her own authority, held possession after the death of her husband, owing to her dower not being paid," supplemented by that of the second: "In case no permission was given by the husband, whether the defendant herself had the right to take possession of her husband's estate, owing to non-payment of her dower."

If dower was due to her and was not paid, she unquestionably was entitled, as against the co-heirs, to hold the estate, which was rightfully in her hands, until she was paid that dower.

So that the critical question which had to be tried in this case is the question whether dower was due to the defendant, as she alleged it was, at the time of her husband's death or not.

The decision of the Lower Appellate Court must be reversed, and the case remanded for re-trial upon this issue. If necessary, the Lower Appellate Court will be able to send down this issue to the first Court under the provisions of section 354 of the Civil Procedure Code.

The costs of this appeal will abide the event.

The 22nd May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Alienation of Minor's Property—Suit by Minor —Liability of Purchaser.

Case No. 1721 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 10th July 1873, reversing a decision of the Additional Moonsiff of that District, dated the 18th April 1873.

Buzrung Sahoy Singh (Plaintiff), *Appellant,*

versus

Mussamut Mautora Chowdhrain and others (Defendants), *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Moonshee Mahomed Yusuf for Respondents.

An alienation of property during the owner's minority is open to be questioned when the minor comes of age, even if it was effected partly through the intervention of a Civil Court, *e.g.*, under a decree on foreclosure proceedings.

A party justifying a title so obtained against a minor must show, not only that he was acting honestly in the transaction, but that facts existed at the time of the mortgage such as would reasonably support the conclusion that there was a necessity for the alienation, and that the mortgagor had authority to give a good title as the minor's agent.

Phear, J.—We think that this is a plain case.

The plaintiff, who appears to have been until very lately a minor, brings this suit to recover possession of a certain property which, he says, was alienated to the defendant during his minority without such consideration or such circumstances as would, under the Hindoo law, make the alienation valid. It is admitted that the property was the property of the minor, and that it was alienated during his minority. The mode of alienation was as follows:—

The defendant advanced money to Narain Doss, the uncle of the plaintiff, upon the security of a mortgage to him of the uncle's share of the property, together with that of the minor, effected by the uncle Narain Doss and by the mother of the plaintiff acting as his (the plaintiff's) guardian.

After this mortgage was effected, and still during the minority of the plaintiff, proceedings were taken under the Regulations for the purpose of foreclosure, and a suit was thereupon brought by the defendant, the result of which was that a decree for possession followed and the defendant was put into possession of the property. And in this way he supposed that he had obtained a full and complete title to the property, not only against Narain Doss, but also against the present plaintiff, the minor, by way of foreclosure of all rights of redemption.

But it is quite plain that an alienation, even of this kind, effected partly as it was through the intervention of the Civil Court, was still only an alienation of the minor's property effected during his minority, and was therefore a transaction which was open to be questioned by the minor when he came of age. The minor is now of age. He has brought this suit within the period which the law allows him for that purpose. In the first place, then, it is incumbent upon the defendant to make at any rate a *primâ-facie* case in support of the goodness of the alienation which was made to him in the way we have mentioned.

But it seems from the judgment of the first Court, which is not in any substantial degree altered by the findings of fact at which the Lower Appellate Court has arrived, that the defendant has not made out any *primâ-facie* case of necessity, or of any other kind such as would justify the alienation of a minor's property during his minority by his guardian, or by the manager of his property. At the most, the defendant has shown that Narain Doss, the plaintiff's uncle, mortgaged his own share in the property, as well as the share of his nephew. It seems that no attempt even has been made by the defendant to prove a necessity for the alienation of the minor's share. It is also left a perfectly open question, to say the least of it, whether or not the minor's mother, who was his personal guardian, did in fact execute the deed of mortgage. And, in short, the defendant has failed to prove to any extent facts which would be sufficient to make it appear *primâ facie* that the mortgage to him and the subsequent foreclosure of the plaintiff's right in this property was good and effective. In this state of the case it would seem that the plaintiff is entitled to a decree.

The first Court gave him a decree, but this decision was reversed by the Lower Appellate Court, on the ground, as far as we can understand the judgment of the Subordinate Judge, that there was no reason shown for doubting the good faith of Narain Doss, the plaintiff's uncle, or for supposing that the transaction of mortgage and subsequent fore-

closure was anything other than *bonâ fide* on the part of the defendant. This may be so. But even if it be so, it is not a sufficient defence to the present suit. It is not enough for the defendant to show that he believed he had got a good title, and was himself acting honestly in the matter of the loan on the mortgage. He must go further and show facts existing at the time when the mortgage was effected, such as would reasonably support at that time the conclusion that there was a necessity for the alienation of the minor's share, and that Narain Doss had authority to give a good title as the agent of the minor. It seems to us that the decision of the Lower Appellate Court cannot be upheld, and that the decision of the first Court is, upon the admitted facts of the case, a right decision.

We therefore reverse the decree of the Lower Appellate Court and affirm that of the first Court, with costs in both Courts.

The 22nd May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Pauper Suit—Jurisdiction—Tergiversation.

Case No. 1677 of 1873.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of the 24-Pergunnahs, dated the 5th May 1873, reversing a decision of the Moonsiff of Alipore, dated the 30th November 1871.

Brohmo Moyee Dassia (Pauper Plaintiff), *Appellant,*

versus

Anund Chunder Chatterjee (Defendant), *Respondent.*

Baboos Sham Lall Mitter and *Nil Madhub Bose* for Appellant.

Baboo Juggut Chunder Banerjee for Respondent.

A pauper application to sue in a Subordinate Judge's Court having been opposed on the ground of over-valuation, it was renewed successfully in the Moonsiff's Court, where plaintiff obtained a decree. In appeal the question of jurisdiction was raised, and the Additional Judge decided that the suit was of a value beyond the Moonsiff's competency to try:

HELD that as it was at defendant's opposition that the original application was rejected, he was not at liberty at this stage to turn round and object to the jurisdiction of the Moonsiff.

Ainslie, J.—THE plaintiff is the special appellant before us. She alleges that she bought certain lands and erected buildings thereon many years ago with her streedhun; that after the lapse of 19 years certain judgment-creditors of her husband attached this property in execution of a decree against him; that she put forward a claim under section 246 of the Civil Procedure Code, but it was disallowed, and the property was sold to the present defendant for a sum of Rs. 600; that thereupon she made an application *in formâ pauperis* in the Court of the second Subordinate Judge of the 24-Pergunnahs, valuing her suit at Rs. 5,300, but that the Subordinate Judge was of opinion, with reference to the sum paid on the occasion of the sale, that the suit was over-valued, and that he could not entertain the application. The plaintiff, thereupon, took her application before the Moonsiff, by whom it was admitted. The Moonsiff tried the suit on its merits and gave plaintiff a decree. In the course of his judgment, he points out that the present value of the property is Rs. 50 a month, and that the market-value must exceed the amount to which his jurisdiction is limited; but he says, "I may also observe that though the property is very valuable, defendant does not "take any objection as to jurisdiction, because "it was at his opposition on the ground of "over-valuation that the pauper application "in the second Subordinate Judge's Court "was rejected." The case was then carried up to the Appellate Court by the defendant, and it came on before the Officiating Additional Subordinate Judge. No exception to the statement made by the Moonsiff to the effect that the defendant himself had caused the rejection of the first application in the second Subordinate Judge's Court was taken in the grounds of appeal, but at the hearing of the appeal the Additional Subordinate Judge allowed the question of jurisdiction to be raised, and he has come to the conclusion that the property in suit is of much more than Rs. 1,000 in value, and that the Moonsiff had no power to entertain it. He has therefore reversed the decision of the first Court and decreed the appeal. The merits of the case have not been entered into by the Subordinate Judge at all.

The question raised in this special appeal is whether it was open to the Subordinate Judge to go into the question of jurisdiction at that stage of the case. It appears to us that if the defendant raised the objection

at the hearing of the first application before the Second Subordinate Judge, and if, as is stated by the Moonsiff, it was at his opposition that the application was rejected—and we may here remark that the defendant has altogether failed to show that the Moonsiff was wrong in what he stated—he is not at liberty now to turn round and raise an objection to the jurisdiction of the Moonsiff; and further, that his own statement in the first instance and the judgment thereon must be taken as conclusive evidence of the value of the property in suit for the purposes of this suit. Therefore, in this view, the Moonsiff had jurisdiction to proceed with the case. The case, therefore, must go down to the Court below for a decision on the merits. The costs will follow the result.

The 18th May 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Hindoo Law—Adoption—Spiritual benefit.

Case No. 1314 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 27th March 1873, affirming a decision of the Subordinate Judge of that District, dated the 18th July 1872.

Ram Soondur Singh (Plaintiff), *Appellant,*

versus

Surbanee Dossee (Defendant), *Respondent.*

Mr. Piffard and *Baboo Protab Chunder Mojoomdar* for Appellant.

Baboo Rujonee Nath Bose for Respondent.

G executed an *unoomotee potro* to his wife S to adopt, on the failure of each adopted son, five sons in succession. After his death S adopted a boy who died ten or twelve years later, after which she adopted another whose adoption it is now sought to have declared invalid. The contention in special appeal is that, as the son first adopted lived to an age sufficiently mature to perform all the acts of spiritual benefit to secure which the *unoomotee potro* was executed, and it should be presumed that he performed all those acts, the power given to S ceased to have any operative force:

HELD that the contention was not supported by a Privy Council ruling cited, and was opposed to the general principles of the Hindoo Law. A son in the situation of the first adopted son in this case cannot exhaust the whole of the spiritual benefit which a son is capable of conferring on his deceased father.

Mitter, J.—IN this suit the plaintiff seeks to obtain a declaration that the adoption of the defendant No. 2 by the defendant No. 1 is invalid according to the Hindoo Law. Both the lower Courts have held that the plaintiff is not entitled to the declaration.

The facts found in the Courts below are these: One Gobind Churn Singh executed some time before his death an *unoomotee potro* to his wife Surbanee Dossee, defendant No. 1, giving her permission to adopt, on the failure of each adopted son, five sons in succession; that, shortly after the death of Gobind Churn Singh, defendant No. 1 adopted a boy of the name of Kristo Churn Singh, who died ten or twelve years after his adoption; that, some time after the death of the aforesaid Kristo Churn Singh, the defendant No. 2, who is still a minor, was duly adopted by Surbanee in pursuance of the deed of permission given to her by her husband before his death; that the plaintiff is an adopted son of the uncle of the aforesaid Gobind Churn Singh, and would be entitled to succeed to the properties left by Gobind Churn after the death of the defendant No. 1, if the adoption of the defendant No. 2 be declared invalid. The validity of the adoption was questioned principally upon the ground that the deed of permission propounded by the defendant No. 1 was not a genuine document. Both the Courts below have found upon this question against the plaintiff.

The only ground urged in special appeal is that admitting the deed of permission to be a genuine document, and that the ceremonies to have been all duly performed, still the adoption is invalid, because upon a proper construction of the *unoomotee potro* (or the deed of permission), the lower Courts should have held that the adoption took place when the operative force of the document in question had ceased to exist. It has been contended that Kristo Churn, the first adopted son, lived to an age sufficiently mature to perform all the acts of spiritual benefit to secure which the *unoomotee potro* was executed, and it should be presumed that he performed all these acts; that, after those acts had been performed, the power given to Surbanee ceased to have any operative force. In support of this contention, the learned counsel for the special appellant has quoted the well-known case of Bhoobun Moyee Debia *vs.* Ram Kishore Acharjee, 10 Moore's Indian Appeals, p. 279.* In order to determine whether this contention is borne out by the authority quoted, I propose to examine in detail the leading facts and the

*3 W. R. (P. C.) 15.

grounds upon which the decision in that case rests.

The facts briefly are these: One Gour Kishore Roy, a zemindar, died, leaving him surviving Bhowanee Kishore, a minor son, and Chundrabalee, a widow. Some time before his death he executed an *unoomotee potro*, empowering Chundrabalee, in the event of Bhowanee Kishore dying issueless, to adopt five sons in succession. Bhowanee Kishore, on attaining majority, assumed possession of the zemindarees, but died soon after without issue, leaving behind him Bhoobun Moyee, his widow, as his heir. Bhoobun Moyee, alleging to have received a power to adopt from her husband before his death, exercised that power, and adopted a son of the name of Rajendro Kishore.

A quarrel ensued between Bhoobun Moyee and her mother-in-law Chundrabalee, which resulted in a similar adoption by the latter of a boy of the name of Ram Kissen. A suit was instituted on behalf of Ram Kissen, as the adopted son of Gour Kishore, against Bhoobun Moyee and her adopted son to recover possession of property which originally belonged to Gour Kishore. The late Sudder Court decreed the claim, holding (1) that the deed of *unoomotee potro* executed by Gour Kishore was in the nature of a testamentary devise; (2) that its legal effect was that it devised the property "to his son Bhowanee Kishore and his heirs-in-general, subject to a power of appointment by the widow, to be exercised in the event of his son, Bhowanee Kishore, dying without leaving a son, either natural or adopted, or to be adopted, him surviving;" (3) that, by the exercise of the power of appointment thus given to Chundrabalee, Bhoobun Moyee, the heir-at-law of Bhowanee Kishore, was divested of her right in the property; and (4) that Bhowanee Kishore died without executing any deed of *unoomotee potro*, as alleged by Bhoobun Moyee, and therefore the adoption of Rajendro Kishore by her was invalid. The Privy Council, on appeal by Bhoobun Moyee, concurring in this last finding with the Sudder Court, proceeded to adjudicate upon the rest of the case thus: "The next question is," they say, "as to the validity of the adoption of Ram Kissen. We see no reason to dissent from the opinion of the Court below upon the facts of the case, *viz.*, that the *unoomotee potro* of Gour Kishore is a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that, at the time when Chundrabalee proposed to exercise it, the power was incapable of execution." The rest of the decision deals with the reasons upon which they came to this conclusion.

But, before I proceed to examine those reasons, I may observe that I do not think that, by the passage last quoted, the Privy Council intended to lay down that the power (of Chundrabalee) "was incapable of execution" for all purposes, *i. e.*, they did not intend to hold that the adoption of Ram Kissen under that power was wholly invalid. That this was not their meaning will appear clear as I proceed further with the examination of the grounds upon which their conclusion is based.

In dealing with these reasons they say: "The first question which arises is as to the construction of this instrument." And upon this part of the case they, differing from the Sudder Court, hold that it is not of a testamentary character, but a simple deed of permission to adopt. And they conclude by saying that "he (*i e.*, Gour Kishore) mentions the objects which induced him to make the deed—religious motives, the protection of his family, and the succession to his property; but it was by the adoption, and only by the adoption, that these objects were to be secured, and only to the extent in which the adoption could secure them.

Having put this legal construction upon the deed, the Privy Council in the next place deal with the intention of its executant to be collected from it, and they say: "It "must be admitted that it contemplates the "possibility of more than one adoption; that "it shows a strong desire on the part of the "maker for the continuance of a person to "perform his funeral rites, and to succeed to "his property; and that it does not in "express terms assign any limits to the period "within which the adoption may be made."

But they hold that some limit must be assigned to it, and then they proceed to determine that limit by taking the particular facts of that case into their consideration But it must be borne in mind that the limit which they fixed was with reference to the exercise of the power by which both the end mentioned by them, *viz.*, performance of funeral rites and succession to property, might be attained. But that they did not intend to hold that the limit assigned by them was the limit within which the power must be exercised for the attainment of either of these

ends is evident from the manner in which they put the question, upon the determination of which the whole case turns, in page 311, X. Moore's Indian Appeals:*—"The "question is whether the estate of his (Gour "Kishore's) son being unlimited, and that "son having married and left a widow his "heir, and that heir having acquired a vested "estate in her husband's property as widow, "a new heir can be substituted by adoption, "who is to defeat that estate and take as an "adopted son what a legitimate son of Gour "Kishore would not have taken?" This passage leaves no doubt in my mind that the Privy Council, when they said "that the power was incapable of execution," did not intend to hold that the power was incapable of execution for all purposes, but only for the purpose of divesting the widow of Bhowanee Kishore of her proprietary rights in the property left by her husband.

In this view of the case quoted, I do not think that it is an authority in support of the proposition of law advanced by the learned counsel for the special appellant. Because, in order to give effect to his contention in this case, we must go the whole length of saying that the adoption of defendant No. 2 is absolutely bad and invalid; but the Privy Council decision quoted does not, as I have shown above, warrant us in saying this. On the other hand, the concluding observations of their Lordships in that case contained in the following passage lend considerable support to the contention of the respondent: "If Bhowanee Kishore," they say, "had died unmarried, his mother, Chundrabalee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule." It is quite evident that the inclination of their opinion regarding this hypothetical case was quite in favour of the validity of the adoption, and the facts of that hypothetical case are exactly the facts found by the Court below in the present case.

Putting, therefore, the case of Bhoobun Moyee *vs.* Ram Kishore Acharjee on one side, is there anything in the general Hindoo law in support of the contention put forward by the special appellant? No passage from any of the treatises of the Hindoo law, and no texts of the Hindoo shasters, have been cited. As far as I am aware there is none in its support. On the other hand, the broad proposition for which the learned counsel contends will in great many cases defeat the essential object for which every Hindoo desires to adopt, *viz.*, the continuance of the spiritual benefit to be conferred upon him after his death. An adopted son attaining an age of sufficient maturity, and by performing the religious services enjoined by the shasters, cannot exhaust the whole of the spiritual benefit which a son is capable of conferring upon the soul of his deceased father. Because these services are enjoined to be repeated at certain stated intervals, and the performance of them on each successive occasion secures fresh spiritual benefit to the soul of the deceased father (see note to verse 74 of section 4 of Sutherland's Dattaka Mimansa, where these rites are fully described). I am, therefore, of opinion that the contention of the special appellant is opposed to the general principles of the Hindoo law.

The result, therefore, is that this special appeal must fail, and the decrees of the Lower Courts are confirmed with costs.

Markby, J.—I concur in the judgment which has been delivered by Mr. Justice Romesh Chunder Mitter. Had we differed in opinion from the Courts below, I should still have considered it doubtful whether this is a case in which a declaratory decree could be made.

The 21st May 1874.

Present:

The Hon'ble W. Markby, *Judge.*

Act VIII. of 1859, s. 230.

Case No. 1702 of 1873.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 7th May 1873, affirming a decision of the Moonsiff of Cutwa, dated the 8th February 1873.

Banee Madhub Dutt (Defendant), *Appellant,*

versus

Nund Lall Mojoomdar (Plaintiff), *Respondent.*

Baboo Kalee Prosunno Dutt, for Appellant.

Baboo Luckhee Churn Bose, for Respondent.

A party who has parted with the actual occupation of land to another is not thereby, as an absolute rule, with-

* 3 W. R. (P. C.) 18.

out restriction, barred from taking advantage of Act VIII. of 1859, s. 230.

A case under s. 230 is to be treated in all respects as a regular suit.

WITH regard to the first point in this case, namely, whether the plaintiff was in a position to make an application under section 230 of the Civil Procedure Code, I think there is nothing to justify me in holding that he was not. The Moonsiff permitted him to make that application, and having entertained the application, numbered it, and tried the case as a regular suit under that section. I have nothing before me to show what the nature of the interest was which the appellant says the plaintiff had parted with to a tenant, so as to preclude himself from taking the advantage of this section. For aught I know that interest was a mere tenancy-at-will. I cannot lay down as an absolute rule, without restriction, that a person who has parted with the actual occupation of the land to another might not take the advantage of section 230. It is quite obvious, as the Judge pointed out, that there are many cases where it would be extremely inconvenient if the parties could not do so.

With regard to the other point, it seems to me that a case under section 230 is to be treated in all respects as a regular suit, and it may be possible, as pointed out in the case referred to in the V. Bengal Law Reports, p. 708,* that there may have been cases under that section in which the Court may not go fully into the question of title. Here it seems to me that the plaintiff proved to the satisfaction of the Moonsiff that he had a title and that the defendant had none; he proved that he is the purchaser of the tenure. All that the defendant has proved is that he holds a mortgage of the property from a person who was in possession of some kind of tenure for a period of upwards of twelve years. Then it must be taken, I think, as admitted now, that, as the Moonsiff says, this person was a koorfa ryot. There was no appeal against that finding of the Moonsiff to the Lower Appellate Court. That being so, as pointed out by the Moonsiff, he had no right of occupancy, so that he had no permanent right that he could transfer. No ground is made that the Moonsiff was wrong in taking that view of the case.

The special appeal must be dismissed with costs.

* 13 W. R. (F. B.) 80.

The 22nd May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Fraud—Evidence—Jurisdiction—Special Appeal.

Case No. 1724 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 11th July 1873, reversing a decision of the Moonsiff of Chuprah, dated the 19th June 1872.

Raj Narain (one of the Defendants), *Appellant,*

versus

Rowshun Mull (Plaintiff) and another (Defendant), *Respondents.*

Moonshee Mahomed Yusuff, for Appellant.

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee*, for Respondents.

Mere speculation and probability will not in law support a finding of fraud. Where a party puts forward a charge of collusion with a view to defraud, it is incumbent on him to support it by evidence to a certain reasonable extent.

E.g., where a party admits that an instrument which, on the face of it, appears to deal with the property, is written or signed by the owner of the property, he can only get rid of its effect by showing facts which would establish fraud in its inception, or show that it was not intended to be operative according to its purport.

Where a Moonsiff's decision as to whether the value of a suit exceeds the limits of his jurisdiction is not appealed against in the Lower Appellate Court, the question cannot be rightly entertained anew by the High Court in special appeal.

Phear, J.—THE case of the plaintiff in this suit is that he took a bond from one Heetun Singh on the 28th November 1868, by which three properties, which have been mentioned in the course of this hearing, were mortgaged to him to secure the repayment of Rs. 2,200. And in February 1872, on the footing of this bond, he obtained a decree for the realization of the mortgage debt by the sale of the property which was the subject of the bond. But he complains that, upon proceeding to realize this money under his decree, he found set up against him two other bonds made by Heetun Singh in favour of Raj Narain, each for the sum of Rs. 99, dated respectively the 20th and 31st March 1868. And he also found that Raj Narain had, on the 26th August 1870, obtained a decree for the realization of these

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bond-debts by the sale of the property covered by the bonds, and that, on the 9th March 1872, one of the properties covered by the bond had been sold in execution of the decree of August 1870 to Oodit Narain, another party defendant.

Upon this state of the facts, the plaintiff asks to have these bonds set aside on the ground that they were as against him fraudulent and collusive; were in fact benamee transactions effected by Heetun Singh for the purpose of defrauding him.

The first Court was of opinion, upon the evidence before it, that the plaintiff had failed to make out his case. There is no doubt that it was incumbent upon the plaintiff to make out a *primâ-facie* case of fraud on the part of Heetun Singh against himself in the matter of these bonds, *i.e.*, the bonds executed by Heetun Singh to Raj Narain. He must show in some way either that these bonds, although they pretended to be made to secure each a debt of Rs. 99, were made for no consideration at all, and amounted to nothing more than a benamee conveyance of the property to Raj Narain for the benefit of Heet Narain himself; or show that these bonds, although as a matter of fact executed by Heetun Singh, ought not, for some good reason, to be treated as valid and operative to affect the property covered by them as against the plaintiff. And it seems that the Moonsiff was quite right in considering that the plaintiff had given no evidence directly tending to establish any position of this kind.

However, on appeal to the Lower Appellate Court, the Judge was of opinion, for reasons which he gave, that these bonds were benamee transactions, and were made for the purpose of defrauding the plaintiff. And in that view he gave the plaintiff a decree.

It seems to us, upon the best consideration which we can give to the judgment of the Lower Appellate Court, that the reasons put forward by that Court for reversing the decision of the Moonsiff are not sound in law. The Judge thought it very suspicious that the consideration for each of the deeds should be just exactly Rs. 99. And he argued, from the mode in which the sale of property effected on the 9th March 1872 in execution of this decree was carried out, that the intention of the defendant Heetun Singh in these matters could not be honest and straightforward. But, as far as we can see, the reasoning of the Judge hardly went beyond this. But mere speculation and probability, such as this is, will not in law support a finding of fraud. And it seems to be unquestionable that there is not any direct evidence upon the record which could support the conclusion that the execution of the bonds in March 1868, eight months before the plaintiff's mortgage was effected, was made with the immediate view of defrauding the plaintiff. We thus have arrived at the opinion that the judgment of the Lower Appellate Court reversing the judgment of the first Court cannot be supported upon the reasons which the Judge has given for it.

However, it has been objected before us on special appeal that at any rate section 50 of Act XX. of 1866 operates to give the plaintiff's bond of November 1868, which is an admittedly registered bond, precedence of the two bonds of Raj Narain made in March 1868, which are neither of them registered. As the value secured by each of them was less than Rs. 100, there was no compulsion upon the parties to register these bonds. But section 50 of Act XX. provides that "every instrument of the kinds mentioned "in clauses 1, 2, and 3 of section 18 shall, "if duly registered, take effect, as regards "the property comprised therein, against every "unregistered instrument relating to the "same property, whether such other instru-"ment be of the same nature as the regis-"tered instrument or not." And it seems to us that the plaintiff is entitled, on the facts which have been found by the lower Courts, to have the benefit of this section of the Act.

It has been maintained by the learned pleader who has appeared on behalf of the appellant that the plaintiff's bond itself has not been established by the finding of the lower Courts. But we think, on the whole, that there was no contest between the parties either in the first Court or in the Lower Appellate Court as to whether the plaintiff's bond was executed by Heetun Singh, as it purports to be. What the defendant said in this matter was that, although the bond appeared to be the bond of Heetun Singh mortgaging the property to the plaintiff, yet it was not a valid and operative bond affecting the property as against him, because it was collusive, and made with a view to defraud him. At this point, in short, he turned the tables upon the plaintiff. That is, he made precisely the same charge against the plaintiff with regard to the validity of his mortgage-bond as the plaintiff had made against him with regard to his two bonds of 1868. And there can be no doubt that it is incumbent on the person, who puts forward a charge of this kind, to support it by evidence to a certain reasonable

extent. When he admits that the instrument, which, on the face of it, appears to deal with the property, is written or signed by the owner of the property, he can only get rid of its effects by showing facts which would establish fraud in its inception, or show that it was not intended to be operative according to its purport. This the defendant has not done. And therefore it seems to us that at this stage we must take it that the plaintiff's mortgage-bond is completely established. And, that being so, we are further of opinion, as has already been mentioned, that he is entitled to have the benefit of section 50 of Act XX. of 1866.

The result is that he ought to have a decree in his favour, not quite so extensive as the decree which the Lower Appellate Court has given him, but still a decree which possibly may be equally effective for his purpose.

We think that the decree of the Lower Appellate Court should be varied, and in lieu thereof it should be declared that the plaintiff's mortgage-deed of 28th November 1868 takes effect, as regards the property comprised therein, against the two bonds executed by Heetun Singh in favour of Raj Narain on the 20th and 31st March 1868 respectively.

As we have in this suit varied the decree, and placed it upon a ground upon which it certainly was not sought by the plaintiff, or given to him by the Court below, we think that the plaintiff is not entitled to costs. And accordingly we direct that each party bear his own costs in all the Courts.

We ought to mention that it was objected further on special appeal that the Moonsiff had no jurisdiction to entertain this suit on the ground that its value exceeded the limits of the Moonsiff's jurisdiction. But this question is purely a question of fact. It was determined by the Moonsiff adversely to the defendant, and this decision, for reasons which are probably apparent, was not appealed against by the defendant in the Lower Appellate Court. The Moonsiff's decision on the point thus became final, and we cannot now, on special appeal, rightly entertain the question anew. There appears to be evidence bearing both ways, *i. e.*, both for and against the defendant's contention on this point before the Court; and it was a matter which fell within the province of the first Court to decide. It is in short impossible for us to say on special appeal that the case is so entirely clear of all question as to the value of the subject-matter of suit as the special appellant desires us to take it; and as he did not appeal against the decision of the Moonsiff to the Lower Appellate Court, he must be bound by that decision.

The 26th May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Mesne-profits—Limitation—Rule for Estimating Damages.

Regular Appeals from a decision passed by the Subordinate Judge of the 24-Pergunnahs, dated the 11th March 1873.

Case No. 130 of 1873.

Thakoor Doss Roy Chowdhry and others (Defendants), *Appellants,*

versus

Nobin Kristo Ghose (Plaintiff), *Respondent.*

Baboos Gopal Lall Mitter and *Anund Chunder Ghosal* for Appellants.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondent.

Case No. 146 of 1873.

Nobin Kristo Ghose (Plaintiff), *Appellant,*

versus

Thakoor Doss Roy Chowdhry and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Baboo Debendro Coomar Roy for Respondents.

An auction-purchaser at a revenue-sale having obtained possession brought a suit to recover mesne-profits, whereupon the defendants pleaded limitation as to any wassilat not accruing within six years prior to the institution of the suit. As the pottahs contained no specification of the amount of the instalments, or any provision for interest on arrears falling due within the year, it was held that, for the purpose of determining limitation, the rent must be taken to be one falling due annually.

Trespassers in occupation of land cannot enter into engagements binding on the person lawfully entitled, especially where the latter is a purchaser at a sale for arrears of revenue.

In estimating damages claimable by a person who has been wrongfully kept out of possession, the Court must look not merely to what the wrong-doers may have actually collected, but also to what it may be reasonably supposed plaintiff could have collected during the period for which profits are claimed.

Ainslie, J.—THIS suit has been brought by Nobin Kristo Ghose to recover from the defendants the sum of Rs. 10,505 as mesne-profits of 738 beeghas 13 cottahs of land situated in Mouzah Joykistonuggur, No. 1137 of the towjee. The plaintiff, it appears, is the purchaser of the talook in question at a revenue-sale. His purchase took place as far back as April 1863, but he did not succeed in obtaining possession until the 29th February 1872. Before the institution of this suit, he brought a separate suit for possession in which he was eventually successful, and obtained a decree for certain lands shown in the Ameen's map of the 1st March 1870 as the lakhiraj lands covered by the measurement-chittahs of the year 1190. The 738 beeghas comprise a tank measuring 4 beeghas, the annual rent of which is stated in the plaint to be Rs. 16. The first objection taken by the defendants in their answer is under the Statute of Limitation; that the plaintiff is only entitled to recover wassilat for that portion of the period during which he was out of possession which falls within the six years immediately preceding the institution of this suit; in other words, that the wassilat accruing from the beginning of 1272 to the 29th Cheyt of that year is barred by limitation. The liability of the defendants to pay mesne-profits on account of the tank is disputed, and with reference to the rest of the lands, namely, 734 beeghas 13 cottahs. the defendants allege that the rate at which plaintiff claims is excessive. They state that this land, 734 beeghas 13 cottahs, consists of two portions, *viz.*, 301 beeghas belonging to Mouzahs Tengrabarriah, &c., included in the pottah held by Kalee Churn Nundee and Gobind Chunder Chatterjee, and 433 beegahs 13 cottahs covered by the pottah of Kumla Kant Aditto, and appertaining to Mouzahs Mowranee and Gopalpore; that both these pottahs are of the year 1253; and that the lessees holding the lands by a jungleboore tenure have never paid rent for any portion of their lands at a higher rate than 8 annas per beegha, so that the plaintiff is entitled to wassilat only at that rate. They further state that a certain portion of the land, *viz.*, the 301 beeghas covered by the pottah of Kalee Churn Nundee and Gobind Chunder Chatterjee, is not in a condition to yield any profits; consequently the lessees have never paid any rent for this, and the plaintiff is therefore not entitled to recover anything from them on account of it.

The lower Court has found on the plea of limitation in favour of the defendants. With reference to the rate or annual profit per beegha, the Lower Court has limited the plaintiff's claim to the amount shown in the pottahs granted to Kalee Churn Nundee and Kumla Kant Aditto. The rest of the defendant's objections were overruled. Both parties have appealed from this decision. The plaintiff's appeal is numbered 146, and the defendant's 130, of 1873. It will be most convenient to take up the plaintiff's appeal first.

On the point of limitation, the Subordinate Judge has held that it "is clear "from the chackdaree pottahs that the "defendant realized the rent by monthly "instalments, and, as such, the cause of action "for wassilat for every month arose in the "beginning of the next." So much of the pottahs as relates to this point has been read to us. We find that there is in one pottah a provision that the rent shall be payable monthly on demand; and there is a further condition that, on the rents being duly paid year by year, the lessee shall continue in possession. The condition in the other lease is that the lessee shall, year by year, month by month, and instalment by instalment, duly pay rent on demand; but there is no specification in either of the pottahs of the amount of the instalments, nor are there any words to show that the instalments alluded to were to be twelve equal monthly instalments; and it further appears that there is no provision whatever for interest on arrears falling due within the year. We do not think we can say that these leases contained a contract to pay rent by defined monthly instalments which, independently of any failure to pay on demand, might be made the subject of an action at the commencement of the following month. This being so, it appears that, for the purpose of determining the question of limitation, the rent must be taken to be one falling due annually. The case will, therefore, be governed by the judgments in the cases reported in 10 Weekly Reporter, p. 486, and 17 Weekly Reporter, p. 208. We think that on this ground the plaintiff must succeed.

In respect to the rents, the question is whether the action of the defendants, by

which they limited their own claim against their lessees, is to have the effect of limiting the plaintiff's claim against them (the defendants). The latter, while in possession, gave leases to Kalee Churn and others at the rate of 8 annas per beegha, but they were themselves trespassers, and had no title whatever to the occupation of these lands. This we must take to have been settled by the decree in the suit for possession. They, therefore, could not enter into engagements by which the person lawfully entitled to the enjoyment of the property is bound, especially when, as in this case, that person is a purchaser at a sale for arrears of revenue, and takes the lands subject only to such encumbrances as are specially protected by section 47, Act XI. of 1859. The evidence given by plaintiff shows that the actual rates of rent recoverable from the cultivating ryots at the time when he recovered possession varied from Rs. 1-4 to Rs. 1-8 per beegha, there being also the intermediate rate of Rs. 1-6. The defendants might have shown that the circumstances of the property were such that it was impossible, or extremely improbable, that the plaintiff could have brought the lands into cultivation on more favourable terms than those obtained by themselves, and that, even if his possession had never been disturbed, it would have been necessary for him, in order to get tenants at all, to give permanent tenures such as they had created. There has been no attempt to show anything of this kind; nor is there any evidence of the amount expended by themselves, or by the intermediate holders, in bringing these lands under cultivation which must have fallen upon the plaintiff if he had dealt directly with the cultivating tenants; the expense of clearing the land of jungle is distinctly stated by one witness, Ram Kant Mundul, to have been paid by himself. The plaintiff is clearly entitled to damages for the wrongful act of the defendants in keeping him out of possession; and in estimating those damages we must look, not merely to what the defendants themselves may have actually collected, but to what it may be reasonably supposed the plaintiff could have collected during the years for the profits of which this suit is brought. There seems to be no reason whatever for supposing that the plaintiff could not have dealt with the ryots so as to receive from them those rents which they have paid to the intermediate holders, and as the intermediate holdings were cultivated by the defendants while they were in wrongful possession, they cannot shirk their liability to pay to the plaintiff such rents as he could have recovered from the ryots. On the oral evidence given in this case, and having regard to the rates prevailing in the year 1268, when the permanent settlement was made by the Government, we think that substantial justice will be done by awarding the lowest rate stated by the plaintiff's witnesses, *viz.*, Rs. 1-4.

With reference to the appeal No. 130, it must, we think, be dismissed with costs, except in regard to the third ground of appeal, which says that the Court below was wrong in awarding wassilat for the pond in excess of the amount claimed by the plaintiff. The plaintiff claimed Rs. 16, but the Court below has awarded him Rs. 50, and it is admitted by the plaintiff-respondent that he is not entitled to more than the sum named and proved by himself. With reference to the quantity of land, it is alleged that the Ameen's map, which is put in, and on which the plaintiff relies, shows 637 beeghas 17 cottahs, and not 734 beeghas 13 cottahs. Now, in the first place, it seems beyond a doubt that the quantities given in the margin of this map, at least in respect of plot No. 3, are not correctly given; but, besides this, if any objection had to be taken as to the actual area, it ought to have been taken by the defendants in their written statement. Instead of taking any such objection, they seem rather to admit the correctness of the area stated in the plaint, for they allege that 301 beeghas are held by Kalee Churn and Gobind Chunder, and 433 beeghas 13 cottahs by Kumla Kant Aditto, making a total of 734 beeghas 13 cottahs, the exact quantity for which the plaintiff claimed mesne-profits. As this matter was not put in issue at all, we think it must be taken that the quantity of land is as stated in the plaint. With reference to what are called *patee bada* lands situated in Tengrabarriah, the defendants allege that they realized nothing from the lessees, and therefore the plaintiff cannot recover anything from them. Now, in the first place, it does not appear that the lease which they granted was in any way modified so as to exclude these lands; and, in the second place, the plaintiff has given positive evidence, which we think must prevail, that these lands did yield a profit. There appears to have been some error in the calculation given at the end of the judgment of the lower Court, but this is immaterial, as the account will have to be made up afresh. The costs, both of the lower Court and of this Court, will follow the result. A consolidated decree must be drawn in the two appeals as the decree in the suit.

The 26th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Arbitration Award—Act VIII. of 1859, ss. 312, 325, 327—Splitting-up of an Award—Signature of Arbitrators.

Case No. 1347 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 7th April 1873, affirming a decision of the Subordinate Judge af that District, dated the 20th May 1872.

Nem Roy (one of the Defendants), *Appellant,*

versus

Bharut Roy and another (Plaintiffs) and others (Defendants), *Respondents.*

Baboo Judoonath Sahoy for Appellant.

Baboo Bama Churn Banerjee for Respondents.

The parties to certain suits having agreed to submit to arbitration, the suits were so referred under Act VIII. of 1859, s. 312. After this reference the parties agreed by an ekrarnama to submit the same suits, together with other matters, to the arbitration of five persons, the effect being to withdraw the first submission, and substitute the new agreement. Before these arbitrators arrived at a final conclusion, the parties by a solehnama compromised the whole of the subjects of dispute, and afterwards an award was drawn up in the terms of the solehnama, and signed by two of the arbitrators and the head arbitrator. When the award was brought before the Subordinate Judge, he considered it had been made *sans vires* in respect of those matters which were not involved in the suits originally referred, and accordingly made a decree only in those suits corresponding with the terms of the award. Some of the defendants applied to the Subordinate Judge to have the effect of a decree given to that portion of the award which was left outstanding by the first decision. This application was disposed, and the remainder of the award enforced. An appeal to the Judge was dismissed with costs:

HELD that the award was illegal, because it was not signed by all the arbitrators, and there had been no agreement to abide by the decision of the majority, or that the voice of the umpire should prevail:

HELD, however, that, as the parties concerned did not take steps to set the Subordinate Judge right, the High Court could not interfere; but that the effect of the decision was to dispose of the award altogether, and not to divide it into two parts of which one might form the foundation of a future judgment:

HELD that the application to give effect to the unenforced portion of the award ought to have been dismissed.

Phear, J.—IT appears to us that the Courts below have fallen into several errors in the matter of this case.

The principal facts are as follows: One Lall Mun Roy, several years ago, brought certain suits against the persons who are called plaintiffs in this case, and other persons, to obtain possession of Kismut Bella Bishenpore and other mouzahs. These suits came on for hearing before the Subordinate Judge, and the parties to them agreed that they should be submitted to arbitration under section 312 of the Civil Procedure Code. And accordingly the suits were so referred.

But, after these suits had been in this way referred to arbitration, the parties, by an ekrarnama come to on the 12th June 1871, agreed to submit the same suits, together with other matters, to the arbitration of five persons—four arbitrators and one head arbitrator, as he is termed. And the effect of this new submission to arbitration was to withdraw the first submission of the suits to arbitration, and to substitute this agreement of the 12th June 1871 in its place.

We find that the arbitrators entered upon their duties under this ekrarnama of June 1871, and took evidence both oral and documentary; but, before they arrived at any final conclusion in regard to the matters submitted to them, the parties. by a solehnama dated the 26th July 1871, voluntarily compromised the whole of the subjects of dispute which had been submitted to the arbitrators by the ekrarnama of June 1871. It does not appear that the parties in terms desired the arbitrators to adopt this solehnama or compromise as their judgment in the matters submitted to them for arbitration. But there is endorsed on this solehnama the approbation or sanction of two at least of the arbitrators. And afterwards, on some date not mentioned, an award was drawn up in the terms of the solehnama or deed of compromise of the 26th July 1871, and was signed by two of the arbitrators and the head arbitrator, that is, by three out of the five persons to whom the decision of all these matters in dispute was submitted by the ekrarnama of June 1871. And the Courts, and indeed, we may add, the parties themselves, seem to have treated this as a final and binding award of the arbitrators come to under the submission to arbitration.

If the first submission of the three suits, which we have mentioned, to arbitration had not been withdrawn, the course of procedure which the parties concerned would have been bound to follow is that which is prescribed by the several sections of Chapter VI. of Act VIII. of 1859. And it is an important part of this procedure that in certain events the Court, upon having an award returned to it, has power to remit the award or any of

the matters referred to arbitration to the re-consideration of the same arbitrators or umpire upon such terms as it may think proper. And the events are: "If the award "has left undetermined some of the matters "referred to arbitration, or if it determine "matters not referred to arbitration. If "the award is so indefinite as to be inca-"pable of execution. If an objection to "the legality of the award is apparent "upon the face of the award." And by section 325: "If the Court shall not see cause "to remit the award or any of the matters "referred to arbitration for re-consideration "in manner aforesaid, and if no application "shall have been made to set aside the award, "or if the Court shall have refused such "application, the Court shall proceed to pass "judgment according to the award, or ac-"cording to its own opinion on the special "case, if the award shall have been submitted "to it in the form of a special case; and "upon the judgment which shall be so given, "decree shall follow and shall be carried "into execution in the same manner as other "decrees of the Court. In every case in "which judgment shall be given according "to the award, the judgment shall be final."

And further, if an award is made upon a submission to arbitration other than a submission of matters which are in dispute in a suit, according to the provisions of section 312, then an award of that kind may be brought before the Court, not returned as a matter of course by the arbitrators as a part of their duty, but brought before the Court by the parties under section 327 of the Civil Procedure Code. And in the event of its being brought before the Court in this way, then the subsequent procedure is precisely the same as if it had been an award returned to the Court by the arbitrators who had been appointed for the purpose of deciding the subject-matter of a suit. That is, under section 325, if no sufficient cause has been shown against the award, then the Court shall proceed to pass judgment according to the award, and upon the judgment which shall be so given, decree shall follow and shall be carried into execution in the same manner as other decrees of Court.

Now in the present case, as we have already mentioned, the first submission of the matters in suit to arbitration was withdrawn by the parties; but a second submission, including both the matters in suit and other matters, was made to arbitrators, and either by the arbitrators themselves or by the action of the parties the award which three of the arbitrators arrived at on this submission to arbitration was brought before the Court. The Court ought then to have proceeded as directed by sections 327 and 324 of the Civil Procedure Code. Unfortunately the Court, that is, the Subordinate Judge before whom the award was thus brought, did not perceive that the second submission to arbitration had had the effect rightly or wrongly of withdrawing the first submission to arbitration. And, accordingly, when the award was brought before him, he considered that it had been made *ultra vires* only in respect of all those matters with which it dealt, and which were not matters involved in the suits originally referred. In this view he treated the award as good, though only to the extent of the subjects of those original suits. It appears that the parties drew the attention of the Subordinate Judge to the fact that three only out of the five arbitrators had signed the award. And that being so, there was apparent on the face of the award itself an objection to the legality of the award, which called upon the Subordinate Judge to act under section 323 of the Civil Procedure Code. But the Subordinate Judge "said: "As the arbitration-award has been "signed by the chief arbitrator and two "others, the absence of the two remaining "arbitrators, whose judgment, even if it had "been at variance with that of those arbi-"trators, would not have prevailed, can form "no ground at all for setting aside this arbi-"tration-award with regard to the question "at issue."

Accordingly he made a decree in the suits corresponding with the terms of the award. But we think it is settled even in this country that an award in order to be good must be signed by all the arbitrators to whom the matter of arbitration has been submitted, unless there is some provision by the terms of the agreement of submission that the majority of voices, or that the voice of the umpire, shall prevail in a case of difference of opinion between the arbitrators.

Now, in the ekrar of June 1871, which is the only submission to arbitration which we have before us, there are no terms of this kind. And consequently no binding award could be made under it unless all the arbitrators joined in making it. And therefore it seems that the Subordinate Judge fell into error when he considered that this was such an award under section 325 of the Civil Procedure Code as he ought to pass judgment upon, and to carry out by a correspond-

ing decree. However, as the Subordinate Judge in the exercise of his discretion did think it right to pass judgment and to make a decree in the suits in this way, and the parties concerned did not think fit to take any steps for the purpose of setting him right in this matter or in the larger matter of the award itself, we cannot on this occasion interfere with the decision of the Subordinate Judge which was then passed. And the effect of that decision is simply to dispose of the award altogether. The award was brought before the Court, and the Court passed judgment upon it according to its terms, and then made a final decree between the parties corresponding to the judgment.

After this has been done the award is converted into a decree, and there can generally be no longer any award remaining which the Courts can be called upon to carry out in any other way than by effective execution of the decree which the Court has in this way passed. No doubt there may be exceptional cases in which the award is separable into distinct parts entirely independent of each other—is, in fact, so many different awards standing upon different foundations—and in such cases the Court might make one of the constituent parts of the award into a decree, leaving the remainder to operate simply as an award; but the present case is certainly not one of those.

However, it seems that neither the present petitioners themselves nor the Courts below have taken this view of the case. They seem to have considered that the effect of the Subordinate Judge's judgment was simply to divide the award into two parts; to give effect to the first part in the way we have mentioned, and to leave the other part standing simply as an award which might itself afford a foundation for a further judgment, and a further decree, if the Court thought fit to make them.

In this stage of things between the parties the present plaint, as it is termed, was filed by several of the defendants in those former suits against Lall Mun Roy, the former plaintiff, and some other defendants, setting out the different facts which we have just been narrating, and finally asking that the Court would be pleased to declare the arbitration-award, that is, the portion of the arbitration-award which was left outstanding and unenforced by the Subordinate Judge's first decision, to declare that arbitration-award to be final, "and to pass an order to "the effect that by enforcing the said award "the plaintiff shall recover possession of the "properties specified therein, and also receive "the hard cash from the defendants."

In truth this is, properly speaking, not a plaint; this is, and was treated by the Subordinate Judge, as an application under section 327 of the Civil Procedure Code, to have the effect of a decree given to a part of an award, the other portion of which had already been dealt with in that way and a decree made in its terms.

It seems at once pretty clear that this course of proceeding was mistaken, and that the Court ought to have refused the application. However it did not do so. The Subordinate Judge, before whom the matter of this so-called plaint came on to be heard, says: "I am of opinion that the decision "of the former cases alluded to by the "parties, dated the 19th July 1871" (that is, the former order of the Subordinate Judge in regard to the first part of the award), "does not nullify or reverse the said arbitra-"tion-decision in regard to properties foreign "to that former suit or suits, but only omits "to apply the said foreign portion of the "arbitration-decision for the decision of the "cases then before the Court."

We have already stated that this view seems to us erroneous. The award was one and indivisible. It was either an award made under the original simple submission of the matters of the three suits to arbitration, or it was an award made under the later submission of the matters of these suits together with other subjects than those in dispute in the suits; in either case it was one award, and the mode of dealing with it was in either case the same. It had to be brought before the Court, to be considered by the Court, and if found regular and proper the Court had to pass judgment and to make a decree upon the footing of it. It could not make two awards out of the one award.

The Subordinate Judge, for the reason which we have just read, decreed the plaintiff's claim as he called it, that is, "con-"firmation of the private arbitration-decision "dated the 2nd July 1871, with the view "that it may be enforced or executed as an "award made under the provisions of Chapter "6, Act VIII. of 1859, as regards the proper-"ties awarded therein to the present plaint-"iffs."

Now it is plain that this order of the Subordinate Judge is most irregular in form. If he was correct in considering that he had a valid award before him which it was right and proper that the Court should turn into a decree, he was bound to act under section 325,

that is, to give judgment accordingly and to make a decree upon that judgment. But here, though he professes to act under the provisions of Chapter 6, Act VIII. of 1859, he does nothing of the kind. And the consequence is this, that the parties supposing that they had obtained something very different from a decree on an award, appealed against this judgment of the Subordinate Judge to the District Judge; and the District Judge entertained the appeal.

But if this judgment had been looked upon in its proper light, and had been made to take its proper shape, then it could not have escaped the notice of any one concerned that by the last line of section 325 of the Civil Procedure Code: "In every case in which "judgment shall be given according to the "award the judgment shall be final." There would therefore be no appeal to the Judge, and no special appeal to this Court. In the event, no doubt, of the Subordinate Judge having erred in the proceedings which he had taken for making the award equivalent to a decree of Court, the parties aggrieved would have a right to come at least to this Court for a remedy, and the result might be much the same as that of an appeal, but the procedure would be different.

On the appeal which, as we have just mentioned, was preferred from the decision of the Subordinate Judge to the Lower Appellate Court, the Judge has, however, dealt with the merits and somewhat concisely dismissed the appeal. It would seem from the language which the Judge has used that he considered the case to be rather of the nature of an application by way of execution of a decree already passed than a suit instituted by a new plaint, as the parties themselves had placed it before the Court. He says: "The present appellant, "considering himself aggrieved by the first "judgment of the Subordinate Judge, peti-"tioned the Subordinate Judge, who ordered "that execution of the award shall issue "only in regard of such matters as were by "the Court referred for arbitration, and this "order therefore prevented the plaintiff or "any one from enforcing the award on all "other points not being included in the "above. The Subordinate Judge has now "given the plaintiff a decree, on this part of "the award, by confirming the whole of it. "And against this order this appeal is "brought. There is nothing urged in "appeal that makes me think that decision "wrong. It is said that the order "on the applicant's objection set aside "the award as far as it related to property "other than that claimed in the three "suits. But this is not correct. No part "of the award was set aside. The Court "enforced the award respecting the mat-"ter which it had referred to the arbi-"tration. And that was all. It did not "enforce, and it had nothing to do with the "rest of the award. An agreement empower-"ing the arbitrators to decide on this "latter was given voluntarily, and as there "is not anywhere the least proof of the "arbitrators having acted improperly, the "parties are bound by the award that it "may be rightly enforced under section 327. "I therefore dismiss the appeal with costs."

So that the Lower Appellate Court agreeing with the first Court treated the matter as if the award was capable of being divided into two; and the one portion of it might be enforced as a decree made in the original suits, and the other portion enforced under a separate decree of its own.

Enough has been said to show that this view is erroneous. Manifestly, it might be very unjust to the parties that an award such as this should be liable to be split up in this sort of way, because the consideration for the whole of the award depends upon the relation between its different parts. Possibly the arbitrators would make a different award with regard to the suits which were submitted to them for decision, if those were submitted to them alone, from that which they would have made with regard to them, if the suits were submitted to them in connection with other matters in dispute. And to treat the whole award as being two separate and distinct proceedings, each to be enforced and carried out by a separate tribunal or Judge, and therefore each liable to fall through for a cause independent of the other, is to entirely alter the state of things upon which the parties agreed that their differences should be submitted to the judgment of the arbitrators. It appears to us that the Subordinate Judge and the Lower Appellate Court have for two principal reasons done wrong in making a decree upon this part of the award, or treating the matter as if a decree had been made. The first reason is that upon which we have dwelt at some length, namely, that after the award had been considered and judgment passed upon it by the Subordinate Judge in the matter of the first suits, there was, strictly speaking, no further award left to be carried out by a subsequent independent proceeding. And the second reason is, that there is in truth

in this case no valid and binding award before the Court, because the only award which is put before the Court is the award of the arbitrators, signed by three out of five only. And there appears to be no term in the submission to arbitration which would make the voices of three out of five, even if the three include among them the voice of the head arbitrator, binding upon the parties.

It follows that we must reverse the decision of both the Courts. But we think, having regard to all the circumstances of this case, that this must be without costs.

If the circumstances under which the solehnama or compromise was come to were such as to give it force and validity irrespective and independently of the imperfect award, then any party who has cause to complain of its terms not being performed, except so far as the decrees ultimately passed in the three suits extended, can obtain a remedy by an action founded on the solehnama. The present plaint might perhaps at the outset have been treated as the commencement of such an action, but as has been already pointed out, the Subordinate Judge did not do so; and it is now impossible to deal with it in that view, because there has been no trial in the Courts below of the issues of fact which would arise between the parties if the action were brought.

The 27th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Right of Occupancy—Act VIII. (B.C.) of 1865, s. 16.

Case No. 1396 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 3rd April 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 13th December 1872.

Emam Ali Mestory (Plaintiff), *Appellant*,

versus

Ator Ali Khan (Defendant), *Respondent*.

Baboo Kalee Mohun Doss for Appellant.

Baboo Grish Chunder Ghose for Respondent.

A tenant's right of occupancy is not avoided by the operation of Act VIII. (B. C.) of 1865, s. 16.

Couch, C. J.—The question in this special appeal was, whether the defendant's right of occupancy had been defeated by the title which the plaintiff had acquired, and by the operation of section 16 of Act VIII. of 1865 (B. C.).

The case was heard before us on the 23rd of April, and we allowed it to stand over in order that the pleader for the appellant might see if he could produce any authority in support of the proposition that the right of occupancy was avoided. It now appears that so far from there being any authority in support of that, there is one to the contrary in 5 Bengal Law Reports, page 18, of the Appendix.* This decision is in accordance with the opinion which I was inclined to entertain when the case was before us on the former occasion, but I thought it desirable to suspend our judgment until it was ascertained what decisions there were in this Court on the subject. We think the right of occupancy is not avoided by the operation of section 16 of Act VIII. of 1865 (B. C.).

The appeal must be dismissed with costs.

The 27th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Misjoinder—Separate Liability.

Case No. 1260 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 31st March 1873, reversing a decision of the Moonsiff of Nowabad, dated the 31st July 1872.

Mohunt Jumoona Doss (Plaintiff), *Appellant*,

versus

Baboo Pookhur Singh and others (Defendants), *Respondents*.

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Nil Madhub Sen for Respondents.

In a suit to recover rent from defendants with whom engagements had been entered into separately, plaintiff obtained a decree making each of them liable for the whole sum claimed.

Held that there was a misjoinder of the defendants and that the decree was wrong in law; but that if the first Court had made each defendant liable in proportion to the rent he had engaged to pay, the objection of misjoinder would not have been allowed to prevail.

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* 13 W. R. 410.

Couch, C. J.—It is alleged in the written statement of the respondent who appeared before us, and in the written statement of one of the other defendants (we have not looked further), that the engagements were entered into separately with the different defendants, and that they ought not to be jointly sued. And this appears to have been assumed to be the fact in the lower Courts. The plaintiff has joined all these persons in one suit, and has obtained in the Moonsiff's Court a decree making each of them liable for the whole sum which lie claimed in the suit. There has been a misjoinder of the defendants which has affected the decision, because it has led to fixing each person with a liability which he ought not to have. The decree should have made each of the defendants liable in proportion to the amount of the rent which he had engaged to pay. If the Moonsiff had made such a decree, the objection of misjoinder would not have been allowed to prevail in this Court. The decree is wrong in law, and we have not the materials before us to amend it so as to make it a legal one. It is not a case which this Court should send it back to the Moonsiff for the purpose of doing that. The decision of the Appellate Court dismissing the suit on the ground of misjoinder is right, looking at the effect which it has had on the proceedings.

The appeal must be dismissed with costs.

The 27th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Boundary Disputes—Right of Suit.

Case No. 1471 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 7th April 1873, modifying a decision of the Moonsiff of Moteeharee, dated the 8th April 1872.

Ameeroonnissa Begum and another (two of the Defendants), *Appellants,*

versus

Gopal Sahoo (Plaintiff) and another (Defendant), *Respondents.*

Mr. C. Gregory for Appellants.

Mr. R. T. Allan and *Baboo Chunder Madhub Ghose* for Respondents.

A proprietor of land has no right to bring a suit to compel his neighbours to agree to a particular line of boundary being marked out between his lands and theirs, when he does not venture to say that they have by any overt act transgressed that boundary.

Phear, J.—In this case the plaintiffs say that they hold by a mokurruree tenure 16 annas of Mouzah Tirkowlia, the boundaries of which are set out in the thakbust map of 1845. They assert that this mokurruree tenure was mortgaged to them under a bill of conditional sale in February 1865 by its then owner Mohabeer Pershad, and that they afterwards obtained the absolute right of property in it by foreclosure, and are in possession of it.

They allege that the boundary pillars which formerly marked the separation between this land and the land of neighbouring proprietors have been destroyed in some places by inundation, and that the defendants, two of whom are neighbouring proprietors, and the other is the karpurdaur of one of them, are offering obstruction, and will not agree to the rebuilding of the pillars according to the thakbust map.

In answer to this plaint, one of the defendants, Mussamut Ameeroonnissa, says that the plaintiff is only entitled to the boundaries as given in the khusrah and settlement of 1859.

On this state of the pleadings, the first Court passed a decree which was virtually a decree in favour of the defendant. It said: "That the suit be decreed in favour "of the plaintiff for confirmation of possession in respect of the khetbut lands of "Tirkowlia *alias* Chitownea to the extent "of 51 beeghas and 10 biswas as per "roobakaree of permanent settlement, dated "the 6th September 1861 A.D.; that the "plaintiff's prayer for posting boundary "marks and pucca pillars on a comparison "with the thakbust map be rejected, but "that the plaintiff may, if he chooses, raise "pillars and boundary marks to distinguish "his boundaries according to the permanent "settlement; and that as the defendants "neither had, nor have, any contention as "against this right of the plaintiff, but as "the plaintiff himself sought to include "within the area of his estate more lands "than what was covered by the settlement, "the costs of the defendants who have "appeared, with the full amount of vakeel'-

"fees at 5 per cent. and interest thereupon "at the rate of 6 per cent. per annum till "the day of realization, shall be charged to "the plaintiff, for it is simply on account "of the illegal demands of the plaintiff "that the defendants have been put to these "expenses."

The effect of this decree substantially is that the plaintiff's suit is dismissed with costs.

But on appeal the Lower Appellate Court was of opinion that the settlement, according to which the defendant had expressed himself willing to consider the plaintiff's rights to be good, gave the plaintiff more than was expressed in the khusrah measurements or khusrah papers, and that the evidence justified its passing a decree in favour of the plaintiff to the whole extent of his claim.

It is not very clear what were precisely the materials upon which the Subordinate Judge came to this conclusion. But we have reason to think that he must to some extent have misapprehended the evidence which was before the Court, for we find him saying that the land settled by the said roobakaree, that is, the roobakaree of 1861, was the same as that situated within the boundaries given in the map prepared for the purpose of settlement. But, so far as we can learn, there was in fact no map prepared for the purposes of the settlement. We therefore find it exceedingly difficult to see how the judgment of the Subordinate Judge could be upheld upon the grounds which he has given for it.

But irrespective of the merits of the Subordinate Judge's judgment, it appears to us very plain that the plaintiff has made out no cause of action in this suit. There is none whatever alleged in the plaint. The suit is brought against more than one neighbouring proprietor; and the defendants are altogether independent of each other. There is no common act charged against them which could constitute a cause of action. The plaintiff simply says that the defendants and their servants are offering obstructions, and will not agree to his rebuilding the pillars according to the thakbust map. If the defendants collectively, or any one of them, are preventing him, the plaintiff, from having enjoyment of land to which he is entitled, then he ought to state that fact specifically and make it the ground of his suit. If they are keeping him out of any portion of the land to which he is entitled he can bring his suit to recover possession of that portion of the land, or if they have trespassed upon it he can complain of the trespass. But he has no right to bring a suit to compel all his neighbours to agree to a particular line of boundary being marked out between his lands and their lands, when he does not venture to say that they have by any overt act transgressed that boundary. There is in truth nothing disclosed in the plaint which can properly form the subject of a civil suit.

And we may add further that, so far as we can discover, there is no evidence on the record of any substantial kind tending to show that the plaintiff is entitled, either by long actual possession or otherwise, to precisely that area of land which is *thaked* out in the thakbust map of February 1845. According to his own account he only got possession of his property by the result of the suit of foreclosure, and he has given no evidence whatever in the present suit to show what was the property designated by metes and bounds which he so obtained possession of. He has given no evidence of the specific land which he has been as a matter of fact holding since he first obtained possession of it. There is no means afforded the Court by which it could judicially say that the land which the plaintiff has been, as he says, continuously holding since he foreclosed his mortgage, is the identical land which was *thaked* out in February 1845. And unless he gives evidence of this character, he is not entitled to a decree of right in the form which he has asked from the Court.

So that on the whole it appears to us that there is no cause of action disclosed in the plaint; and there is no evidence adduced by which the plaintiff could support and make out his title to the land, even if a cause of action had been alleged. In other words, the suit as it stands is entirely without a foundation, and consequently ought to be dismissed. It appears to us that the decision of the first Court was virtually right, and that the decision of the Appellate Court was wrong. Accordingly, we reverse the decree of the Lower Appellate Court, and dismiss the plaintiff's suit with costs in all the Courts.

We may add that this decision is necessarily without prejudice to the plaintiff's right to sue the defendants or any of them in respect of any trespass which he may have cause to complain of on their part.

The 28th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble C. Pontifex, *Judge.*

Land Acquisition Act (X. of 1870), s. 35—Appeal —Jurisdiction—"District Judge"—Costs.

Appeal from an award of Mr. F. L. Beaufort, Judge, appointed under Act X. of 1870, for the Town of Calcutta.

Sreemutty Bamasoondaree Dabee, *Appellant,*

versus

W. Verner, Collector under Act X. of 1870, for the Town of Calcutta, *Respondent.*

Mr. Apcar for Appellant.

The *Advocate-General* for Respondent.

Act X. of 1870, s. 35, must be construed with reference to its object, which was to give an appeal in all cases from the decision of the Court which assessed the compensation.

If there was an assessment of compensation in Calcutta by the High Court on the original side, there would be an appeal from that in the same manner as from its judgment in a suit; and if the Local Government substitutes, for the High Court, a Judge specially appointed, his decision would be subject to appeal.

The words "may appeal therefrom to the Court of the District Judge" in the s. 35 must be read not literally but as meaning the Court which is the Appellate Court of the district, treating Calcutta as a district (which it is for the purposes of the Act) and the High Court, exercising its appellate jurisdiction, as the Court of Appeal.

An appeal does not lie, under this Act, on the question of the amount of costs, which the Judge is to determine in the same way as is done in suits by the taxing officer.

On this appeal coming on for hearing, the Advocate-General, for the respondent, took a preliminary objection that no appeal lay. He referred to section 35 of the Land Acquisition Act, under which the appeal came up, and contended that as the High Court was not the District Court, and the amount of compensation awarded was below Rs. 5,000, there was no appeal under the section 35. Reference was also made to clause 12, section 2 of the General Clauses Act," which says: "District Judge shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction."

After hearing Mr. Apcar on the preliminary objection, the Court reserved judgment, which was subsequently delivered as follows by—

Couch, C.J.—This was an appeal from the award of Mr. Beaufort, the Judge appointed by the Government of Bengal under the Land Acquisition Act, 1870, for the Town of Calcutta, and the question to be first determined is whether the appeal lies to this Court. The Act says in section 3 that the expression Court, which is found in a subsequent section where the Collector is directed to refer the matter to the Court, means, in the "Regulation Provinces, British Burmah, and Sindh, a principal Civil Court of original jurisdiction." In these the Town of Calcutta must be included; otherwise there would be no provision in the Act for any reference in cases within Calcutta. The principal Court of original jurisdiction here is the High Court; and if there were no other provision in the Act, it would have seemed that the compensation would have to be awarded by this Court. But the Act says that the expression Court means a principal Civil Court of original jurisdiction, "unless when the Local Government has appointed (as it is hereby empowered to do), either specially for any case, or generally within any specified local limits, a judicial officer to perform the functions of a Judge under this Act," and then the expression 'Court' means the Court of such officer. This has been done here, and Mr. Beaufort has been appointed.

The appeal is given by section 35 which says: "If the Judge differs from both the assessors as to the amount of compensation, he shall pronounce his decision, and the Collector or the person interested (as the case may be) may appeal therefrom to the Court of the District Judge, unless the Judge whose decision is appealed from is the District Judge, or unless the amount which the Judge proposes to award exceeds five thousand rupees, in either of which cases the appeal shall lie to the High Court."

Before considering what is the construction of this section, I quote the language of Justice Blackburn in giving his opinion to the House of Lords in the Eastern Counties and the London and Blackwall Railway Companies *vs.* Marriage, 9 H. L. Cases 36, which was a case depending on the construction of the provisions of an Act of Parliament in which there was a great difference of opinion. The learned Judge says: "We are bound to look at the language used in the Act, construing it with reference to the object with respect to which the Legislature has used that language, but construing it in its ordinary grammatical sense, unless there is something in the subject-matter or the context to show that it is to be understood

in some other sense; and doing all this we are to say what is the intention of the Legislature expressed by that language."

Now it appears to me that the object of section 35 was to give an appeal in all cases from the decision of the Court which assessed the compensation, and looking at the definition or statement of the meaning of "Court" in the 3rd section, with the words of section 35, if there was an assessment of compensation in Calcutta by the High Court on the original side, there would be an appeal from that in the same manner as from a judgment of the High Court on the original side in a suit. And if the Local Government substitutes for the High Court, a Judge specially appointed, as Mr. Beaufort was, it appears to me that it was not intended that his decision in a case in Calcutta should be final, whilst his decision in a similar case outside Calcutta would be subject to appeal. The object of the section was that there should be an appeal, and bearing this in mind, we must read the words of section 35, "may appeal therefrom to the Court of the District Judge," not literally, but as meaning the Court which is the Appellate Court of the district. By 'District Judge' is meant the Appellate Court of the district which the District Judge's Court is. It would not be right to read these words in their ordinary grammatical sense. They should be read with reference to the object of the section and as meaning the Court of Appeal for the district, treating Calcutta as a district, which it is for the purposes of this Act, and the High Court exercising its appellate jurisdiction as the Court of Appeal. There is nothing in the General Clauses Act (Act I. of 1868), section 2, which is opposed to this. That says: "District Judge shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction." If in section 3 of the Land Acquisition Act the words "District Judge" had been used instead of "Court," the High Court would not have been included, because the section says those words shall not include a High Court in the exercise of its original civil jurisdiction. But the General Clauses Act does not prevent this Court, where the subject-matter and the apparent object of the Legislature require it, giving to those words such a meaning as will include the High Court on the appellate side.

The language is not prohibitory. It is not that District Judge shall mean the principal Court of original jurisdiction, and no other —not the Court of Appeal for the district. There is nothing in the Act to prevent us from putting on section 35 of the Land Acquisition Act a construction which carries out the object of the Legislature. For these reasons we think that the appeal lies.

We proceed therefore to consider whether the compensation which has been awarded by Mr. Beaufort is sufficient. The witness Nilmoney Mitter, who was called on the part of the claimant, makes the value considerably more than has been allowed by Mr. Beaufort. He says he has calculated the value at Rs. 4,661 and has made certain deductions. In the latter part of his evidence he says "that the value is the cost of the building minus 10 per cent. for deterioration." According to the opinion of the assessor for the claimant, Mr. Hendry, this witness has not made a proper deduction. Mr. Hendry considers there ought to be a deduction of 20 per cent. Nilmoney Mitter says he believes the value of the land to be Rs. 300 a cottah, but he gives no grounds for this belief, and I think it obvious that in fixing the value at Rs. 300 a cottah he has given too great a value for the land. Looking at these circumstances, it appears to me that he is a witness who has exaggerated the amount which should be awarded, and cannot be safely relied on in determining what the amount should be. Degumber Mannah, a witness who was called for the Government, is, I think, one whose opinion may much more safely guide us in coming to a conclusion. He appears from his own account (and he was not cross-examined to show that what he said was untrue) to be a man who had considerable experience in estimating the value of buildings. He said that the total value was Rs. 3,636. I think this may be taken as a fair opinion of the value. There appears to be no reason for distrusting his judgment. He makes a deduction as he says of 25 per cent.; but on this, I think, we should rather be guided by what Mr. Hendry said, and take the proper deduction for deterioration to be 20 per cent. We may safely follow the opinion of the claimant's own assessor as to that. I would deduct 20 per cent. from Rs. 3,636, the amount which Degumber Mannah gives, *viz.*, Rs. 727, leaving Rs. 2,909 for the value of the building.

We have next to consider what ought to be allowed for the land. I put out of sight the Rs. 400 a cottah which was given for other land. The circumstances of that purchase are unknown to us, and it can there-

fore afford no criterion of the value of this land. Nor would it be safe to take the price at which land was sold in this locality at the Registrar's sale as showing the value of this land. Mr. Rowe says it is Rs. 150 a cottah, but I think Mr. Rowe was disposed to make the value of the land as low as possible. I do not say that Mr. Rowe would intentionally do so, but what the Judge has said in his remarks on that subject shows that Mr. Rowe fixed the value as low as it could be. I am therefore not inclined to adopt the estimate which Mr. Rowe has put on the land. As far as we have the means of judging of it—and we have very little—on the materials which have been given to us, I should allow for the land at Rs. 200 a cottah, which will make Rs. 500 the amount to be given for the land. To this must be added the 15 per cent. allowed under section 42 of the Act, and I think we should also add the Rs. 110 for changing residence. Mr. Apcar might very fairly have supposed that it was not necessary for him to argue that before Mr. Beaufort. It had been allowed by the Collector for compensation for removal, and was not disputed. It was not necessary for the learned Counsel for the claimant to press that before Mr. Beaufort. The total sum to be awarded will therefore be Rs. 4,025.

It has been contended that the decision of Mr. Beaufort as to costs is wrong. I think an appeal does not lie on the question of the amount of costs. By section 35 the subject of appeal is the amount of the compensation. The Act does not clearly lay down what is to be done about costs, or how the amount of them is to be determined, but it seems to me that the Judge is to determine the amount of costs incurred by either party in the same way as it is done in suits by the taxing officer. In similar proceedings in England the taxing officer determines the amount of the costs. I think there is no appeal under this Act on a question of costs, and there is no analogy between this and an appeal from a judgment of the Court where the question of costs may be gone into. The general rule in such cases is that the quantum to be allowed is left to the taxing officer. What the Court deals with on an appeal is not whether the proper amount has been allowed, but whether the allowance has been made on a proper principle. Here there is no appeal either as to the amount or the principle on which the costs have been allowed, but only as to the amount of compensation to be awarded.

We direct the award of Mr. Beaufort to be altered in accordance with the opinion which we have just given. The Rs. 4,025 will bear interest at 6 per cent. per annum from the date of possession being taken by the Government up to the date of payment. The appellant is entitled to the costs of this appeal. It appears to us that in this Court we should give costs on the same scale as we would in an appeal from the decision of a Judge exercising the ordinary original civil jurisdiction, and that the costs of the appeal should be allowed on scale No. 2.

The 28th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble C. Pontifex, *Judge*.

Malicious Prosecution—Right of Action—Maintenance and Champerty—Nominal and real Plaintiffs—Costs.

Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

Chunder Cant Mookerjee (Defendant), *Appellant*,

versus

Ram Coomar Coondoo and another (Plaintiffs), *Respondents*.

Mr. Kennedy and *Mr. Phillips* for Appellant.

Mr. Lowe, *Mr. Branson*, *Mr. Evans*, and *Mr. Collis* for Respondents.

An action may be maintained against a person for procuring a suit to be instituted, if he did so maliciously and without reasonable or probable cause; not otherwise.

Maintenance and champerty are not offences in India, and the ground on which agreements which are champertous, and agreements as to maintenance, are considered void here, is because they are considered void and against public policy. Accordingly, in this country, no action lies against a person for maintenance.

If a person who has an interest in having a question decided, puts forward another to have it tried in a suit in that other's name, the Court has power to require the real plaintiff, though not appearing as such, to give security for the costs.

THE following is the judgment of Macpherson, J., in this case:—

The plaintiffs seek to recover damages from the defendant for injuries caused to

them by him, by means of certain litigation carried on against them by or in the names of one John McQueen and his wife.

The whole litigation was in fact conducted by the defendant in the name of the McQueens, but at his own expense, under an agreement entered into between them and the defendant on the 17th of July 1867. That agreement is embodied in an indenture in which it is recited that Mrs. McQueen is entitled to certain property in Howrah then in the possession of the Coondoos (the now plaintiffs); that the McQueens, "having no funds wherewith to adopt or commence any legal proceedings" for the recovery of the property, had applied to the defendant to assist them in commencing and conducting the necessary suits, and to make all the requisite advances and disbursements connected therewith until their final termination, and that the defendant had agreed to do so; and also, as the McQueens had "no means whatever," to pay to them or the survivor Rs. 150 a month until the final termination of the litigation. The McQueens then (by the deed) appoint the defendant their attorney to institute and prosecute all necessary suits, to sign all papers and documents, to receive all moneys and take possession of all lands, &c., to which the McQueens may become entitled under any decree or order that may be made, and to appoint attorneys, and vakeels, &c., and the defendant covenants to institute and prosecute the necessary suits and proceedings and to make all requisite advances and payments, and to pay the McQueens Rs. 150 a month during the pendency of the suits. Then it is agreed that out of the moneys or proceeds of lands, &c., recovered, the defendant shall, in the first place, retain and reimburse himself all advances and payments made by him, with interest thereon at 12 per cent.; in the second place, retain to himself by way of remuneration for his trouble and risk one-third of the net proceeds of the litigation (after repaying himself with 12 per cent.); and, in the third place, make over the remaining two-thirds to the McQueens. The McQueens further covenant not to intermeddle with the defendant in the prosecution of the litigation, and that they will render him all possible assistance, and that the power of attorney given by them to the defendant shall be irrevocable so long as he prosecutes the litigation and pays the monthly allowance of Rs. 150. But there is a proviso that, if McQueen chooses to devote his whole time to it, he may have the management of the suit, *but under the control of the defendant;* and that the McQueens may at any time revoke the power of attorney given by them to the defendant on paying him all that he has advanced, with interest at 12 per cent., and the sum of Rs. 2,000 by way of liquidated damages. And power is reserved to the McQueens to compromise, but only with the consent of the defendant, unless the sum to be received on the compromise should exceed the total amount of the defendant's advances with 12 per cent.

This agreement having been entered into, a suit was commenced against the present plaintiffs on the 8th of August 1867, in the name of the McQueens, in the Hooghly Court.

On the 17th of April 1868, the suit was heard and was dismissed with costs. Thereupon there was an appeal to the High Court which, on the 15th of April 1869, reversed the decree of the Judge of Hooghly and gave judgment in favour of the McQueens.

On the 11th of May 1869, the Coondoos filed their petition for leave to appeal to the Privy Council. On the 14th the McQueens (suppressing the fact that an appeal had been filed) got an order for execution, under which they, on the 17th, were actually put in possession of the property at Howrah, and also attached other property of the Coondoos in order to obtain payment of the costs which had been decreed to them.

On the 10th of July the High Court directed that the Coondoos should be restored to possession (on giving security), unless the McQueens gave security for what they might receive pending the appeal and for costs; and on the 21st December 1869 security (in fact provided by the defendant) to the extent of Rs. 12,000 was given by the McQueens, who continued in possession, and also recovered the sum of Rs. 4,739 from the Coondoos by way of costs.

On the 3rd of September 1870, the McQueens brought a suit for wassilat in the Hooghly Court against the Coondoos and got judgment for a large sum.

In September 1871, the defendant agreed to purchase the whole property and all the rights of the McQueens therein and in the appeal to the Privy Council and in the wassilat suit. On the 21st of September in that year, the McQueens executed what is called a memorandum of agreement, which was produced by the defendant's attorney at the trial, and which is in the following words:—

"Whereas we (the McQueens), for the "consideration hereinafter mentioned, agree "to sell and convey all our right, title, and "interest in the land, &c. (describing the

" property), and also all our right, title, and " interest of and in a certain suit in respect " thereof now pending in appeal to the Privy " Council, and also all our right, title, and " interest in a certain suit now pending in " the Hooghly Court for mesne-profits in " respect of the said land and premises, to " Chunder Cant Mookerjee for the sum of " Rs. 22,000 made up as follows: Rs. 12,500 " due by us to the said Chunder Cant " Mookerjee for moneys paid to us and on our " account, and in respect of which sum of " Rs. 12,500 we have this day examined the " accounts of the said Chunder Cant Mookerjee and find the same to be correct, and have " signed the said account accordingly; the " sum of Rs. 500 paid to us this day as earnest-" money; the further sum of Rs. 5,000 to be " paid to us on the execution of the conveyance; and the sum of Rs. 4,000, the balance, " secured by a promissory note of the said " Chunder Cant Mookerjee, payable to us or " order three months after the date thereof." The execution of this document (which, it will be observed, is in truth no agreement at all, but a mere recital) is witnessed by the defendant's attorney, Mr. Hatch. Then comes a receipt signed by the McQueens, dated the 14th October 1871, for Rs. 500 " on account of the consideration-money mentioned in the above agreement."

On the 25th of June 1872, an order was made by the Privy Council reversing the decree of the High Court, with costs in the Court below, in addition to the sum of £312-10-4 for the costs of the appeal. Subsequently the judgment in the wassilat suit was on review set aside, and the suit dismissed with costs.

On the 14th of September 1872, the Coondoos were restored to possession.

There is no doubt whatever that the whole of the proceedings in Court from first to last, although taken in the name of the McQueens and with their consent, were taken under the instructions and at the expense of the defendant. Throughout the McQueens may have assisted, but the strings were pulled entirely by the defendant.

The plaintiffs sue alleging that, though they have eventually been successful in the Privy Council and have been restored to the possession which they had before the litigation began, they have as the consequence of these proceedings sustained a loss of about Rs. 25,000.

The plaint may be said to have two aspects. It says that the defendant was guilty of champerty and maintenance, and acted illegally in instituting and maintaining the suit, and that the litigation was commenced and upheld maliciously by the defendant in the names of persons who had no legal or equitable right, and without reasonable or probable cause.

I may say at once that I do not think it possible to support the plaintiff's suit so far as it rests on the allegation that the original suit by the McQueens was brought without reasonable or probable cause. Whatever the result in the Privy Council may have been, it cannot be said that there was no reasonable or probable cause when a Division Bench of this Court actually decided in April 1869 in favour of the McQueens.

But the plaint also, after charging that the agreement entered into by the defendant with the McQueens savours of champerty and maintenance and is illegal and contrary to public policy, alleges that the litigation was instigated and carried on and conducted by the defendant at his own expense and with a view to his own benefit, and that the defendant was the real mover in the proceedings, and unlawfully used the procedure and process of the Court to the damage and injury of the plaintiffs.

So far as the facts are concerned, there is no doubt that the litigation was entered into by the defendant in pursuance of the agreement of the 17th July 1867, and was instigated and carried on and conducted by the defendant at his own expense and with a view to his own benefit, and that he was the real mover in all the proceedings which were had in the name of the McQueens. There is no doubt, too, that he used the procedure and process of the Court to the damage and injury of the plaintiffs.

But was there anything illegal or against public policy in the agreement of July 1867 and the subsequent institution and maintenance of the suit by the defendant? And, even if there were, have the plaintiffs a good cause of action, when the suit was brought with the McQueens' consent and was not brought without reasonable or probable cause?

I was of opinion that the agreement which was the subject of the suit of Grose *vs.* Omirtomye Dossee* (4 B. L. R., O. J., p. 1) was illegal and void as being against public policy [see pp. 46, 47, 49, and 50], although I concurred with the Chief Justice Sir Barnes Peacock in giving effect to it so far as

* 12 W. R., Original Side Appeals, 13.

to treat it as a security for the repayment of all advances made and interest at 12 per cent. For the same reasons which weighed with me in that case, I think that the agreement made by the defendant with McQueens in 1867 was illegal and against public policy, as also were the subsequent institution and maintaining of the suit against the Coondoos by the defendant.

The only substantial difference between the agreement in Grose's case and that which the defendant entered into is, that the terms of the latter are rather less unfavourable to the party in whose name the suit was to be brought. The defendant was to have had as clear profit to himself only one-third of the net proceeds after deducting costs of litigation and all his advances, with interest thereon at 12 per cent.; whereas Grose was to have had one-half of all that was recovered absolutely, and was to have had all advances made by him, and 12 per cent. thereon out of the other half. The power of attorney given to the defendant was in reality, though not in express words, irrevocable. For when the deed starts with the recital that the McQueens had no means whatever—and when the evidence shows that in fact they never paid a farthing towards the costs of this suit, and were persons without any means —it is impossible to attach any value to the provision in the deed of July 1867 which enabled the McQueens to revoke the power of attorney to the defendant on paying him Rs. 2,000 by way of liquidated damages as well as all sums advanced by him together with 12 per cent., or to the concluding power given by the deed to compromise, but which power was accompanied by a proviso that no compromise should be good which was not made with the defendant's consent, unless the amount realized by the compromise exceeded the total amount of the defendant's advances with 12 per cent. There can be no doubt that the agreement of July 1867 was practically irrevocable by the McQueens, and that it was all along intended to be so.

The view that such an agreement is against public policy and illegal is strengthened by the decision of the Madras High Court in the case of Mulla Jaffarjee Tyeb Alli Saib *vs.* Yacab Kadar Bye (7 Mad. H. C. Rep. 128), also by the recent decision of this Court in the case of Soondaree Chowdrain *vs.* The Court of Wards (20 W. R. 446).

The question remains whether under these circumstances the plaintiffs have any cause of action and can recover damages for the loss caused by the defendant's having, in pursuance of the illegal agreement entered into by him in July 1867, instituted and maintained this litigation. The plaint alleges the defendant's conduct to have been malicious. But there was no special malice in the matter, no more than there always is, and must be (if malice it can be properly called at all), when a mere speculator takes up and prosecutes a suit.

In my opinion this suit will lie. The case of Pechell *vs.* Watson (8 M. & W. 691) is an authority that it will. It was there held that a suit would lie to recover damages for unlawfully upholding and maintaining an action by another against the plaintiff (Pechell), as also for unlawfully and without reasonable and probable cause instigating a pauper to commence and prosecute the action, whereby the pauper did commence and prosecute the action. The case of Pechell *vs.* Watson proceeded (as Lord Denman says in Flight *vs.* Leman, 4 Ad. & El., N. S., 883) on the principle that to maintain an action already commenced was unlawful. The case now before me proceeds (so far as one portion of it is concerned) on the same principle. In Flight *vs.* Leman it was held that the action would not lie: but that was because it was for instigating another to commence and prosecute a suit, but neither showed *maintenance* nor alleged want of probable cause.

The case of Cotterell *vs.* Jones (21 L. J., C. P., 2) has been much relied on for the defendant. But the only point actually decided there was that as the plaintiff showed in his plaint that he could not possibly prove any legal damage, the suit was bad. The plaintiff in the original suit had been nonsuited: but the defendant in that suit (the plaintiff Cotterell) had omitted to get an order for the payment of his costs on the non-suit. Therefore the Court held that he could prove no legal damage, and that his subsequent suit could not be sustained. That case in no way shakes the authority of Pechell *vs.* Watson so far as it decided that a suit would lie to recover damages for unlawfully upholding and maintaining an action brought by another.

The defendant has had notice from the first that the plaintiff considered him liable for their costs. When the original suit was pending in the Court of the Judge of Hooghly, they applied to have him added as a defendant, in order that, if they succeeded in getting the suit dismissed, they might recover their costs from him. The Judge, however, refused the application on the ground that the defendant had no

present interest in the property in suit, concluding his observations on the point thus:—

"Therefore, in my opinion, he cannot be made a party to it, merely because he supplies funds for carrying it on, the terms of his agreement providing for the reimbursement of his expenses whether the suit fails or succeeds." The Judge was in error when he supposed that the agreement provided for the reimbursement of his expenses if the suit failed. Under the agreement the defendant was entitled to be reimbursed nothing if the suit failed. In one event only was he to be reimbursed from any source save the proceeds realized by the suit, in the very highly improbable event, namely, of the McQueens paying back all moneys paid or advanced by him, together with interest at 12 per cent., and Rs. 2,000 by way of liquidated damages.

The principle that those who maintain, and are the persons chiefly interested in the result of suits instituted by them in the names of others, may be compelled to recoup to the defendants who are sued the costs incurred by them in defending themselves, has been frequently recognized and acted on in this Court. See Bamasoondery Dossee *vs.* Anundloll Doss, Bourke's Rep. 45, O. C. J., and again (in appeal) p. 96, Appeals from O. C. J. [The report of this case at p 96, I may remark in passing, is not very accurate. Among other things it represents me as being one of the Judges who heard the appeal This is a mistake, for the Appellate Court consisted of the Chief Justice and Mr Justice Norman only.] And something of the same principle is to be found in such cases as Hilton *vs.* Woods, 4 L. R., Eq., 432, and *In re* Jones, 6 L. R., Ch., 497, though in cases of the latter class a good deal turns on the fact of the person whom it was sought to make liable for the costs being attorneys on the record.

Apart from all precedent, and even if it were doubtful whether the agreement of 1867 were actually illegal and void, it seems to me to be perfectly fair and just, that in a case such as this the defendant should be held responsible to the plaintiff for the loss he has sustained by reason of the suits which the defendant substantially only for his own benefit] has maintained against him.

It is said that this suit is barred by limitation. But there is no ground for any such contention. The plaintiffs could not have successfully sued until the case was decided in their favour by the Privy Council.

The damages recoverable from the defendant are those which might have been recovered from the McQueens had they been persons of means and the defendant had not intermeddled in the suit. Security has been given to a certain extent for the costs of the appeal to the Privy Council. It was argued that because that security was given, the plaintiffs are now limited to the amount for which it was given: and also that they cannot recover from the defendant until they have proceeded against the security and failed to recover. In my opinion, the plaintiffs are neither limited to the amount for which security has been given, nor bound to proceed in the first instance against the security.

I think the plaintiffs are entitled to recover the Rs. 4,739 which they had to pay the McQueens as costs after they succeeded in their appeal to the High Court; also the sum of Rs. 124, then due from the McQueens to the Coondoos and which was credited to them so as to leave the balance due by them Rs. 4,739. Mr. Phillips objects to this item of Rs. 124 being allowed. But the plaintiffs are clearly entitled to it. It was due to the Coondoos at the time execution issued against them: and the sum of Rs. 4,739 actually levied from them was the balance due after giving them credit for this item of Rs. 124. As matters stand, the plaintiffs never have been paid that sum of Rs. 124, and, under the circumstances, are entitled to recover them now. Then there are the plaintiffs' own costs, Rs. 892-14 and Rs. 758. Interest at 12 per cent. (being the rate allowed as against the Coondoos both in the Court of first instance and in this Court) is to be allowed from the dates on which the amounts were paid by, or became payable to, them.

As regards the appeal to the Privy Council, the plaintiffs are entitled to Rs. 1,551-8-2, the amount paid by them to the High Court for furnishing and transmitting records, &c.; also to £312-10-4 allowed expressly by the Privy Council, which at par is Rs. 3,125-2. Then there are Rs. 16 for unfructuous attempts to execute the decree of the Privy Council against the McQueens: and Rs. 1,224-7-3, the costs allowed in the wassilat suit on the review of judgment, &c. On all these items I shall allow interest at the rate of 6 per cent.

I do not think that the extra costs incurred either in England, or to Messrs. Beeby and Rutter here, in connection with the appeal, are recoverable in any shape.

Under the head of wassilat for the time he was out of possession (during which time the defendant was in actual possession and enjoyment of the rents), I shall allow Rs. 150 a month with interest at 12 per cent. on each item. There is no reason why such interest should not be recovered by the plaintiffs, seeing that the defendant in his wassilat suit against them charged them, and obtained a decree at that rate.

There will be a decree accordingly for the plaintiffs with costs on scale 2.

The defendant appealed from this judgment on the following grounds:—

1st.—For that the learned Judge erred in holding that the suit was not barred by limitation.

2nd.—For that the learned Judge ought not to have found as facts that the suit was entered into by the defendant in pursuance of the agreement of the 17th July 1867, and was instigated and carried on and conducted by the defendant at his own expense and with a view to his own benefit, and that he (the said defendant) was the real mover in all the proceedings which were had in the name of John McQueen and Mary Ann his wife.

3rd.—For that the learned Judge erred in law in holding that the agreement made by the defendant with the said John McQueen and Mary Ann his wife, dated 17th July 1867, and the subsequent institution and maintaining of the suit in the Hooghly Court, were illegal or against public policy.

4th.—For that, even assuming the agreement of 17th July 1867 to have been illegal or against public policy, the learned Judge having found that there was no malice nor any want of probable cause, was in error in holding that the plaintiff's suit would lie.

5th.—For that the learned Judge was in error in holding that, even if it were doubtful whether the agreement of 17th July 1867 was actually illegal and void, the defendant should be held responsible to the plaintiffs for the loss sustained by them by reason of the suits instituted against them by John McQueen and Mary Ann his wife.

6th.—For that the learned Judge was in error in holding that the plaintiff's claim was not limited to the amount for which security had been given for the costs of the appeal to the Privy Council, and that the plaintiffs were not bound to proceed in the first instance against the security.

7th.—For that the learned Judge ought to have dismissed the plaintiff's suit with costs.

8th.—For that the learned Judge held that, notwithstanding that the plaintiff's application to the Hooghly Court to make the defendant a party to the suit therein was refused, they could maintain this present suit.

9th.—For that the learned Judge erred in holding that the defendant, maintaining the suit of the said John McQueen and Mary Ann his wife, gave to the plaintiffs a cause of action.

Mr. Kennedy, for the appellant, contended that the agreement of July 1867 entered into between the appellant and the McQueens was valid and legal. The McQueens having a good cause of action against the respondents were desirous of instituting a suit against them; but having no funds whatever to commence any legal proceedings for the recovery of the property, they applied to the appellant to assist them in commencing and conducting the necessary suits and to make all the requisite advances and disbursements connected therewith until their final determination. The appellant consenting to assist the McQueens, a written agreement was thereupon entered into between them, whereby the appellant covenanted to institute and prosecute the necessary suits and proceedings and to make all requisite advances and payments, and to pay the McQueens Rs. 150 per month during the pendency of the suits. The deed further contained a covenant to the effect that out of the moneys or proceeds of land, &c., recovered, the appellant should, in the first place, retain and reimburse himself all advances and payments made by him with interest thereon at the rate of 12 per cent.; and, in the second place, retain to himself, by way of remuneration for his trouble and risk, one-third of the net proceeds of the litigation; and, in the third place, make over the remaining two-thirds to the McQueens. Now, it is contended by the respondents, that as the McQueens have lost the suit in the Privy Council, the appellant, who was the party who originally instituted and maintained the suit throughout for the McQueens, should be made to pay all the costs of the suit. But it appears clearly from the agreement, and it has furthermore been decided by Mr. Justice Macpherson, that the institution of the original suit by the appellant for the McQueens against the respondents was "*not without reasonable or probable cause.*" Under the

circumstances, therefore, this suit for costs against the appellant was not maintainable, and ought to have been dismissed by Mr. Justice Macpherson.

Mr. Kennedy cited Cotterell *vs.* Jones, 21 L. J., C. L., 36; Mobbs *vs.* Vandenbrande, 33 L. J., C. L., 180; Flight *vs.* Leman, 4 Q. B. (N.S.) 883; and contended that all these authorities clearly decide that no action for costs is maintainable against a third party for bringing and prosecuting a suit in the name of the plaintiff against the defendant, unless it be shown that there was no reasonable and probable cause for the action, and that an injury has thereby been sustained.

The respondents further contend that they are entitled to all the costs as against the appellant, because he was guilty of champerty and maintenance, and that he acted illegally in instituting and maintaining the suit. Now, in the first place, there is no law among the Hindoos which relates to champerty; and, in the second place, it has been expressly decided that a champertous agreement is not in this country illegal.

He further cited Jadubindo Odhikaree *vs.* Lokenath Geree, 1 Marshall 306; Ramrao Khanderao *vs.* Govind Pandshet, 6 Bom H. C. 65; Tyson *vs.* Jackson, 30 Beavan 387; Hartley *vs.* Russell, 2 Simon and Stuart 244; and Williams *vs.* Prothroe, in the Exchequer Chamber, 5 Bingham 309. He contended that the respondents in the case first instituted against them by the McQueens had two courses open to them—either to have made the appellant a party to that suit, or to have made an application to the Court, while the cause was pending, for a stay of proceedings till security for costs was given by the McQueens. Haymond *vs.* Giffard, 4 M. & W. 194; Doe d. Wright *vs.* Smith, 8 Dowling's P. C. 517; Evans *vs.* Rees, 2 Q. B. (N.S.) 339; Burke *vs.* Hutchinson, 7 Irish Eq. Rep. 509; Worrall *vs.* White, 9 Irish Eq. Rep. 572; and Rice *vs.* Dublin and Wicklow Railway Co., 8 Irish C. L. Rep. 155.

This suit is furthermore barred by limitation. No. 40 of the second schedule of the Limitation Act limits the period to two years for suits "for compensation for any wrong, "malfeasance, nonfeasance, or misfeasance, "independent of contract and not herein "specially provided for."

The time when the period begins to run in these cases is when the wrong complained of is done. In this case the wrong supposed to have been done was when the money was given to the McQueens to prosecute the suit against the respondents: that happened in 1862. But assuming for a moment that the period of limitation did not run from that date, it at all events certainly ran from the time when the plaint in that suit was filed, which was in 1867. In either case the present action is barred. The only exception to this period of two years for instituting a suit, is given in section 24 of the Limitation Act, which says: "In the case of "a continuing nuisance, a fresh right to sue "arises, and a fresh period of limitation "begins to run, at every moment of the "time during which the nuisance continues."

But this exception cannot apply in the present case.

Mr. Branson, for the respondents, contended that the suit is not barred by the statute of limitation. It is true the wrong was done when the suit was instituted, but it was not completed till after the order of the Privy Council was made, which was on the 25th of June 1872. Therefore it is clear that the period of limitation did not begin to run either from the time when the suit was instituted, or from the time when the money was paid, but from the time when the Privy Council made their order. According to Mr. Justice Macpherson, "the plaint-"iffs could not have successfully sued until "the case was decided in their favour by the "Privy Council." The present suit was brought in 1873. Under the circumstances, therefore, the plaintiffs were then completely within the time under the statute.

With regard to the agreement which was entered into between the appellant and the McQueens, it was clearly illegal. There are many cases in which it has been held that to maintain a suit on behalf of another for a consideration was champertous and contrary to public policy. Champerty is defined in Hawkin's Pleas of the Crown, Vol. I., p. 463, section 1, as being the "unlawful "maintenance of a suit, in consideration of "some bargain to have part of the thing "in dispute, or some profit out of it." With regard to Mr. Kennedy's argument that a champertous agreement is valid in this country, Mr. Branson referred to the case of Tara Soondaree Chowdhrain *vs.* The Court of Wards, 20 W. R. 446, in which the Court held that the suit could not be maintained by reason of the nature of the transaction on which it was based, which was void as being contrary to public policy, and therefore not giving plaintiff any right to sue for the property professed to be passed; and

to the case of Mulla Jaffarjee Tyeb Alli Saib *vs.* Yacab Kadar Bye and others, 7 Mad. H. C. Rep. 128, where the Court held that by the law of England, which prevailed in that case, the contract was clearly void, being contrary to the plain provision of the common and statute law against maintenance, and that it was also void as being contrary to public policy.

In Harrington *vs.* Long, 2 Mylne & Keene 590, the Master of the Rolls held that an indemnity against all costs incurred in the prosecution of a suit amounted to maintenance.

In Spryе *vs.* Porter, 7 E. & B. 58, the Court of Queen's Bench held that an agreement to give a portion of the profits derived from property recovered by means of information given for the purpose of the proceedings, amounted to maintenance.

In Simpson *vs.* Lamb, 7 E. & B. 84, it was held that the purchase of the subject-matter of a suit by the attorney was void as against public policy; and it made no difference that the purchaser was not the attorney on the record.

And in the case of Earle *vs.* Hopwood, 9 C. B. (N. S.) 566, a contract with an attorney to remunerate him for his exertions by a sum commensurate with the benefit resulting to the client, was held to be void on the ground of maintenance. *Vide* also *In re* Jones, 6 Law Rep., Ch., 497.

With regard to the question as to whether the action is maintainable, the case of Pechell *vs.* Watson, 8 M. & W. 693, is an authority on the point. In that case the Court held that a suit would lie to recover damages for unlawfully upholding and maintaining an action by another against the plaintiff (Pechell), as also for unlawfully and without reasonable and probable cause instigating a pauper to commence an action whereby the pauper did commence and prosecute the action.

In this case the McQueens were virtually paupers, and had no funds to begin the suit against the respondents; the agreement entered into by the appellant with the McQueens was illegal: so was it illegal on the part of the appellant to have instituted and maintained the suit; and as the respondents were thereby injured by being compelled to defend the suit, they are now clearly entitled, having won the action, to ask for costs against the appellant.

Mr. Collis on the same side contended that if the common law of England is not applicable, and if there is no special law bearing upon such cases, the principles of equity and good conscience should prevail. The appellant in this case took upon himself the whole control of the litigation, shielding himself, however, behind his men of straw. The case was ultimately decided in favour of the respondents by the Privy Council, and it is only just and equitable, therefore, that the appellant, though he was not a party to that suit, should be made to pay the costs and expenses incurred in defending the suit as he had instituted and maintained it throughout. Mr. Collis cited Juggessur Coomar *vs.* Prosono Coomar Ghose, 1 Indian Jurist (N. S.) 282; Sreemutty Bamasoonderee Dossee *vs.* Anundo Lall Doss, Bourke's Reports 50; Bhayro Raoot *vs.* Anooroodeb Deo Narain Singh, 1 Marshall 608; and Story's Equity Jurisprudence, s. 1049. Mr. Kennedy's contention that the Courts were unanimous in deciding that a champertous agreement was not illegal in this country is not correct. In the case of Baboo Brijnarain Singh *vs.* Rajah Teknarain Singh, 6 S. D. A., Select Cases, 131, an agreement to give one-fourth of the property claimed to a person on condition of his advancing the funds required for the costs of the suit, was held to be illegal, being a champertous agreement. *Vide* also the case of Ram Golam Singh *vs.* Keerut Singh, 4 S. D. A, Select Cases, 12, and the case of Mussamut Zuhoboonnissa Khanum, 6 S. D. A., Select Cases, 298, where similar agreements were held by the Courts to be illegal.

The judgment of the Appellate Court was delivered as follows by—

Couch, C.J.—The plaint in this suit stated that the defendant conspired and agreed with certain persons named John McQueen and Mary Anne his wife to cause or suffer to be instituted and maintained in their names a civil suit for the possession of certain lands and premises of which the plaintiffs were in possession as owners, and it set out a deed made between McQueen and his wife and the defendant in which, after reciting the title of McQueen and his wife to the premises of which the plaintiffs were in possession, it is recited that McQueen and his wife had applied to the defendant to assist them in commencing and conducting such proceedings as might be necessary for recovery of the said premises and to pay "all advances and disburse all and every sum or sums of money whatever which should or might be necessary for stamps, fees to Counsel or mookhtear's fees, or for any purpose whatever referring to the

said proceedings." It also recited that these two persons requiring assistance, the defendant had agreed to pay to them the sum of Rs. 150 a month for their support and maintenance until the final determination of the suit and proceedings. It was then covenanted on the part of the defendant to provide the money to carry on the suit and to pay Rs. 150 monthly, and it was agreed between McQueen and his wife and the defendant, that the defendant was, in the first place, out of the moneys to be recovered from the defendants in that suit, or in case of recovery of the lands held by them out of the proceeds of the sale thereof, to retain and reimburse himself all moneys he might have paid, advanced, or disbursed under the agreement, either in respect of the suit or suits so to be commenced or otherwise, with interest at the rate of 12 per cent. per annum, or in respect of the monthly sum of Rs. 150, and then to retain by way of remuneration for his trouble and risk in conducting and carrying on the business and advancing the necessary funds therefor, and for the monthly payments, one equal third part or share in the clear net proceeds of such suit or suits after all payments with interest.

The plaint states the proceedings in the suit, and charges that the defendant, by reason of the acts which he is alleged to have committed, had made himself liable for all costs incurred by the plaintiffs in defending the suit, and for the rents and profits which the plaintiffs would have received in respect of the property since possession was obtained of it by McQueen and his wife under the decree of this Court.

Mr. Justice Macpherson made a decree in favour of the plaintiffs, from which there is an appeal. What we have to determine is, whether, on the facts proved, the action or suit can be maintained. Now, an action may be maintained against a person for maliciously and without reasonable or probable cause procuring a suit to be instituted The law on this subject is stated by Mr. Justice Williams in a case to which I shall presently refer. The action may be brought against the defendant, although he was not a party to the suit, because an action would be maintainable against the plaintiffs in the suit if they instituted it without reasonable or probable cause. Practically such actions are seldom or never brought; because, if the suit has been brought without reasonable or probable cause, the judgment will be in favour of the defendant, and he will get his costs by the judgment in the suit. Consequently actions for instituting proceedings without reasonable or probable cause are mostly where the proceedings were of a criminal nature, as an action for a malicious prosecution, or where the action is one in which the defendant has been arrested, and then the action is for the malicious arrest. But in order to maintain an action of this kind there must be malice, and the suit must have been brought without reasonable or probable cause. Mr. Justice Williams in Cotterell and Jones, 11 C. B. 730, says: "It is clear that no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also a legal damage"

In this case Mr. Justice Macpherson has found, and I agree with him, that there could not be said to be a want of reasonable or probable cause for instituting the suit. A Division Bench of this Court made a decree in favour of the plaintiffs. It is true that the decree was reversed on appeal to Her Majesty in Council, but the fact that two of the learned Judges of this Court were of opinion that the plaintiffs were entitled to a decree would show that there was reasonable and probable cause for the plaintiffs prosecuting the suit and attempting to recover possession of the property. We must take it on the authority of the highest tribunal that the learned Judges of this Court were mistaken in the view which they took of the plaintiff's case; but we cannot say that persons who have obtained a judgment of the High Court, although it was afterwards reversed, had not reasonable or probable cause for bringing the suit. If there had been no reasonable or probable cause for bringing the suit, the want of it would have been evidence of malice. But that is not the case here, and there is no evidence that the defendant entered into this agreement with McQueen and his wife from any malicious motive. In fact, all the evidence we have as to how the agreement came to be made is in the recital in the deed. That shows that these persons, thinking they had some right to recover possession of the property, and being without means to institute proceedings for that purpose, applied to the defendant to lend them money and to give them the means of remaining within the jurisdiction of the Court, and to support them while the suit was proceeding. So far as there is any evidence in the case, I think there is no ground for holding that an action for mali

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cious prosecution and without reasonable or probable cause, can be maintained against the defendant.

I may, in addition to Cotterell and Jones, upon the law for this part of the case, also refer to Flight and Leman, 4 Q. B. 883

The case has been presented in the plaint in another form, *viz*, as an action for what is called maintenance—for maintaining a suit which was brought by McQueen and his wife. Now, we have to see whether such an action can be maintained in India. When we look at the ground upon which it is maintainable in England, it will be seen that the cases where it has been allowed will not apply in this country, and cannot be considered as being the law here. In England, maintenance and champerty were offences by the common law, offences punishable according to the common law. This is shown in Hawkin's Pleas of the Crown where he treats of this subject. The statutes in England were declaratory of the common law, and imposed penalties for these offences in addition to the penalties which were imposed by the common law. So that the state of things in England is that maintenance was an offence and punishable as such, and an agreement in England to maintain an action or an agreement of a champertous nature was void, because it was to do that which was illegal; it was an agreement to do what was an offence, and so it was void. The reason, that a person who suffered injury by an action being maintained by another was allowed to bring a suit, was that, if a person did an illegal act by which another suffered special damage, an action might be brought against him for the damage. An illustration of this is to be found in an action being allowed to be brought against a person guilty of the offence of obstructing a public highway, by a person who suffered special damage by reason of the highway being obstructed. On the same principle, an action for maintenance was allowed in England, but that does not apply to India. It has been always admitted that the English common law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force, in this country. They certainly do not apply in the mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous or agreements for maintenance have been held to be void in this country is that they are contrary to public policy; or as described by the Judicial Committee of the Privy Council in Fischer and Kamala Naicker, 8 Moore's Indian Appeals 170,* are considered to be immoral and against public policy, and such as the law will therefore not enforce here and will treat as void. But, if this is the ground on which agreements of this kind are void in India, as I consider it to be according to the decisions on the subject in India and also by the Judicial Committee, it will not enable an action to be brought against the person who maintains the suit. The ground on which an action is allowed in England, *viz.*, that the defendant has been guilty of an offence by which the plaintiff has suffered damage, does not exist here. When we examine the English law, and see the ground of the action there, I think that in this country an action for maintenance cannot be brought. This part of the case of the plaintiffs in this suit is unsupported.

But the case was also put on another ground. It said that the defendant had an interest in the suit which was brought by McQueen and his wife, and having an interest in the suit, and having also (it is not disputed he did) supplied the means of carrying it on, he ought to be made liable to pay the costs by an action being brought against him. This argument assumes that the agreement in the indenture is a valid one, and is not void as being contrary to public policy; for, if it were, the defendant acquired no interest in the property. Taking it that the defendant did acquire an interest in the subject-matter of the suit by the agreement, and that it was carried on for his benefit as well as that of the plaintiffs in it, the objection against the present suit is that the defendant was not guilty of any wrongful act. If he had an interest in recovering the property, it was not a wrongful act to supply the money to carry on the suit. For this reason, it was in England an answer to a suit for maintenance that the party had an interest in the suit which was brought, and which he was charged with having maintained.

In considering the third ground on which it is sought to support the case of the plaintiffs, we must take it that the defendant did not do a wrongful act; and there is no ground for the plaintiffs being allowed to bring an action against the defendant,

* 3 W. R. (P. C.) 33.

although they may have sustained an injury by the defendant's supplying the means for carrying on the suit. If the act is one which the defendant might lawfully do, the plaintiffs cannot sue him for damages which they have sustained by reason of it. The course which ought to have been taken, assuming, as we must in this part of the case, that the agreement was not void and that the defendant had an interest, was to make the defendant a party to the suit, and to require that he, who had become entitled to one-third part of the proceeds of the suit, should, by becoming a party to it with the other plaintiffs, put it in the power of the Court to give judgment against him, and to bind him by the judgment as the others would be bound, and, if necessary, to make an order that he should pay the costs. It was known to the plaintiffs that this deed had been made; but, whether it was known or not, and if they did not discover it before the suit was finally disposed of, which would be their misfortune, they are not in a worse position than where persons may be made liable in a suit as defendants, but the plaintiff, not being aware of their liability, does not join them in the suit; the plaintiffs cannot afterwards sue them. Here the plaintiffs might have insisted that the defendant should be made a party to the suit. And, if it was doubtful whether that could be done, there are various authorities to show that, if the suit was really his suit, and was carried on for his benefit, the defendant might have been required to give security for the costs. Mr. Kennedy has cited several cases on the point which were decided by the Courts in Ireland, and there are cases in the English Courts to the same effect. If a person who has an interest in having a question decided puts forward another to have it tried in a suit in his name, but the person putting the nominal plaintiff forward is the substantial plaintiff in the case (as where a landlord puts forward his tenant to dispute a claim of a right of way), the Court has power to, and would, require the real plaintiff, though not appearing as such, to give security for the costs.

It appears to me that in this case either the defendant ought to have been required to be a plaintiff with McQueen and his wife, or that he ought to have been called upon to give security for costs. The Court having erroneously refused to do that, there ought to have been an appeal. The plaintiffs have omitted to take the course which the law prescribed, and they cannot remedy it by bringing an action when there is no principle of law on which it can be sustained.

I think the suit should be dismissed; but, looking at all the circumstances of the case, it is not one in which the defendant should get his costs. The decree of Mr. Justice Macpherson will be reversed, and the suit will be dismissed without costs in either Court.

Pontifex, J.—I also think this suit must be dismissed.

The 8th May 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Lawrence Peel.

Champerty—Mofussil Courts—Immoral Contract.

On Appeal from the High Court of Judicature at Madras.

Chedambara Chetty

versus

Runga Krishna Muthu Vira Puchaiya Naiker.

In consonance with the principles laid down by the High Court of Calcutta in several decisions, the Lords of the Privy Council HELD that, although the Law of Champerty was not applicable to the mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family-affairs, by an agreement between him and the real heirs; that, if he should establish their claim, he should be entitled to a share of their estate; and that such an agreement could not be enforced, being something against good policy and justice, something tending to promote unnecessary litigation, and something that in a legal sense is immoral.

In this case the appellant sued the respondent, who was the zemindar of Marungapury, to recover the amount alleged to be due upon the bond marked A, and set out at page 10 of the record. The material portion of the bond is this: "With reference to the "dealings which you had heretofore held with "Lekamani and others, widows of my elder "brother Tirumalai Poochai Naiker, the late "zemindar, on account of their maintenance "and Court-costs as per a loan-bond for "Rs. 20,000 and an agreement for Rs. 10,000, "the accounts being adjusted up to date, the "sum, which was found due by them, and "which alone was assigned to be paid by "me, is Rs. 67,000. As I have undertaken "to pay you the same, I hereby bind myself "to pay you the said sum of Rs. 67,000

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"within the 30th September of the current "year, and get back this bond and the bond and "agreement above referred to. On failure to "pay the money within the above prescribed "time, I bind myself to pay you on demand "the said sum of Rs. 67,000, with interest at "half per cent. per mensem, and receive "back this and aforesaid bonds." The bond and the agreement referred to are Exhibit B, at page 11, and Exhibit C, at page 12, of the record. Their effect will be afterwards stated.

The respondent was the younger brother of the late zemindar or polligar of Marungapury. He seems to have been treated as heir presumptive by his brother. Immediately upon his brother's death, he was recognized by the authorities as the zemindar; and, being a minor, he and his estate were placed under the guardianship of the Court of Wards. It is stated in the judgments, and, if the record in the former suit which has been recently before the Court is looked at, it amply appears that the widows themselves also recognized in the first instance this boy as the heir. And, even without going out of the record, it appears, upon what is strictly in evidence in this case, that for two years they acquiesced in his recognition by the Government as heir, and received, at the hands of the Collector who was exercising the power of the Court of Wards, certain sums by way of maintenance. In December 1866 a change came over them. The plaintiff in this suit then came upon the stage, and the agreement which is marked B was executed on the 21st day of that month. It is an agreement of a very singular nature, and the material portions of it are these: "As with reference to the moneys to be "borrowed of you by executing loan-bonds "in view to meet the expenses incidental to "suing out (our claims) in the Revenue and "Civil Courts, and before the superior author-"ities respecting our zemindaree, which is "now held by the Court of Wards in their "management on behalf of another, to whom "it is intended to be transferred, and to "meet our maintenance-expenses, we have "agreed of our own free-will to repay on "demand the amount so borrowed of you, "with interest at the rates provided for in "such bonds, and in consideration of the aid "you propose to give us in money, and in "exertions towards establishing our title to "the said zemindaree, to pay you as allowance "and gratuity, immediately after the zemin-"daree is granted to us, one lakh of rupees out "of the incomes thereof, and a moiety of the "surplus proceeds that may be transferred "to us by the Court of Wards; you shall "accordingly prosecute the claims, and shall, "immediately after the said zemindaree is "granted to us, have the zemindaree under "the management of your own agent, disburse "the maintenance-amounts due to us as per "agreement, the peishcush (revenue), and "the establishment charges, and pay yourself "from the surplus proceeds the lakh of rupees "above agreed to be paid to you; and we "shall redeem the zemindaree from your "agent's management only after the said "amount has been fully paid to you." After this comes this material passage: "In the "meantime we shall not transgress the direc-"tions of your agent in the matter either of "the said claim"—that is, of the suit to be brought—"or of our household affairs, &c., "or of the management of the zemindaree. "If, on the contrary, we fail so to conduct "ourselves, we agree of our free-will to pay "you at once, without any objection, from "out of our assets and those of our heirs, "the principal and interest due on the loan-"bonds, the allowance of one lakh of rupees "agreed above to be paid, and the amount "forming a moiety of the surplus proceeds "remaining with the Court of Wards on that "day. We further agree not to execute any "bonds in the matter of this claim or debts "to anybody other than yourself." It appears, then, that these ladies having changed their mind, and determined to claim the estate as the heirs of the late zemindar, for that purpose put themselves wholly into the power and into the hands of the plaintiff; that they agreed to pay him on demand the moneys to be advanced with interest at the rates to be provided for in the bonds which the agreement contemplated they would give the plaintiff for the advances when made; that they further agreed that, if they succeeded in the suit, they would pay him a lakh of rupees and a moiety of the surplus collections, mortgaging the zemindaree to secure those payments; that they would do nothing in the suit or otherwise without his consent; and that, if they violated the agreement, they should at once become liable to pay both the principal and interest due on the loan-bonds, and also the lakh of rupees and the amount of the surplus collections remaining with the Court of Wards on that day.

Under this stringent agreement, the suit No. 30 of 1868 was instituted in their names; but it is impossible to read the agreement, and to know anything of the manner in which litigation is conducted in India without

seeing that, although the suit was carried on in the name of the ladies, the whole management of it was committed to the plaintiff, and that he was, as was represented in the argument, the real *dominus litis*. It further appears that but one bond was executed by the widows under this agreement, *viz.*, the bond which is dated the 26th of May 1867, and purports to be a bond for securing the repayment of the sum of Rs. 20,000 (the amount of the plaintiff's advances up to that time), with interest at 12 per centum per annum. The principal, if not the only, question raised in the suit by the widows was the legitimacy of their husband's younger brother. The family being a joint Hindoo family, he, if legitimate, was unquestionably entitled to the zemindaree as the heir preferable to the widows. A further question was, however, raised by the Collector who defended the suit as guardian of the minor zemindar, *viz.*, whether the polliam was an hereditary estate at all, or one the succession to which, upon the death of the actual polligar, was determinable by Government. The suit being in that state, the boy, having attained the age of 18, which is the age fixed by the Regulations for the majority of a zemindar, was put by the Court of Wards into possession of his estate, and made a formal defendant; and immediately upon, or very shortly after, that, the transactions which are in question in this suit took place. We find the dates given in the judgment of the Judge, Mr. Davidson, and there is no doubt about them. The defendant was installed as zemindar on the 23rd of July; on the 2nd of August 1869, he had notice that he had been made supplemental defendant to the suit. The suit was fixed for hearing on the 16th; and, on the 11th, in anticipation of that hearing, certain Commissioners were sent to Marungapury by the Court in order to examine the widows, who, of course, were purdah women. The widows seem then to have become desirous of settling and compromising their suit, and the terms upon which they were willing to compromise were finally embodied in a razeenama. Those terms, however, did not include any subsidiary arrangement to be made in respect of the money which was due from them to the plaintiff; the razeenama only expressed that they were willing to consent to the dismissal of their suit upon the terms of their having assigned to them certain villages by way of maintenance, and each party paying his own costs.

As to what took place on the 11th and the subsequent days, there is a considerable conflict of testimony; but their Lordships, adverting to what was said by Mr. Davidson, the Judge, as to the credit due to the witnesses on either side, and particularly as to the manner in which the zemindar gave his evidence, and to the fact that the finding of the learned Judge has been adopted by the superior Court, have no doubt that it is their duty, upon any matter of fact upon which the testimony is conflicting, to adopt the finding of the Zillah Judge. It must, therefore, be taken as found that on the 12th, when the first negotiation for the compromise took place, there were present on that occasion, not only the vakeels and agents of the nominal parties to the suit, but certain persons acting on behalf of, or as agents for, the appellant; that the latter then contended that the compromise could not be carried into effect without their principal's consent; that a large sum of money was due from the ladies to him; that something was to be paid to him in respect of his interest under the agreement; and that it lay upon the zemindar to make those payments. It must further be taken to be found that, although Lekamani, the principal widow, stated that the sum due to the plaintiff was small, his agents made use of threats to the respondent to the effect that, unless he would make himself liable for moneys to the amount of Rs. 62,000, the consent of the plaintiff to the compromise would be refused, that the case would go on, and would probably terminate in the loss of his zemindaree. Their Lordships cannot doubt that such threats were used; that the note for Rs. 62,000 was given by the respondent in consequence of them; and that that note was not given, as it has been once or twice represented in the argument, to Lekamani or anybody on Lekamani's behalf, but was given to Rungaiengar, who was one of the persons acting on behalf of the plaintiff.

The note having been thus given and obtained on the 12th, the razeenama was signed by Lekamani and the respondent on the 13th. In the meantime a messenger had been sent from Marungapury to bring the plaintiff from Shivagunga, where he seems to have resided. It is stated that he was sent for on the 11th, but that he did not arrive until the evening of the 14th. On the 15th there was a further transaction; he asserted that Rs. 62,000 was not a sufficient satisfaction of his claims, and that he must have Rs. 67,000. As to what then took place, there is again a considerable conflict of

evidence. It is sworn by him and by his witnesses that some examination of his accounts was made; that by the account so rendered it appeared that he had actually advanced to the ladies Rs. 58,000, although a bond had been taken for only Rs. 20,000; that he estimated the compensation to be allowed for the further benefit which, if the suit had been successful, he might have derived under the agreement B, at the sum of Rs. 13,000 odd; that the Rs. 67,000 were compounded of those two sums; and that the respondent voluntarily executed the bond A for that amount. On the other hand, the case made for the respondent (which is deposed to both by him and his witnesses) is that there was no rendering of accounts at all; that there was merely a demand for Rs. 67,000 instead of the Rs. 62,000; and that the plaintiff himself then renewed the threats which had been previously made by his agents.

Some, but not all, of the witnesses say that he threatened, if his demand was not acceded to, not only to go on with the pending suit, but also to sue on the note of hand for Rs. 62,000. All, however, speak to threats to the effect that he would go on with the suit; that he would carry it through all the Courts up to this board; and that the result to the young zemindar would probably be the loss of his zemindaree and the ruin which had fallen upon other zemindars; they also swear that the respondent in vain asked for time to consult the Collector who had so recently been his guardian, and that, under the pressure so put upon him, he was induced to execute the bond for Rs. 67,000.

Their Lordships have already said that, when the evidence is conflicting, they must adopt the view which was taken of it by the Judge, Mr. Davidson. They must, therefore, hold not only that the respondent acted under the pressure of the threats deposed to, but, upon the material question whether any accounts were rendered, that there was no accounting at all; that the sum for which the bond was given was an arbitrary sum fixed by the plaintiff as the amount for which he would be content to allow the arrangement between the widows and the zemindar to be carried out. It may be observed that the bond as drawn out is not altogether consistent with the story told by the plaintiff himself, since, on the face of it, the Rs. 67,000 would appear to be the balance found to be due in respect of advances, for maintenance, and for costs; whereas, upon the statement and admission of the plaintiff himself, it included the sum of Rs. 13,000 and odd as a compensation for that contingent advantage which he was to derive under the agreement B, in the event of the success of the suit.

It may be well to state what afterwards took place before considering the legal effect of these transactions. On the 16th of August the suit came on for hearing; the razeenama was then presented, but Mr. Norton, who had been Counsel for the Collector, as guardian of the infant, and who appeared on that day as Counsel for the zemindar, now adult, before the razeenama was filed and acted upon, prayed for an adjournment. That was granted, and on the 31st of August the case came on for final hearing. Mr. Norton then, as Advocate-General, acting for the Collector alone and not for the zemindar, raised the question which was lately before their Lordships, and was then finally decided, *viz.*, that the estate was not hereditary; that the nomination of the infant zemindar as the next zemindar was an act of State with which the Municipal Court had nothing to do; and, upon that plea, which must now be taken to be unsustainable, the Judge dismissed the plaintiff's claim, directing her to pay all the costs. Lekamani then appealed against that decision. No doubt, she might have acquiesced in the title of the zemindar, and they might have privately carried out the arrangements, supposing they were to be carried out, upon which they had previously agreed. However, she saw fit to appeal; but by her appeal she sought only that the decree, instead of being the decree that was made, should be a decree framed in consonance with the razeenama. In this she did not go beyond her rights. The respondent appeared upon the appeal by his Counsel, and treated the razeenama as a thing altogether gone, and by which he was no longer bound. The High Court seems to have considered that that was so, and that the razeenama was to be out of the case. They dealt with the ground upon which the suit had been dismissed, and finally decided, in a very elaborate judgment, which has since been confirmed by Her Majesty in Council, that there was nothing in that ground; that the estate must be taken to be an hereditary estate; and that the succession to it was to be determined by the Civil Courts according to the ordinary Law of Inheritance. They then gave the widow time to consider whether she would press her suit, and have the case remanded in order that the issue as to

the legitimacy of the respondent might be regularly tried. The widow elected to have that issue tried. The case was remanded, and the respondent was found to be legitimate. The widow afterwards appealed against that decision to Her Majesty in Council, and her appeal upon that point was dismissed. Therefore the question of the legitimacy was fought out between the parties to the bitter end.

Now, upon the transactions which took place between the 11th and 16th August, several questions have been raised. The issues settled in this suit were in effect whether there was any consideration for the bond, and whether the bond had been obtained by such undue pressure and threats as were sufficient to vitiate the contract.

And the principal questions which have been argued at the bar are, first, whether there was sufficient consideration for the bond; next, whether, if there were, there had not been a failure of that consideration; and, thirdly, whether the plea impeaching the bond on the ground of pressure and threats could be supported.

Upon the first point their Lordships will assume, at all events for the sake of argument, that, if the transaction had been between parties dealing with each other at arms' length, and unaffected by any of the circumstances on which the third plea is founded, there would have been a sufficient legal consideration to support the bond.

Assuming, however, that there was a real substantial debt due to the appellant from the women on an agreement to which no objection could have been taken; that there was a *bond-fide* arrangement by which the widows were to have their suit dismissed; and that one term of that arrangement was that they should be relieved of the debt due to the plaintiff, their Lordships must observe that they agree with the Judges of the High Court in holding that the transaction would hardly amount to what is called a "novation." It was not a transaction by which the widows were altogether released from the debt which they had incurred to the plaintiff, nor was the plaintiff's position altered by reason of his having lost his remedy against them. It appears upon the face of the bond that he was to retain his securities against them until the bond was satisfied; and that the contract on his part was, in fact, rather an agreement to abandon his remedy against them on the payment of the Rs. 67,000 than an actual abandonment at the time of the transaction.

The question which has been raised as to the failure of consideration, if it were necessary to determine it, might present some difficulty. It is quite clear that the respondent never got the benefit of that for which he stipulated; that circumstances prevented the razeenama from being acted upon; and that, in the events which afterwards took place, he was exposed to have his title questioned and carried up to the Court of ultimate appeal, just in the same way as it would have been litigated had the razeenama never been executed. On the other hand, there is, no doubt, a good deal of truth in the argument of Mr. Mayne to the effect that the failure of consideration was in some degree due to the respondent himself; and that, if, when the widow had appealed from the first decision in her suit, and claimed the benefit of the razeenama, he had joined in also asking for the benefit of the razeenama the whole transaction might have been carried out, as the parties had originally intended it should be. It is, however, unnecessary to decide this question, since it appears to their Lordships that the respondent is entitled to succeed on the other issue settled in this suit.

What was really the position of the parties? Here was a man who had originally nothing at all to do with this family. All the members of the family appear at first to have been agreed that this young boy was the true heir to the zemindaree. The widows afterwards, then, either of their own mere motion, or at the instigation of the plaintiff or his agents, determined to dispute that title. They next deprived themselves of all freedom of action with respect to the suit which they thought fit to bring, by giving the interest and the powers which are given by the agreement B to the plaintiff.

With respect to the Law of Champerty or Maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The Statute of Champerty, being part of the statute-law of England, has of course no effect in the mofussil of India; and the Courts of India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the Courts in England. On the other hand, the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably, the true principle is that stated by Sir Barnes

Peacock in the course of the argument, *viz.*, that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive. Now, looking at all the facts of this case, their Lordships think it is extremely doubtful whether the plaintiff could have recovered on this agreement if the question had arisen between the widows and the plaintiff after he had got the estate for them; whether, upon the principles laid down by Chief Justice Peacock and cited by Mr. Justice Kemp in the case in the 13th Weekly Reporter, the Courts might not have refused to enforce such an agreement. The principle laid down by the learned Judge was that, although the law of champerty was not a law applicable to the mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family-affairs, by an agreement between him and the real heirs that, if he should establish their claim, he should be entitled to a share of the estate. Nor, in holding that such an agreement could not be enforced, would the Courts, as it seems to their Lordships, be running counter to what was decided by this Committee in the case of Fischer *vs.* Kamala Naicker,* for the judgment there assumes that, if the agreement is something against good policy and justice, something tending to promote unnecessary litigation, something that in the legal sense is immoral, it cannot be supported. But it is not necessary for their Lordships to decide a question which has not arisen, *viz.*, what would have been the rights of the appellant as against the widow. It is sufficient for them to say that they are dealing with a person who had got up, or, at all events, intervened in, a suit with which he had no necessary concern; who had made himself *dominus litis* in that suit, and had acquired over the plaintiffs in it the power of preventing them from doing what they felt to be right and just; and from interested and corrupt motives was exercising that power. The zemindar must be taken to have been the legitimate heir; and, even if the widows had *bonâ fide* entered into the litigation to dispute that legitimacy, it is perfectly clear that, at the time when this transaction took place, they had come to a better mind, and had satisfied themselves that the right thing as regarded the boy and as regarded the family was to acquiesce in his title, to admit his legitimacy, and to allow him to remain zemindar.

Their Lordships think it would be contrary to every sound principle of justice and of policy to permit a person who had acquired this sort of irregular interest in a suit—and a power which cannot be safely conceded to any speculator—to make his power of preventing a family-arrangement so just and proper from being carried into effect, the means of extorting a large sum of money from the person whose title had been unjustly challenged? The case, however, does not rest here. The transaction was not one entered into between two persons, each of whom was capable of taking care of himself. Here was a boy of 18 without proper counsel or assistance, for such of his servants as gave him any advice thought with him that he should do nothing until he could see the Collector; and his vakeel, who is represented as his legal adviser in the matter, disowns having given him any counsel, and has been treated as having failed in his duty in refusing that counsel. There is, moreover, clear evidence that he was threatened with the consequences of not immediately acquiescing in the plaintiff's demand; that these threats were addressed by a powerful man to a boy, and were, therefore, likely to disturb his mind, and render him incapable of acting as a free agent. Whoever has had to do with litigation in India must know that such threats are of far greater weight there than they would be in this country. This suit was one in which the legitimacy of the respondent was called in question; and the person threatening was a person conversant with law-suits—a person of great wealth and great power; and we all know how easy it is in India, upon such an issue as that, to get up any amount of false evidence, and that it is not because a man has a true case that he is sure to bring it to a successful issue. Their Lordships think the Judges of the High Court have rather understated the case when they treated the threats as threats only of consequences perfectly legal; for (putting aside the threat as to suing on the note for Rs. 62,000, which is not so satisfactorily proved as the others) they think that the threats proved

* 3 W. R. (P. C.) 33.

may well be taken to be threats of carrying on the litigation against the respondent *per fas aut nefas*. In any case they were threats which overcame his free-will, and induced him, contrary to his own judgment and his own sense of right, and without any evidence that any such sum as was claimed was due, to execute the bond extorted from him.

That being their Lordships' view, they think that the Court below was right in holding that the bond cannot stand against the respondent. It is not necessary to go into the question which has been argued on both sides as to the power of the Court to make the bond stand as a security for what may really have been advanced. It is not necessary to consider whether, in a suit brought to enforce a fraudulent deed against a person from whom something is justly due, a Court of justice ought to exercise the power of saying that such a deed shall stand as security for what is really due; because, in this case, but for the bond which was thus extorted from him, nothing was ever due from the respondent to the appellant, and there existed no privity of contract between them.

Upon these grounds their Lordships think that the decisions of the Courts below, now under appeal, were right, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

The 12th May 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Limitation—Act IX. of 1871—Bona Fides.

Case No. 49 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 5th December 1873. reversing an order of the Moonsiff of Bolepore, dated the 30th July 1873.

Rohinee Nundun Mitter (Decree-holder), *Appellant,*

versus

Bhugwan Chunder Roy and another (Judgment-debtors), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Gooroo Doss Banerjee for Respondents.

By the new law of limitation (Act IX. of 1871, Sch. II., art. 167), prescribing three years as the time within which application shall be made for execution of a decree, it was intended that there should be two specific dates from which the three years were to be counted, without reference to any inquiry whether the proceedings were taken for the purpose of enforcing the decree, or were merely colourable for the purpose of keeping the decree alive.

Markby, J.—As the law applicable to this subject formerly stood, the Court had to inquire, when an application for execution was made, whether any proceedings to enforce the decree or to keep the same in force had been made within three years prior to that application; and the Full Bench of this Court, in a decision reported in the 6th Weekly Reporter, Miscellaneous Rulings, 101, have laid down that, "if a party made an "application, and neglected to lodge the "necessary tullubana, his neglect would be "evidence from which the Court, upon a "subsequent application for execution, would "have to decide whether the former appli-"cation were a *bond-fide* one, or merely "colourable for the purpose of keeping the "decree alive. In all these cases (they say) "the Court to which application for execu-"tion is made must decide whether the for-"mer application which is relied on was "*bond-fide* or not," thereby indicating that the true question is whether the application is *bond-fide*. Then they go on to say: "We cannot lay it down as a rule of "law that an application made without "lodging tullubana would not be a *bond-*"*fide* application, for it might happen that, "immediately after the making of the appli-"cation, the defendant might die, and it "might be necessary, instead of lodging the "tullubana, to make a fresh application for "execution against his heir-at-law." These remarks show what is meant by the words *bond fide;* that they are used to describe an application which is not merely colourable, but which is made really for the purpose of keeping the decree alive. If that provision of the law, with this construction upon it, had governed this case, we should have had to consider the first ground of special appeal, which in substance is this: that there was

no evidence upon which the Courts could find that these proceedings were merely colourable. But the wording of the new law is different; and the first question which arises is whether or no the new statute is applicable to this case. The Statute (Act IX. of 1871) provides that it shall come into force on the first day of July 1871, with a proviso that nothing contained in sections 2 and 3, or in Parts II. and III., shall apply to suits instituted before the first day of April 1873. But it has been pointed out that this is not what in this Act is called a suit, but what is called an application, as appears by the schedules, and that that distinction is made by the Act throughout between applications and suits. This seems to us correct, and we think that, as regards these applications, the Act came into operation on the date on which it came into operation generally, namely, the 1st July 1871. That construction of the Act is not in fact contested by the respondent.

The question, therefore, is what is the true construction of the new law of limitation which is made applicable to this case? Now, the law provides that the time within which an application is to be made for execution of a decree shall be three years, either from the date of the original decree; or, if there has been any appeal, from the date of the decree or order of the Appellate Court; or, where there has been a review of judgment, from the date of the decision passed on the review; or, where the application next thereinafter mentioned has been made, from the date of applying to the Court to enforce, or keep in force, the decree or order. Now, the question is whether we are to read this provision as the Full Bench read the provisions of the former law, as intending an application made *bonâ fide* for the purpose of enforcing the decree, and not merely colourable for the purpose of keeping the decree alive? It seems to us, however, that we cannot so qualify the words of the statute. We think that, if the Full Bench decision had not existed, there could not, upon these words of the Legislature, have been any doubt whatever that what was intended was that the time should be measured from the specific date there given. No doubt, this language of the Legislature coming, as it did, upon that Full Bench decision, it would be right to consider whether or no it was intended to set aside the very important principle which the Full Bench decision laid down. We think, however, this is made quite clear by the next paragraph, which runs thus: "Where the notice next hereinafter mentioned has been issued, the date of issuing "a notice under the Civil Procedure Code, "section 216." Now, we think it is clear from that paragraph that the date of issuing a notice is an absolute date from which the time is to be reckoned without any reference to the question of *bona fides*. There is not a single word in that paragraph upon which the consideration of the (so-called) *bona fides* of the application can possibly be imported. If that is so, we think (reverting to the paragraph which we have to interpret) that it must be so in this case also. It is pointed out in the Full Bench decision by Sir Barnes Peacock that issue of the notice is a proceeding, and it is a proceeding which would be sufficient to keep the decree alive if it follows upon a *bonâ-fide* application, for it will then be a proceeding in furtherance of the application previously made to enforce the decree. But, on the other hand, if it only follows upon an application which is merely colourable, then, within the principle of that decision, it would be no proceeding at all. It would be hardly possible, however, to suppose that the Legislature should have intended that an application which was merely colourable should not keep alive the decree, and that a notice following that application, which would be in no way better, should keep the decree alive. That would almost amount to a contradiction. If, therefore, there could be any possible doubt upon the construction of the first paragraph taken alone, there can be no doubt, when the two paragraphs are read together, that the Legislature intended that there should be two specific dates from which the three years were to be counted without reference to any inquiry whether the proceedings were taken for the purpose of enforcing the decree, or were what the Full Bench called merely colourable for the purpose of keeping the decree alive.

Upon these grounds, therefore, we think that there having been within three years such an application as is prescribed in the new law, it is unnecessary to decide the question which was raised in the first ground of appeal. Upon the second ground of appeal the judgment of the Lower Appellate Court will be reversed with costs, and the case will be sent back to the first Court in order that execution may proceed.

The 28th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble C. Pontifex, *Judge.*

Indian Contract Act, s. 237—Principal and Agent—Auction—Sending a Man to bid.

Case stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction, under section 55 of Act IX. of 1850, by Mr. R. S. T. MacEwen, Judge of the Court of Small Causes at Calcutta.

Mackenzie, Lyall, & Co., *Plaintiffs,*

versus

E. O. Moses, *Defendant.*

Neither party was represented before the High Court.

The sending a man to bid at an auction cannot be considered as conduct calculated (in the language of the Indian Contract Act, s. 237) to induce third persons to believe he had generally authority to buy.

Case.—THE plaintiffs in the case are auctioneers, and, on the 28th January last and subsequent days, held a sale of the stock-in-trade of the firm of Barham, Hill, & Co. The defendant is an attorney of the High Court, and employed one Manook to bid on his behalf for stationery and other articles to the value of Rs. 25, and for an iron safe to the extent of Rs. 75. The iron safe having gone beyond the defendant's limits was not purchased, but stationery and other articles to the value of Rs. 149-12-6 were purchased by Manook, and entered in the sale-sheet against Moses.

On 12th March the plaintiffs sent to the defendant a letter, enclosing a list of a few articles purchased for him, and calling upon him to take delivery of the same. On the 17th March he sent a clerk to take delivery, who returned with another paper, marked A, containing a list of articles to the value of Rs. 149-12-6. Upon receipt of this, Moses wrote the following letter to the plaintiffs :—

Calcutta, 17th March 1874.

Messrs. MACKENZIE, LYALL, & Co.

DEAR SIRS,—You sent me a memorandum of 4 or 5 lots, which may probably be the lots Mr. Manook purchased on my account. You now send me a memorandum of ever so many lots of which I know nothing. I saw Mr. Manook on the last day of the sale, and he told me that he had purchased on my account certain articles to the value of about Rs. 20, which he promised to clear for me, to which extent I am willing to be bound by his acts. He has most probably purchased all these lots for different other parties, but all in my name. I certainly did not authorize him to exceed the above sum, except that I told him to bid for an iron safe (which I do not see in the list), No. 75, in addition to the above. If you re-sell, you may do so at Mr. Manook's risk, for I shall only consider myself liable to the extent of the authority Mr. Manook had from me. I shall write to Mr. Manook to call, and when he calls, if the things are not re-sold, I shall take delivery of such as he has bought on my account, which will not exceed Rs. 20 as he told me; till then I am helpless.

Yours faithfully,

(Sd.) E. O. MOSES.

Twenty rupees is the limit of Manook's authority here referred to; but both defendant and Manook in their evidence state that the actual limit given was Rs. 25, and I find this to be the fact.

Plaintiffs replied to the above letter as follows :—

Calcutta, 18th March 1874.

E. O. MOSES, Esq.

DEAR SIR,—You acknowledge to have employed Mr. Manook as your agent for purchasing lots for you at the sale of Messrs. Barham, Hill, & Co.'s stock, and you never intimated to us that you limited his authority in that capacity to only certain lots. We cannot be held responsible for the wrong acts of your agent in the absence of any such intimation from you, and we shall call upon you to pay us for any loss which may occur on the re-sale now being held.

Yours faithfully,

(Sd.) MACKENZIE, LYALL, & Co.

On the same day defendant again wrote :—

Calcutta, 18th March 1874.

Messrs. MACKENZIE, LYALL, & Co.

DEAR SIRS,—I shall thank you to return me the memorandum enclosed in your letter to me of 12th instant, which I received only

yesterday, or if the same has been destroyed, please send me a copy of it. I sent in the memorandum yesterday to your office through my Baboo, and he informs me that one of the gentlemen in the office destroyed it. I was willing this morning when I saw your Mr. Parker, and am still willing, to pay for, and take delivery of, the lots pointed out by me to Mr. Parker. Since my interview with your Mr. Creaton of last evening, I have seen Mr. Manook, and he has explained to me under what circumstances the rest of the lots were knocked down in my name, and I am prepared to defend any suit you may like to bring against me.

Yours faithfully,

(Sd.) E. O. MOSES.

The plaintiffs did not reply to this letter. Fleming, an assistant of the plaintiffs, who signed the letter of 12th March, has stated that the short list sent on that day, and which is not now forthcoming, contained only one day's sales, and that his reason for keeping it back was that he substituted for it the complete list (A), and I find this to be the fact.

Defendant was refused delivery of the lots he offered to take and pay for, and was told that he must take all or none. This is in terms of a rule printed on the back of the catalogue, and which is as follows:—

"All lots bought by any one purchaser to "be taken delivery of at the same time, and "to be considered as forming one lot or pur-"chase."

The plaintiffs re-sold the articles. There was a loss of Rs. 26-9 on the re-sale, and, on 1st April, defendant was called upon to pay the same. He refused, and this suit has been brought to recover the amount.

Defendant pleads that Manook was a special agent with limited authority, and that he is not liable for acts done beyond the scope of that authority.

Manook, in his evidence, accounts for the long list against Moses by saying that he bought for himself and for other people, from whom he had orders, and intended to keep each purchase separate, but that the auctioneers said to him, "What is the use of buying in so many names? Put them all down in one name;" and that he permitted this to be done in Moses's name. This statement has not been proved, and all that is clear is that Manook bought in Moses's name.

The facts which I have found are these:—

1st.—That Moses employed Manook to bid for him at the sale.

2nd.—That Manook was restricted to the purchase of certain articles of stationery and other things to the value of Rs 25, and no more.

3rd.—That Moses marked with a pencil in the catalogue the articles which he wanted, and appended his initials "E. O. M." to the same.

4th.—That Manook exceeded the authority delegated to him by Moses.

5th.—That it is customary with the plaintiffs to ask known brokers at their auction-sales for their written authority, and that the precaution had not been taken on this occasion, although Manook, as a broker or bidder at their sales, was unknown to them.

6th.—That the defendant, before the re-sale took place, was willing and ready to take delivery of, and pay for, certain lots purchased for him, but was refused delivery; that at that time so much as the agent did within his authority could have been separated from what he did in excess of his authority.

7th.—That the re-sale resulted in the amount of loss claimed by the plaintiffs.

The catalogue with Moses's marks and initials is not forthcoming. Manook says that, on the first day of the sale when asked who he was bidding for, replied for Moses, and pointed to the leaf in the catalogue containing Moses's initials, and that the auctioneer tore out and kept the leaf. All the salesmen, who have been examined, deny this, and Creaton, who conducted the sale on the first day, is positive that he never saw it. He asked Manook for whom he was bidding, and, on being told it was for Moses, was satisfied. I do not find Manook's statement regarding the disappearance of the leaf proved.

With reference to the 6th instance of finding of fact, and to section 227 of the Indian Contract Act, that part which the agent did within his authority could have been separated from the part beyond his authority if the plaintiffs had permitted it; because each lot was numbered and sold separately for a specific sum, and the agent could have pointed out the lots bought for the defendant. The plaintiffs, however, refused, and insisted on the rule above set forth, and it was afterwards not possible for the defendant or for the Court to separate the two, and therefore, under section 228, the defendant was not bound to recognize the transaction.

The plaintiffs however now, as then, go for the whole. They contend that the defendant is bound by the acts of his agent; that their rights are not to be limited by his private instructions to his agent of which they had no notice; that it was the duty of the defend-

ant to acquaint them of the limited nature of the agent's authority.

The question which I have the honor to submit, and upon which I entertain doubts, is the issue of law, *viz.*, whether, under section 237 of the Indian Contract Act, the act of the defendant in sending Manook to bid at the auction was conduct calculated to induce the plaintiffs to believe that the agent's acts were within the scope of his authority.

The terms of the section relate to "words or conduct" on the part of a principal inducing third persons to believe that particular acts and obligations are within the scope of the agent's authority. It might be said that the question whether or not particular words or a particular line of conduct, on the part of a principal, is or is not such as to induce a particular belief in the mind of third persons is a question of fact for the Court to determine; but the real question, at all events, so far as regards this case, is, what is the legal effect of sending a man with limited authority to bid at an auction, without informing the auctioneer that his authority is limited. In other words if A sends B to an auction with instructions to bid for, and buy, a paper-weight for Rs. 2, and B buys, in addition to the paper-weight, a piano and carriage and pair of horses for Rs. 2,000 in A's name, is A bound by the transaction? The auctioneer is not likely to ask for the bidder's authority, or check the bidding, so long as he believes that the name given as that of the principal is that of a person good for the amount bid up to or for the total of the bids made in his name.

Under English Law, agency is divided into two heads—special and general—but there is no such distinction in the Indian Contract Act. In the present case, the broker was, in my opinion, a special agent employed for the special purpose of bidding on behalf of his principal for certain articles up to a fixed limit. Story and other authorities and the cases lay down the rule of English Law that a person dealing with a special agent is bound to acquaint himself with the limitation and extent of the authority conferred upon him, and acts at his own peril (Story, Vol. I., 4th Ed., 207). It is also part of the plaintiffs' own evidence in this case that it is the custom for Mackenzie, Lyall, & Co. to ask the known brokers at their auction-sale for their written authority, but that was not done in Manook's case, although he was a stranger, and not one of the known brokers at these sales.

Section 182 of the Contract Act defines an agent to be "a person employed to do any "act for another, or to represent another in "dealings with third persons." Section 237 provides that, "when an agent has, without "authority, done acts or incurred obligations "to third persons on behalf of his principal, "the principal is bound by such acts or "obligations if he has by his words or "conduct induced such third persons to "believe that such acts and obligations were "within the scope of the agent's authority." The plaintiffs contend that the act of the defendant in employing Manook at all to bid was conduct on his part calculated to induce them to believe that Manook had general authority to buy for Moses to any extent; and the illustrations to section 237 would seem to warrant this construction. The "conduct" there consists in the mere consigning of the goods. In this case the "conduct" is the mere sending of the agent to bid. Behind the two sendings are private instructions of which third persons have no knowledge.

Kent in his Commentaries on American Law, Vol. II., 8th Ed., 806, referring to special agency, says: "Whoever deals with "an agent constituted for a special purpose "deals at his peril, when the agent passes the "precise limits of his power; though, if he "pursues the power as exhibited to the "public, his principal is bound, even if "private instructions had still further limited "the special powers." See also foot-note (d) to this passage. This would go to show the principles involved in the illustrations to section 237.

Now, in this case, Manook pursued and exhibited to the auctioneer and to the public the power granted to him by Moses as buying for him, although in so doing he exceeded his private instructions.

On the other hand, Manook was not one of the known bidders or brokers at auction-sales and was in fact a stranger to both parties as such until he was commissioned on this particular business by Moses. It was only on his stating to the auctioneer that he was employed by Moses that his bids were accepted at all. Under these circumstances the case seems to me to fall rather within that put by Story at p. 208, Vol. I., 4th Ed.: "If a man "send his horse to a fair by a stranger instructing him to sell the horse without a warranty "he constitutes him a special agent; and, if "the stranger warrant, the owner will not be "bound." See also Wilkinson *vs.* Candlish, English Law Journal Reports (N. S.), Vol. XIX. Exchequer 166.

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On the whole I am of opinion that Manook was a special agent with limited authority, and that it was the duty of the plaintiffs to have ascertained the extent of that authority; and that the mere act of employing Manook to bid at the sale was not of itself conduct calculated to induce the plaintiffs to believe that Manook's acts were within the scope of his authority, and therefore that the defendant is not liable; but, having regard to section 237 of the Indian Contract Act and to the arguments which I have stated, I am not altogether free from doubt on the subject. I have dismissed the suit, contingent upon the opinion of the High Court, on the question whether the act of the defendant in employing Manook at all to bid for him at the sale was conduct calculated to induce the plaintiffs to believe that he was employed generally for the purpose of bidding, so as to make his principal responsible for all purchases made in his name?

The judgment of the High Court was delivered as follows by—

Couch, C.J.—In this case, which is referred to this Court by the Small Cause Court, the Judge says: "The facts which I have found are these:—

"*1st.*—That Moses employed Manook to bid for him at the sale.

"*2nd.*—That Manook was restricted to the purchase of certain articles of stationery and other things to the value of Rs. 25, and no more.

"*3rd.*—That Moses marked with a pencil in the catalogue the articles which he wanted, and appended his initials 'E. O. M.' to the same.

"*4th.*—That Manook exceeded the authority delegated to him by Moses.

"*5th.*—That it is customary with the plaintiffs to ask known brokers at their auction-sales for their written authority, and that the precaution had not been taken on this occasion, although Manook, as a broker or bidder at their sales, was unknown to them.

"*6th.*—That the defendant, before the sale took place, was willing and ready to take delivery of, and pay for, certain lots purchased for him, but was refused delivery; but at that time so much as the agent did within his authority could have been separated from what he did in excess of his authority.

"*7th.*—That the re-sale resulted in the amount of loss claimed by the plaintiffs."

The question referred is whether "the act of the defendant in employing Manook "at all to bid for him at the sale was con-"duct calculated to induce the plaintiffs to "believe that he was employed generally for "the purpose of bidding, so as to make his "principal responsible for all purchases made "in his name."

Our reply to this question, we think, should be that, it being found, as we understand it to be, that Manook was only authorized to bid for certain articles, and to bid for them up to a certain sum, the defendant is only liable to pay for the articles marked and within that limit. The case appears to us to leave it in doubt whether the authority to Manook was to bid for certain articles without reference to the sum which he was to bid, or whether his authority was not limited in both ways—limited to bid only for certain articles, and also not to bid beyond a certain sum. Whatever the authority was, the sending a man to bid at an auction cannot, we think, be considered as conduct which, to use the language of the Contract Act, induced third persons to believe he had general authority to buy. A broker's bidding at an auction for a particular article is certainly not conduct which ought to induce the auctioneer to think that the broker has authority to bid for anything that is put up for sale at that auction—to bid for everything which was going to be sold. If it were so, a person might be almost ruined by employing a broker to bid for a single article which he desired to have. There is an example applicable to the case in Story on Agency, section 129. The Judge of the Small Cause Court has quoted this book, but has not noticed this section. There the learned author, speaking of the distinction between a special and general employment of an agent and the grounds of it, says: "The same distinction was familiarly exemplified in the civil law by the case of an authority even to buy a single thing for the principal. If the agent was authorized to buy generally without fixing any price for the thing, the principal was bound by his purchase, at any price whatsoever. But, if the agent was limited as to price, then he could not bind the principal beyond that price. The former was a general, the latter a limited, authority." Then the authorities from the civil law are quoted. This shows that it would be most unreasonable to say that conduct of this kind—sending a broker or agent merely with authority to bid for a particular article, or to bid a particular price—is such as to make the person liable to take and pay for every article which the person

employed might think fit to bid for. We must state to the Judge of the Small Cause Court that the act of the defendant was not such as to induce third persons to believe that Manook was employed generally for the purpose of bidding, so as to make the defendant responsible for all purchases made in his name. The judgment dismissing the suit will stand. As no one appears in this Court, there will be no costs of the reference.

The 28th May 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Mesne-profits—Decree—Execution.

Case No. 52 of 1874.

Miscellaneous Appeal from an order passed by the First Subordinate Judge of Mymensingh, dated the 24th December 1873.

Bhoobunessuree Chowdhrain and another (Judgment-debtors), *Appellants,*

versus

W. B. Manson (Decree-holder), *Respondent.*

Baboo Ashootosh Mookerjee, for Appellants.

Baboos Bhowanee Churn Dutt and *Umbika Churn Bose* for Respondent.

Following a judgment of the High Court, North-West Provinces, it was held that, when a decree is silent as to mesne-profits subsequent to the institution of the suit, they cannot be given by the Court executing the decree.

Where a suit is for mesne-profits alone, the Court executing the decree is not competent to fix the amount in the course of execution.

Kemp, J.—THE judgment-debtors are the appellants in this case. It appears that the late Mr. Brodie obtained a decree on the 27th of December 1870 against the judgment-debtors or their predecessors. The suit was for possession of a 10-anna share and for wassilat on a 3-anna 6-gunda 2-cowrie 2-krant share of an estate of which the plaintiff, Mr. Brodie, had obtained a *dyesoodee ijara* lease from the defendants. It appears that the farm of the 3-anna 6-gunda 2-cowrie 2-krant share had run out at the time the suit was brought, but the farm of the 10-anna share had still some time to run when the suit was brought. The claim as stated in the plaint was for possession of the 10-anna share with wassilat from the 13th of Kartick 1273, which is alleged to have been the date of ouster, to the 23rd of Cheyt 1276, or for 3 years 5 months and 11 days, amounting to Rs. 1,015-8; and with reference to the 3-anna 6-gunda 2-cowrie 2-krant share, the claim was for wassilat alone, and not for possession, the wassilat being calculated from the 13th of Kartick 1273 to the 13th of Cheyt 1275, or for 2 years 5 months and 18 days, amounting to Rs. 481. The decretal order is to this effect: That the plaintiff, the lessee, is to obtain possession again of the 10 annas up to the term of his lease; and for that share, as well as for the share the term of which had expired, namely, the 3-anna 6-gunda 2-cowrie 2-krant share, he was to receive wassilat "বেদখলের সময়," that is, wassilat for the time he was out of possession as per plaint. That wassilat was to be ascertained by an inquiry, and interest on the sum ascertained was to run from the date of ascertainment at the rate of 6 per cent. per annum. We have been thus particular in setting out the terms of the decree, inasmuch as the whole case turns upon the proper construction of that decree. The Subordinate Judge, in a not very intelligible judgment, says that an Ameen was deputed to ascertain the wassilat; that he found that the net wassilat on the 10-anna share for 4 years 8 months and 29 days was Rs. 1,556-14-8, and that on the 3-anna 6-gunda 2-cowrie 2-krant for 2 years 5 months and 18 days, the wassilat was Rs. 268-1-6, total Rs. 1,826-15-8. But then, says the Subordinate Judge, as a former Judge had awarded Rs. 459-14-8 as the yearly jumma payable to the zemindar Hur Kishore Chowdhry, the decree-holder had agreed to accept wassilat at that rate, and that the judgment-debtors likewise agreed to this rate of wassilat, but wanted the sudder jumma and collection charges to be deducted. This the Subordinate Judge considered to be absurd; for, if the sudder jumma were to be deducted from the wassilat, then the decree-holder would receive nothing; and if to this be added 10 per cent. for collection-expenses, the decree-holder, instead of getting something in the shape of wassilat, would have himself something to pay to the debtors. Therefore,

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says the Subordinate Judge, the decree-holder, for the purpose of avoiding litigation, consented to Rs. 459 as the rate of wassilat, and this the Subordinate Judge considers to be a very fair arrangement. He also observes that he would have been better pleased had the judgment-debtors shown correct accounts of their collections, but, not having done so, the debtors must be satisfied with the mode of calculation and the rate fixed by Mr. Simpson for wassilat. They were therefore ordered to pay wassilat at the rate of Rs. 459-14-8, with interest on the aggregate sum at the rate of 4 per cent. from the date of the decision of the Subordinate Judge.

On appeal, the grounds taken are:—

1st.—That the lower Court was wrong in allowing mesne-profits in respect of the 10-anna share for 4 years 8 months and 29 days, inasmuch as, upon a true construction of the decree under execution, the decree-holder is entitled to mesne-profits in respect of the said share for 3 years 5 months and 11 days only. The *2nd* ground is that the suit in respect of the 3-anna 6-gunda 2-cowrie 2-krant share having been for mesne-profits alone, the amount of those profits ought to have been determined prior to the decree that was passed in the suit, and that the lower Court was not competent to fix the amount in the course of execution. *3rd.*—That the lower Court has erred in refusing to make allowance for the usual costs of collection and for the jumma payable to Government in its estimate of the annual profits of the talook; and, further, that its estimate of such profits was conjectural and unsupported by evidence.

On the first ground, we think that the Judge is clearly wrong in his construction of the decree. The decretal order has already been set out by us in detail, and it is sufficient to say that the "বেদখলের সময়" referred to in the decretal order means from the 13th of Kartick 1273 to the 23rd Cheyt 1276; and therefore that the wassilat must be calculated for 3 years 5 months and 11 days, and not for 4 years 8 months and 29 days. There is a judgment of the High Court of Judicature, North-West Provinces, by the Chief Justice Sir Walter Morgan and Mr. Justice Ross, dated the 10th of November 1869, to be found at page 166, Vol. I. of the reports of that Court, to the effect that, when a decree is silent as to mesne-profits subsequent to the institution of the suit, they cannot be awarded by the Court executing the decree.

On the second ground, we think that, inasmuch as the suit with reference to the 3-anna 6-gunda 2-cowrie 2-krant share was not a suit for possession of the share with mesne-profits, but was a suit for mesne-profits alone, the Court executing the decree is not competent to give the amount of wassilat in the execution-stage.

With reference to the third ground of appeal, we do not think that the lower Court has erred. The judgment-debtors have not filed any account of the amounts collected by them during the time of their wrongful possession, and it is very clear that the Ameen's inquiry resulted in fixing a much larger sum than that fixed by the Court; and the decree-holder appears, as the Subordinate Judge observes, to have accepted Mr. Simpson's rate in order to avoid further litigation. It is also clear that this mehal was given in *dyesoodee ijara* to Mr. Brodie, and that the terms of his lease were that he was to collect the whole of the assets receivable from the ryots, and that the parties indebted to him, namely, the zemindars, were to pay the sudder jumma. We, therefore, think that the judgment-debtors are not entitled to any deduction on account of the sudder jumma or collection-charges.

We modify, therefore, the decree of the Subordinate Judge as follows: The wassilat on the 10-anna share will be calculated for a period of 3 years 5 months and 11 days at the rate assumed by the Court below, and no wassilat is to be given in the execution-stage in respect of the 3-anna 6-gunda 2-cowrie 2-krant share: The rest of the decree will stand. Each party to pay their own costs of this appeal.

The 28th May 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Rent-decrees—Review.

Case No. 360 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 3rd July 1873, affirming an order of the Moonsiff of Deang, dated the 31st May 1873.

Mooraree Mobajim (Petitioner), *Appellant,*

versus

Mahomed Akmal (Opposite Party), *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where claims for rent were decreed by a Deputy Collector on the basis of a decree for a kubooleut, and the latter decree was subsequently set aside in appeal: HELD that the remedy open to the judgment-debtors under the former decree was to petition the Deputy Collector for a review of his decisions.

Kemp, J.—THE appellant before us obtained an order from the Deputy Collector, dated the 16th of May 1870, for the refund of certain moneys which the opposite party, the respondent before us, had recovered in execution of three decrees. It appears that the respondent brought a suit against the appellant before us for a kubooleut, and while that suit was pending on appeal before the High Court, three suits for rent were also brought on the 13th of May 1868, 24th of July 1868, and 27th of May 1869. It is said that these claims for rent were brought on the basis of the decree for a kubooleut. But the decrees are not on the record, as they ought to have been, and it was the business of the special appellant to see that they were on the record, and to place them before the Court. This is the more important, inasmuch as we find that, in the petition of objection on the part of Mahomed Akmal, the special respondent before us, when called upon to show cause why he should not refund that money, he distinctly says that the decrees were "প্রার্থীকের স্বিকারী বাকি খাজনার" on a balance admitted by the then petitioners, now appellants before us. These decrees not being before the Court, we have only the order of the Deputy Collector, and it is true that in that order the Deputy Collector recites that these claims for rent were based upon the decree obtained for a kubooleut. The Deputy Collector in his order says that the appellants before us might get a refund of this money, and a kyfeut is called for from the office as to what sum has been paid. The opposite party, the special respondent, appealed against this order to the Collector and to the Revenue Commissioner, who both declined to go into the merits of the case—the Collector holding that there was no appeal, and the Commissioner holding that he had no jurisdiction. The appellant has now proceeded to execute the order of the Deputy Collector, treating it as an order passed in execution of decree, and has applied to the Civil Court to carry out that order. The first Court, the Moonsiff, misunderstood the case altogether. He says that, as more than three years have elapsed since the date of the decree, it cannot be executed, and therefore the petitioner's prayer must be rejected. On appeal, the Judge was of opinion, after stating briefly the facts of the case, that the petitioner could not now, "without more ado," as the Judge says, ask the Court to get him back the sums realized under the three rent-decrees which were not appealed from or set aside, and that clearly the petitioner cannot have what he asks; in short, the Judge thought that the petitioner must bring a separate suit.

We think that the petitioner, special appellant before us, had a remedy open to him which he neglected to take, namely, to petition the Deputy Collector for a review of these three rent-decisions. We also, as already observed, have not these decrees before us, and we cannot say whether they were based upon the kubooleut-decree or not. Then we also have the fact that, if the petitioner, special appellant, had asked for a review, the question might have been gone into as to what was the rent due to the special respondent, not according to the kubooleut set aside by the High Court, but according to the admitted rate; and, if we were to hold that the order of the Deputy Collector could be carried out, and the sum refunded, the result would be that the special respondent would lose the whole of his rent, as any suit which he might subsequently bring for rent would be barred by the Statute of Limitation. We dismiss the special appeal, but, under the circumstances without costs.

The 28th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, s. 246—Limitation—Res adjudicata.

Case No. 1783 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 12th July 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 16th August 1872.

Rughoonath Pershad and another (two of the Defendants), *Appellants,*

versus

Surjoo Pershad Singh and another (Plaintiffs), *Respondents.*

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Baboo Kalee Kishen Sen for Appellants.

Mr. R. E. Twidale for Respondents.

An objector's claim, under Act VIII. of 1859, s. 246, having been disallowed, he brought a regular suit to establish his right, and to have the sale stayed. The attached property was however sold pending this suit, which was subsequently dismissed. He then brought another suit for a declaration that the property (which was still in his possession) was his, and was not affected by the sale:

HELD that, in calculating limitation, no deduction could be made for the time consumed in the first suit; and that the cause of action in the second suit was the same as that in the first.

Phear, J.—WE think that the Judge has fallen into error in this case. The plaintiff sues alleging that he has been and is in possession of certain land as his own property; that this land was attached under a decree which had been passed against another person; and thereupon he objected to the attachment and sale of his property under this decree, in pursuance of the provisions of section 246 of the Civil Procedure Code. But, on the 27th February 1871, the claim so made by him to the property and his objection to the sale were disallowed. On the 18th April of the same year, he brought a regular suit to establish his right to the property, in which he asked that the sale might be stayed. The sale, however, was effected, notwithstanding the pendency of this suit, on the 1st May 1871. And, on the 29th of the following September, the Court dismissed the suit with costs.

The present suit was instituted on the 27th April 1872 for precisely the same purpose as the regular suit which was instituted on the 18th April 1871, namely, in order to have a declaration that the property of which the plaintiff says he is still in possession, is his, the plaintiff's, property, and was not affected by the sale which was held in May 1871.

The first Court was of opinion that the present suit is barred by the operation of the last clause of section 246.

But, on appeal to the Lower Appellate Court, the Judge was of opinion that the time which was consumed in the fruitless suit instituted in April 1871 and dismissed in September 1871 ought to be deducted from the period which has elapsed between the rejection of the plaintiff's claim in February 1871 and the date when the present suit was brought.

And if this deduction be made, then the present suit will appear to have been brought within the period of one year from the time of the rejection of the plaintiff's claim under section 246.

The Judge does not give the ground upon which he thinks this deduction ought to be made; and we know of no other ground upon which he can put it than that afforded by the 14th section of Act XIV. of 1859. But it appears to us plain that the deduction is not authorized by this section. The words of the section are: "In computing any period "of limitation prescribed by this Act, the time "during which the claimant, or any person "under whom he claims, shall have been "engaged in prosecuting a suit upon the same "cause of action against the same defendant, "or some person whom he represents, *bonâ* "*fide* and with due diligence, in any Court of "judicature which, from defect of jurisdiction "*or other cause*, shall have been unable to "decide upon it, or shall have passed a decision "which, on appeal, shall have been annulled "for any such cause, including the time "during which such appeal, if any, has been "pending, shall be excluded from such com-"putation."

And it has been held that the words "or other cause" mean a cause of the nature of defect of jurisdiction.

If, then, the Judge thought that the dismissal of the plaintiff's first suit in September 1871 fell within the words of this section, he must have considered that the dismissal was the result of defect of jurisdiction in the Court, or of some cause analogous to defect of jurisdiction. But it is quite plain to us that this was not the case.

So that it appears to us to be beyond question that the Judge was wrong in considering that the deduction of time which he made could lawfully be made in this case. And if the deduction of time be not made, then quite plainly the present suit has been instituted at a distance of time exceeding one year from the date when the plaintiff's claim under section 246 was disallowed by the Court. The last clause of section 246, which we referred to just now, runs in these words: "The order which may be passed "by the Court under the section shall not be "subject to appeal, but the party against "whom the order may be given shall be at "liberty to bring a suit to establish his right "at any time within one year from the date "of the order."

And the effect of this clause is that, if he does not bring his suit to establish his right within one year from the date of the order, he is barred from bringing his suit.

But it has been pressed upon us in argument that the present suit is not founded upon the cause of action which was furnished by the order of the 27th February 1871. It is said that, since that order was made, and

since the plaintiff's first suit was instituted, the sale of the plaintiff's property in execution of the stranger's decree has been effected, and that this sale constitutes a new cause of action; that it is such an addition to the plaintiff's ground of complaint as to substantially alter his cause of action.

But we think that this contention is not sound. The plaintiff, by coming before the Court under section 246, invited the Court to decide between him and the judgment-creditor and judgment-debtor in the other suit whether the property which had been attached was his property or the property of the judgment-debtor, with a view to prevent its being sold. The result of his objection was that a summary order was passed under section 246 declaring that the property was the property, not of the present plaintiff, but of the judgment-debtor, and liable to be sold in execution of the decree. This summary decision of the Court, which he, the plaintiff, had himself invited, was not altered in any degree by the natural consequence which flowed from it, namely, that the property was sold. And therefore it seems that the ground upon which the plaintiff puts his present suit is nothing other than the ground upon which, according to the terms of the last clause of section 246, he has a right to come into Court in a regular suit to ask that his right to the property attached may be established, provided he comes within one year.

So that, if we look at the present suit alone, regard being had to the date on which the summary decision of the Court was passed under section 246, it appears clear that the present suit is barred by the last clause of section 246.

But, if we go further and look at the suit which the plaintiff brought in April 1871, we find that that suit was a suit substantially the same as the present suit, and founded upon the same cause of action. The plaintiff then, *before* the sale had taken place, brought his regular suit in order to have the summary order of February 1871 set aside, and his right to the property attached established. We have already pointed out that is the essence of the present suit. The object which he sought in the suit and the ground upon which he tried to establish his case are substantially the same in both the suits. Therefore the present suit seems to be also barred by the simple fact that the plaintiff had previously brought a suit on the same ground of action in April 1871, which suit was dismissed in September 1871.

We may remark that the late Chief Justice, Sir Barnes Peacock, pointed out in the case which is reported in 7 Weekly Reporter 256, the special ingredient which was the distinguishing feature of the cause of action under section 246. He says: "If "the Court had summarily decided that the "property was liable to be sold, then it "would be necessary to get rid of that summary order, and the suit must have been "brought within one year from the date of "that order."

As long as the summary order passed on the 27th February 1871 in the present case was operative against the plaintiff, he could have no right to have it declared that he had a title to the land as against the persons in whose favour that summary order was made, unless he asked the assistance of the Court for that purpose within the period of one year limited according to section 246.

We are of opinion that the decision of the first Court was correct, and that the decision of the Lower Appellate Court overruling that decision is erroneous. Accordingly we reverse the decree of the Lower Appellate Court, and affirm that of the first Court, with costs.

The 28th May 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Conveyance—Non-registration—Specific Performance—Damages.

Case No. 1739 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 29th April 1873, affirming a decision of the Moonsiff of Pursa, dated the 29th September 1871.

Nund Kishore Lall (Plaintiff), *Appellant,*

versus

Mohun Lall and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Moonshee Mahomed Yusuf and *Baboo Judoo Nath Sahoy* for Respondents.

Where the executants of a deed of conveyance (*kobala*) omit to have it registered, and the property is sold to a third party who takes it *bonâ fide* for valuable consideration, the party in whose favour the conveyance

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was executed should seek his remedy against the executants, not in a suit for specific performance, but in an action for damages.

Phear, J.—We think that the decision of the lower Court is right, although we by no means concur in all the reasons for it which have been given by the Lower Appellate Court.

The suit, so far as it is a suit against the present possessor of the land to recover possession of the land, must fail, because the plaintiff is unable to give any evidence of his title. According to his account, that title was given to him by a conveyance from the 1st and 2nd defendants in December 1870. But, inasmuch as the plaintiff admits that this conveyance, although duly executed as he says, was not registered, it cannot be used in evidence in this suit. And no other evidence of the contract of sale can be substituted for it.

So far as this is a suit brought against the 1st and 2nd defendants to compel them to take the kobala or deed of conveyance to the registration office for the purpose of its being registered, it is a suit for the performance of an implied contract to this effect. The Court would only make a decree for specific performance when it was satisfied that complete justice between the parties required that the decree should be made, and that a money-recompense would not afford a sufficient remedy for the plaintiff.

Now, in this case, several very serious difficulties lie in the way of carrying out a decree for specific performance, even supposing such a decree were made in favour of the plaintiff, because, in the first place, if the defendants 1 and 2, acting under the orders of this Court, were to go with the plaintiff to the registration office, and present the kobala for registration, it seems to be clear that they would be out of time, and it is more than doubtful whether the plaintiffs, under these circumstances, would have any means of compelling, or right to require, the Registrar to register the deed.

And, secondly, if the result could in this way be effected, which the plaintiff desires, and the deed could be registered, then the use which the plaintiff would make of it would be to oust the 3rd defendant from the actual possession of property which he has honestly bought from the other defendants, and for which he has given valuable consideration. A Court of Equity should certainly hesitate some time before it passed a decree for specific performance of a contract against the defendant No. 1, which should lead to a consequence of this kind as regards an honest third person, the defendant No. 3.

And, finally, there seems to be really no substantial reason for making a decree for specific performance at all, because the plaintiff would, so far as we can judge on the facts of the case, be afforded ample remedy for the wrong which he has suffered by a decree for money-damages if he had asked for it.

On the whole, it seems that this suit has been misconceived. Instead of bringing it, the plaintiff ought to have sued the defendants Nos. 1 and 2 for damages in order that he might be recompensed the loss which he has sustained by their wrongful conduct.

We dismiss the appeal with costs.

All the parties respondent who appeared separately must have separate costs.

The 21st May 1874.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation—Fraudulent or Forcible Acquisition —Regulation II. of 1805, s. 8.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Maharajah Rajender Kishore Singh

versus

Rajah Saheb Perhlad Sein.

Regulation II. of 1805, s. 3, which provides that the limitation of 12 years shall not be considered applicable to any private claims of right to immoveable property, if the party in possession shall have acquired possession by violence, fraud, or other unjust dishonest means, must be considered with some strictness (otherwise the door would be opened widely to a large class of claims which ought properly to be barred), and the alleged fraudulent or forcible dispossession must be clearly established.

In this case the plaintiff and the defendant are two neighbouring Rajahs, each possessing a large tract of land, and the question is to which of their conterminous estates the villages in dispute belong. It would appear that disputes arose between the predecessors of these Rajahs in the early part of this century, and two cross-suits were instituted between them in the beginning of the century. The then Rajah of Ramnugger claimed 12½ tuppehs, and, on the other hand, the then

* From the judgment of Bayley and Pundit, JJ., in Regular Appeal No. 136 of 1863, decided on the 29th September 1866.

Rajah of Bettiah claimed some 85 villages, which are said to have formed a mehal called Hamrah. The result was that each failed. The Rajah of Ramnugger failed in establishing his title to those tuppehs, the tuppehs being accorded to the Rajah of Bettiah, and, on the other hand, the Rajah of Bettiah failed to obtain the 85 villages, the villages being declared to belong to the Rajah of Ramnugger. In 1861 the present Rajah of Ramnugger instituted a suit against the present Rajah of Bettiah for the recovery of nine villages, alleging them to be part of the 85 villages decreed to his predecessor, and that the Rajah of Bettiah had dispossessed him of them, and he put his case in this way. In 1840, on the death of the then Ranee of Ramnugger, the Government laid claim to the estate as having escheated to them for want of heirs, and took possession of it; and the plaintiff now alleges that, shortly before or upon the Government taking such possession, the Rajah of Bettiah contrived to possess himself of the nine villages in question. The Principal Sudder Ameen, before whom the case came in the first instance, decided against the plaintiff *in toto*. The High Court, being dissatisfied with that decision, remanded the case, and ordered a local investigation. The Ameen who conducted the local investigation reported in favour of the plaintiff as to one of the nine villages only; but the Principal Sudder Ameen adhered to his opinion that the plaintiff was entitled to none.

On the case coming again before the High Court, they came to the conclusion that the evidence of the plaintiff on the whole preponderated as to three of the villages, and accordingly they decreed to him those three, dismissing his suit as to the other six. There was, however, on the record an issue whether the suit was not barred by the Statute of Limitations, which was disposed of by the High Court in this way: "As to limitation, "it is clear that if we believe the evidence "of the plaintiff regarding the villages we "have decreed to him, that plaintiff is in "time as regards the villages decreed to him, "because the cause of action arose to the "plaintiff at a time when it was impossible "for him to bring the present suit, until he "had first obtained a decree in proof of his "own rights of inheritance, and so shown "his having a *locus standi* in Court." Their Lordships propose now to deal with this question of limitation, to which the argument before them was chiefly, if not wholly, confined.

The facts bearing upon this question may be shortly stated thus: The Government took possession of the estate in 1840 or 1841. That is the time at which the plaintiff alleges dispossession on the part of the defendant, and therefore the time when his cause of action arose. It appears that the plaintiff brought a suit against the Government and another defendant for the purpose of establishing his title as heir to this estate. A decision was pronounced in his favour in the year 1845 by the Principal Sudder Ameen, which decision was confirmed by the Court of Sudder Dewanny Adawlut in 1846. In 1848 he was actually put into possession, and he remained in possession until 1854. He was afterwards called upon to give further security to abide the event of the appeal, and on his failure to do so, the Court of Sudder Dewanny Adawlut caused the estate to be put under attachment. The appeal was decided finally in his favour in 1858 by the Judicial Committee of the Privy Council, and thereupon he was again put into possession.

The very question now to be decided arose between these same parties in a suit wherein the present plaintiff sought to recover from the present defendants certain other lands which he alleged were within the limits of the zemindary of Ramnugger, and not within those of Bettiah. This suit, though commenced on the same day as the present, came on appeal before this Board in February 1869. In that case, as in the present, it was contended on the part of the plaintiff that the operation of the statute had been suspended by the litigation in which he had been engaged in order to establish his title to his estate and by his dispossession in 1848.

In order to show that the case is precisely in point, it is enough to read a few sentences of the judgment. It is reported in the 12th Moore's Indian Appeals, and at page 341 this is stated: "If, however, it were granted that a right of action accrued to the "appellant at the date of the thakbust pro-"ceeding" (that would be the year 1845, three or four years later than the cause of action would arise in the present case), "and "their Lordships think it impossible on the "evidence to fix the dispossession at a later "date, the suit would nevertheless fall within "the 12 years' limitation, unless the appel-"lant could show that he is entitled to deduct "the whole or some part of the period "between February 1848 and the beginning "of 1858," "and, to support this claim to "deduction, he must show that, during the

"period to be deducted, he was, in the words "of the regulation, 'from good and sufficient "'cause precluded from obtaining redress.' "Their Lordships would have great difficulty "in affirming the proposition that such good "and sufficient cause had here been shown "to exist. The appellant's title to the Raj "of Ramnugger was established in the Courts "of India in September 1846. He was put "in possession of the property in June 1848, "though between May 1854 and some day in "the beginning of 1858 it was again under "attachment. How can it be said in these "circumstances he was, between 1848 and "1858, precluded from maintaining a suit for "protecting his zemindary and recovering "lands taken from it by encroachment? It "would be very dangerous, in their Lord-"ships' opinion, to lay down as a rule that "the pendency of an appeal to England puts "the party who, subject to that appeal, is "the owner of an estate, under a legal dis-"ability to bring a suit in that character "against third parties." Their Lordships, therefore affirmed the decision of the Indian Courts, which in that case had held that the Statute of Limitations was a bar to the plaintiff's claim.

Their Lordships consider themselves precluded from considering whether the present case is taken out of the statute by the exception in section 14 of Regulation III. of 1793, *viz.*, "or shall prove that from minority or "other good and sufficient cause he is pre-"cluded from obtaining redress," because this question is actually *res judicata* by this very tribunal between the same parties. It has, however, been argued on the part of the plaintiff that in this case he brings himself within an exception to be found in the subsequent Regulation II. of 1805, section 3: "The limitation of 12 years fixed by sec-"tion 14, Regulation III., 1793, section 8, "Regulation VII., 1795, and section 18, "Regulation II., 1803, shall also not be con-"sidered applicable to any private claims of "right to lands, houses, or other permanent "immoveable property, if the person or per-"sons in possession of such property when "the claim of right thereto may be preferred "in a competent Court of judicature shall "have acquired possession thereof by vio-"lence, fraud, or by any other unjust dis-"honest means whatever;" and the regulation goes on to say that if the plaintiff seeks to exempt himself from the ordinary rule, he must state the fraud or violence in his declaration or replication. It has been argued that the plaintiff does sufficiently state a case of dispossession by fraud and violence in his plaint and subsequent statement by his pleader, and that the evidence is sufficient to satisfy their Lordships that he was dispossessed by fraud or violence within the meaning of the words of this statute. Although it may be perhaps fairly contended that there is a sufficient statement in the declaration to bring the plaintiff within this exception, no issue appears to have been directed to this question, and the attention of the High Court does not appear to have been directed to it at all, inasmuch as they confined their attention entirely to the question whether the plaintiff could bring himself within the exception of section 14 of Regulation III. of 1793. But their Lordships nevertheless are asked to consider the evidence and to say that the plaintiff has brought himself within this exception. They think it right to observe that this is an exception which they think must be construed with some strictness, for the door would be opened widely to a large class of claims which ought properly to be barred by limitation if at any period less than 60 years a plaintiff were enabled to evade the operation of the Statute of Limitation merely by alleging and giving some evidence of fraudulent or forcible dispossession. Their Lordships think that such fraudulent or forcible dispossession must be clearly established.

Applying their minds to the evidence which has been relied upon on the part of the plaintiff, they have to observe in the first place that in the suit as originally brought and heard before the Principal Sudder Ameen there was no allegation of violent or fraudulent dispossession. There was simply a statement of dispossession. Upon the case being remanded, evidence of dispossession was brought forward for the first time, and it was to this effect: With respect to each of the three villages (and their Lordships believe with respect to each of the nine also), one or two witnesses depose to the agents of the Rajah of Bettiah having come upon the land while the putwaree was in the act of collecting the rents; that they happened to have found upon him the rent-rolls and official documents connected with the land; that they took them forcibly from him, and expelled him and took possession. The same story is told in each of the cases; and, what appears more singular, it is also said that although the attention of the Government authorities was called to the matter, they refused to take any notice of it. It should be recollected that the putwaree ther

dispossessed was the putwaree acting on behalf of the Government; and it is further to be observed that the plaintiff himself states more than once that he received all these 85 villages from the Government, who were in possession of them, without making any statement at all as to this alleged forcible dispossession. It is further to be observed that the Principal Sudder Ameen would appear to have wholly disbelieved this evidence, and that the attention of the High Court was never called to it.

Under these circumstances, their Lordships have no difficulty in coming to the conclusion that no such fraudulent or forcible dispossession has been proved as would bring the plaintiff within the exception of section 3 of the Regulation of 1805, and they feel bound to decide that the plaintiff's claim is barred by the Statute of Limitations. The plaintiff's suit must be dismissed upon that ground; and it is therefore unnecessary for their Lordships to express any opinion upon the merits of the case.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the suit of the respondent be dismissed, and that the appellant have his costs in both the Courts below and of this appeal.

The 22nd May 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Foreclosure—Notice.

Case No. 2042 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 2nd July 1873, affirming a decision of the Moonsiff of Manickgunge, dated the 9th December 1872.

Kalee Koomar Dutt (Defendant), *Appellant,*

versus

Pran Kishoree Chowdhrain (Plaintiff), *Respondent.*

Baboos Bama Churn Banerjee and *Kissen Dyal Roy* for Appellant.

Baboos Sreenath Dass and *Gopal Lall Mitter* for Respondent.

The only person on whom effectual service of notice of foreclosure can be made is the person really interested in protecting the estate.

Ainslie, J.—THE present plaintiff, as representative of one Dino Bundhoo Bose, sues to recover certain property from the hands of a mortgagee who has foreclosed and obtained a decree for possession. The property was originally mortgaged by one Hur Narain, who died leaving a son, Prosunno, and a wife, Jogodessuree. On the death of Prosunno, Jogodessuree entered into possession, and notice of foreclosure was served upon her in September 1858. This Jogodessuree was not the mother but the step-mother of Prosunno. In 1862, Dino Bundhoo, the maternal uncle of Prosunno, instituted a suit to have his right to succeed as heir of Prosunno declared as against Jogodessuree, and eventually succeeded in recovering the property from her. But in the meantime the mortgage had been foreclosed by a decree made in 1867 in a suit in which the defendant was at one time made a party. However, his name was afterwards struck off the record. The only question now is whether the notice of foreclosure served upon Jogodessuree, the party in possession of the mortgaged property after the death of Prosunno, and before Dino Bundhoo had come forward with his claim, is binding upon the latter. Jogodessuree, as the step-mother, appears to have had no legal right to the inheritance; but it may be doubted whether the mortgagee was aware of this, or aware at the time that he served the notice that there was any probability of a conflict between Dino Bundhoo and Jogodessuree. It may be taken that the notice was served upon a person whom he took to be the legal representative of Prosunno. On the other hand, there is this consideration that the person who was really interested in protecting the property from foreclosure was the true heir, and if we were to hold that, without notice to him, a notice served upon another person in temporary possession must be taken to be sufficient notice, it might very easily happen that the interest of the real heir would suffer even if no fraud should be practised. This, we think, points Dino Bundhoo out as the only person on whom service of notice could be properly made. Although cases may arise in which, as is alleged in the present case, it is difficult to find out who is the proper heir, and although in this particular case there may be some hardship, we do not think we can on that account depart from what we hold to be the general rule, that the only person on whom effectual service of notice of foreclosure can be made is the person really interested in protecting the estate; in this case the heir-at-

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law Dino Bundhoo. With reference to the alleged hardship of the present case, it may be observed that the suit by Dino Bundhoo was instituted in 1862—five years before the date of the decree obtained by the mortgagee, so that the mortgagee had ample time to serve him with notice of foreclosure, and to include him in the foreclosure-suit.

The appeal will be dismissed with costs.

The 29th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble E. G. Birch, *Judge.*

Sale of Jote in Execution—Right of Occupancy.

Case No. 878 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 17th January 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 27th June 1872.

Kripa Nath Chakee (Plaintiff), *Appellant,*

versus

Doyal Chand Pal and another (Defendants), *Respondents.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Tarinee Kant Bhuttacharjee for Respondents.

The sale of a jote in execution of a decree against the jotedar does not prove it to be transferable, nor does the purchaser acquire a right of occupancy by his purchase where the right is not dependent on custom, but is a mere creature of the Rent Law.

Couch, C.J.—In this case the plaintiff sought to recover arrears of rent, for 1274, 1275, and 1276, of a jote described in the plaint.

The suit was in the first instance brought against Anund Moyee, but a person named Doyal Chand came forward and said that he was the owner of the jote, and that he purchased it at a sale in execution of a decree against Anund Moyee. Anund Moyee did not appear to defend the suit.

The Moonsiff by his decree gave the plaintiff the rent for 1274 with interest against the defendant Anund Moyee, and decreed that the defendant Doyal Chand, who had come in, was liable for the rent for 1275 and 1276 with interest, provided that he was not to be evicted, if he paid the amount of the decree with costs and expenses into Court within fifteen days from the date of the decree.

From this there was an appeal which was heard by the Subordinate Judge. It would appear from his judgment that the plaintiff had appealed, and Doyal Chand had also appealed, and the ground taken was that the jote being a transferable one, the tenant (by whom, we presume, the Subordinate Judge meant Doyal Chand) could not be ejected. The Subordinate Judge notices, what is the fact, that Anund Moyee held the jote, but that, under a sale in execution of a decree against her, the appellant before him, Doyal Chand, had purchased it. Then he says this proves the jote to be a transferable one, and that the plaintiff's agent had not, nor had the plaintiff, said that it was not: "I "therefore consider that, as the jote has "been held by appellant's predecessors (that "is, the predecessors of Doyal Chand) for "more than twelve years, the tenant has "obtained a right of occupancy." And he made an order that the appeal and the cross-appeal be decreed; both parties to pay their own costs; Anund Moyee to be liable to the decree for rent on account of 1275 and 1276, and the decree for ejectment should be reversed.

We do not understand this, or how the Subordinate Judge arrived at the conclusion that there ought to be such a decree. The principal question in the case is whether he was right in holding that the jote was transferable, and consequently, as he appears to do, that Doyal Chand had acquired a right of occupancy, and therefore could not be ejected. This seems to be the view he took, and finding that it was transferable, and that

Doyal Chand had acquired a right of occupancy, he reversed that part of the Moonsiff's decree which ordered the ejectment of Doyal Chand.

The only circumstance which he relies upon as showing that the jote was transferable is that it had been purchased by Doyal Chand at a sale in execution of a decree. We have held recently in a Full Bench in Regular Appeal No. 27 of 1873,* that, in the absence of any custom, a right of occupancy is not transferable, that is, that a right of occupancy, which is merely a creature of the Act, and does not depend upon any custom, cannot be transferred. Upon the authority of that case, we must hold that the decision of the Subordinate Judge, where he held that this jote was transferable, and that Doyal Chand acquired a right of occupancy by his purchase, is wrong. The consequence of this is that Anund Moyee might be considered by the landlord as still liable to pay the rent, because the landlord does not appear to have in any way recognized the transfer, or done anything which could amount to an acceptance of the land, or allowing the tenancy of Anund Moyee to be given up. Doyal Chand has no right whatever to continue in occupation of the land. He has not acquired a right of occupancy. The Moonsiff's decree was to some extent in his favour, as it allowed him to continue in occupation if, within fifteen days, he paid the rent for the two years for which the Moonsiff thought he was liable. But the decree which ought to be made is one for the rent for the three years against Anund Moyee. So far the decree of the Subordinate Judge is right, but it is wrong in reversing that part of the Moonsiff's decree which made Doyal Chand liable to be ejected.

The case is presented to us in rather a confused form, but the decree of the Moonsiff appears, so far as the order of ejectment is concerned, to be one which the parties cannot complain of. We must reverse the decree of the Subordinate Judge, and alter the decree of the Moonsiff by making Anund Moyee liable for the rent for the three years, and allowing the provision for ejectment, if the rent were not paid within 15 days, to remain. The parties will bear their own costs in this Court and in the Lower Appellate Court.

* *Ante*, p. 22.

The 1st June 1874.

Present:

The Hon'ble J. B. Phear and G. G Morris, *Judges.*

Special Appeal—Finding—Issue.

Case No. 1851 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 30th May 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 12th February 1873.

Chowdhry Ajoodhya Pershad Singh and others (Plaintiffs), *Appellants,*

versus

Hur Buksh Singh and another (Defendants), *Respondents.*

Mr. M. L. Sandel and *Baboo Doorga Mohun Dass* for Appellants.

Baboo Gopal Lall Mitter for Respondents.

A plaintiff, having complained in special appeal that the Courts below had without evidence found against him on the question whether certain land was protected from enhancement, asked the High Court to set aside the finding, although it was not essential to the decree which had been passed.

Accordingly the Court, seeing that documents had been received in proof of payment of rent without any evidence of authenticity, set aside the finding, and declared that it should not operate as a bar to the issue being raised in any future suit.

Phear, J.—In this appeal the plaintiff complains that the Courts below have, without evidence before them, found against him, the plaintiff, the issue whether or not the land which is the subject of suit is protected from enhancement. As it happens, the finding on this issue is not essential to the decree which has been passed in the case, although the issue itself was a cardinal issue between the parties. The plaintiff, however, brings this appeal in order to be protected against the possibility of this finding being used against him in any future suit which may possibly occur between himself and the defendant.

The Sudder Moonsiff says: "I am of

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"opinion that, in accordance with the evidence "produced by defendant and admissions of "the plaintiffs, it appears that the rent has "been paid by the defendant from the begin-"ning of 1255F. to the institution of this "case, *i. e.*, from a period of more than 20 "years, at a uniform rate of rupee 1 per "beegha as is mentioned at the foot of the "plaint. Hence, under the precedents of "the High Court, a permanent right of kasht "(cultivation) has accrued to the defendant, "and such lands are not liable to enhance-"ment."

It appears that the bulk of the evidence which the Moonsiff here refers to and which he discusses at some length in his judgment consists of receipts filed by the defendant, purporting to be receipts of rent extending over a considerable portion of the period from 1255 to the date when the suit was instituted. and of certain copies of *shushmahai* papers said to have been filed in the Collectorate.

The plaintiff at the trial objected to the admission of these receipts and these copy *shushmahai* papers upon the ground that they were not sufficiently proved. And it seems to be now beyond question that neither the one nor the other class of document was proved at the trial. No attempt was made to establish that the receipts were authentic documents, or that the alleged originals of the copy *shushmahai* papers were filed in the Collectorate by, or on behalf of, the person by whom they purport to have been filed. The Moonsiff, however. overruled the objections which the plaintiff made upon this point for reasons which we certainly do not find very intelligible.

It is not necessary, however, that we should discuss these now, because we think it is clear beyond all dispute that, when the plaintiff objected to the reception of these documents without proof, the Court was bound to insist upon proof of some kind being furnished. It is not a question now whether sufficient *primâ-facie* proof of authenticity was given to justify the Court in receiving the documents in evidence, because it is admitted that no proof whatever was given. This being the case, it is plain that the finding come to by the Courts upon this issue cannot be supported. It must, therefore, be set aside, and it must be declared that it shall not, in any future suit between the plaintiff and the defendant, operate as a bar to this issue being raised again.

The appellant must have his costs of this ppeal.

The 1st June 1874.

Present:

The Hon'ble C. Pontifex and Romesh Chunder Mitter, *Judges.*

Ancestral Property—Mortgage—Onus Probandi.

Case No. 1013 of 1873.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 17th January 1873, affirming a decision of the Moonsiff of Pauchpookhuriah, dated the 31st December 1870.

Sreemutty Sreemutty (Plaintiff), *Appellant,*

versus

Lukhee Narain Dutt and others (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

In a suit by a Hindoo widow to recover a share of property alleged to have been inherited from her husband (J), and which had been mortgaged by her husband's brother (B), and sold under a decree obtained on the mortgage, the question was raised whether the money for which the property was mortgaged had been borrowed by B for his own private use or for the benefit of the family:

HELD that the onus was on the defendant to show that the plaintiff had derived any benefit from the money.

Pontifex, J.—THIS is a suit by the plaintiff seeking to recover one-and-a-half-annas share of a putnee talook which she claims to have inherited from her husband Juggurnath Deo. The suit was instituted under the following circumstances: Brindabun, who was the husband's brother, and in whose name the talook had been settled, made a mortgage of the whole three annas of the property which was subsequently sold under a decree obtained by the mortgagee; and the purchaser entered into possession.

The plaintiff now seeks to recover her one-and-a-half-annas share.

The first Court held that the plaintiff had not sufficiently established her title. It found that the property had originally belonged to the ancestors of Juggurnath and Brindabun, but it held that, as the property had afterwards been resumed by Government, and a fresh settlement made with Brindabun, such settlement was for his benefit, and for his benefit alone. On these grounds the Moonsiff gave the defendant a decree.

Against that decree the plaintiff appealed, and the Lower Appellate Court reversed the finding come to by the first Court, and held that, inasmuch as the property had been previously settled by Government with the ancestor of the family, the subsequent settlement with Brindabun must be taken to be a settlement for the benefit of the family. Now, although the evidence as to that is objected to, and although it is no doubt meagre in quantity, yet we cannot say that there is not evidence of the talook having belonged to the ancestor of the family, sufficient to support the finding of the Judge; and with that finding we cannot interfere on special appeal.

Then another objection has been made, namely, that the plaintiff ought to have proved that she was not barred by limitation in her suit. Now, the Judge has found that the plaintiff had, since her husband's death, lived with her husband's brother. He says: "Looking to the period subsequent to his "death, we find that the plaintiff has always "been living with Brindabun, and supported "by him." We think that this is sufficient to justify the Judge in holding that the plaintiff was not barred by limitation.

But the Judge, after having found that the plaintiff was not barred by limitation, proceeded to determine this further question, namely, whether or not the money was borrowed by Brindabun for his own private use, or for the benefit of the family; and he held that the onus lay upon the plaintiff to show that the money was not applied for the joint benefit of the family. We think that in so holding he placed the onus of proof on the wrong party. When the plaintiff sued to recover her one-and-a-half-annas share in the talook in dispute, the only thing she had to do was to come into Court, and prove her title. Anything derogating from her title must be proved by the other side; and it was for the defendant to prove that the plaintiff had any benefit from the money, and not for the plaintiff to prove that she had had no benefit.

It is further said that this was a collusive suit between Brindabun and the plaintiff, and that therefore the onus ought to have been shifted on to the plaintiff. If this suit were collusive, the onus might perhaps have been properly so shifted, but the Judge has not found that there was any collusion, although the Moonsiff was of that opinion: and we think that there should be a distinct finding by the Judge as to collusion before the onus of proof ought to be shifted.

Under these circumstances, the appeal will be allowed, and the plaintiff will have a decree for the one-and-a-half-annas share of the property claimed by her, with costs in all the Courts.

The 1st June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mortgagor's Right of Suit—Adjustment of Accounts—Act VIII. of 1859, s. 2.

Case No. 76 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 20th December 1872.

Roy Dinkur Doyal and another (Plaintiffs), *Appellants,*

versus

Sheo Golam Singh and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee* for Appellants.

Mr. R. E. Twidale for Respondents.

Plaintiffs brought a former suit to recover possession of certain property which had been mortgaged to defendants under a zur-i-peshgee lease, and obtained a decree for possession on their depositing the sum which the Court found to be due on the mortgage. Plaintiffs delayed applying for execution till four years after when they alleged that the money had been paid off by the usufruct of the land. Their application having been refused, they brought the present suit for possession alleging that the debt had been discharged by the usufruct:

HELD that the present cause of action within the meaning of Act VIII. of 1859, s. 2, was a fresh cause of action as compared with the former one, which was for an adjudication of the state of the accounts between the parties up to a certain date, whereas the latter had reference to the accounts since that date.

Phear, J.—IT appears to us that the Subordinate Judge in this case has misapprehended the nature of the suit.

The principal facts are that the property which is the subject of suit was mortgaged to the defendants, or to persons whom the defendants represented, by a zur-i-peshgee lease dated the 19th June 1861, to secure

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repayment of a certain capital sum of money advanced. The plaintiffs who represent the mortgagors now claim to be entitled to recover possession of this property on the allegation that the principal with interest due under the zur-i-peshgee deed has all been discharged by the usufruct of the property.

It appears that the plaintiffs formerly brought another suit of the like kind, in which suit the Principal Sudder Ameen, by a decree dated the 18th February 1868, ordered that the plaintiffs should get possession of the property on a deposit of Rs. 4,824-14-9, being the amount of the zur-i-peshgee or mortgage-money which he found to be due on the mortgage at that time. The plaintiffs did not avail themselves of the decree, and have since brought this suit. It is true that they did apply for execution of the decree in July 1872, *i. e.*, four years after that decree had been made, so far as it directed possession of the property to be given, but they did not offer to pay the money declared by it to be due, because they said that, after the interval which had elapsed since the decree, that money had in fact been paid off by the usufruct of the land.

The Court, however, to which this application for execution was made, rightly or wrongly, refused to inquire whether that was the case or not, and refused, further, to give the plaintiffs the benefit of the order for possession unless they paid down the money. And it was after this had occurred that the plaintiffs brought the present suit.

The Subordinate Judge, shortly referring to these facts, says: "The plaintiffs being "unwilling to comply with the terms of "the decree, they bring a fresh suit for "possession of the same property for which "they have already obtained a decree, and "they can be put into possession of it with-"out a regular suit. The ground on which "this suit is brought is the same; that the "money has been realized by the defendants, "and their mortgage-deed should therefore "be set aside. I think the present suit of "the plaintiffs is barred by section 2, "Act VIII. of 1859. If such suits be "allowed, there will be no end of a suit. "Suppose that it is found in this suit, as "it was in the former one, that the entire "sum payable by the plaintiff is not made "good by the income, and a decree is again "passed in favour of the plaintiff for posses-"sion on payment of the money found to "be due, will the plaintiff be allowed to "bring a third suit after one or two years "have elapsed for possession on the allega-"tion of the debt being satisfied from the "income? This will cause a great inconve-"nience to the defendants to be troubled "by several actions on the same matter, and "there being no help for them to get rid of "the dispute. It was owing to the plaint-"iffs' own idleness, folly, or bad intention, "that they did not receive possession, and "they cannot derive any benefit by such "conduct; the delay in recovering possession "caused by their own fault can give them "no cause for a fresh action. If they can "receive possession without a suit, why "should they be allowed to maintain a suit "giving unnecessary trouble to the defend-"ants?" And accordingly the Subordinate Judge dismissed the suit with costs upon the ground that it was barred by section 2, Act VIII. of 1859.

Now the words of that section are: "The "Civil Courts shall not take cognizance of "any suit brought on a cause of action "which shall have been heard and deter-"mined by a Court of competent jurisdic-"tion in a former suit between the same "parties or between parties under whom "they claim."

What, then, was the cause of action which was heard and determined between the present parties in the former suit, and what is the cause of action which is put forward by the plaintiffs in this present suit, and which they ask to have now heard and determined?

It seems to us plain that the principal cause of suit is the relation which subsists between the parties as mortgagor and mortgagee, and the consequent right on the part of the mortgagor at all reasonable times to ask for an account from the mortgagee. The suit is brought for the purpose of obtaining an adjustment of accounts or adjudication of the state of the accounts between the parties, and for such relief at the hands of the Court as the plaintiff may be entitled to upon that adjustment or adjudication of the accounts. Now the former suit effected an adjustment of accounts up to the date of 18th April 1868. The substantial cause of action within the meaning of section 2, Act VIII. of 1859, in the present suit, that which the plaintiff desires to have heard and determined, is the state of accounts which has arisen since the 18th April 1868 —obviously an entirely fresh cause of action. The matter which the Court is asked in this suit to hear and determine, is a matter which has arisen and come into being since

the matter of the last suit was heard and determined. It has arisen since the date of the decree of April 1868. And consequently section 2 of Act VIII. of 1859 does not bar the Courts from entertaining this suit.

It appears to us that it would be hard upon the mortgagor if the law were otherwise. The decree which was passed in April 1868 was simply a declaration that at that time a certain sum of money was due from the mortgagor to the mortgagee accompanied by a decretal order; that, upon that sum being paid by the mortgagor, he should have possession of the property delivered over to him. That decree did not put an end to the relation of mortgagor and mortgagee. The Court did not in that suit pretend to foreclose the plaintiff's right of redeeming in the event of his not paying the money then declared to be due. It perhaps may be doubted whether the Civil Courts in this country have the jurisdiction to foreclose in this way the mortgagor's right to redeem, so long as his right of suit is not barred by the Statute of Limitation. But, however this may be, that decree certainly did not profess to foreclose the plaintiff's equity of redemption, and it would be very hard upon him therefore that his equity of redemption should nevertheless be indirectly foreclosed by the effect which the Subordinate Judge has given to section 2, Act VIII. of 1859, without any period of grace or any terms whatever being attached to this foreclosure.

After the explanation which we have endeavoured to give of the nature of the action, it is unnecessary for us to point out that the mischief and vexation which the Subordinate Judge sees, as incidental to the maintenance of this suit, are imaginary. There is no grievance whatever caused to the mortgagee by his being called upon in Court to account for the rents and profits of the property since the period when the decree of April 1868 was passed. It is his duty at all times under the law to be ready to account; and the effect of maintaining and carrying out this suit, so far as he is concerned, will merely be that he will have to account for the rents and profits which he has derived from the possession of the land since the last decree was passed between him and the plaintiff.

We reverse the decision of the lower Court, and remand the case for re-trial upon its merits.

Costs will abide the event.

The 1st June 1874.

Present:

The Hon'ble C. Pontifex and Romesh Chunder Mitter, *Judges.*

Act X. of 1865, s. 187—Legatee—Probate.

Case No. 2653 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 26th August 1873, reversing a decision of the Moonsiff of Doobrajpore, dated the 20th March 1873.

Mun Mohun Ghossal (Plaintiff), *Appellant,*

versus

Pureshnath Roy and others (Defendants), *Respondents.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Juggut Doollub Bysack for Respondents.

Where the first Court decreed a suit for possession of land claimed under a will, the Lower Appellate Court was held to have done right in reversing the decision on the ground that plaintiff had not taken out probate under Act X. of 1865, s. 187.

The "probate" intended by s. 187 is a copy of the will certified and sealed by a Court of competent jurisdiction, and it may be taken out by a legatee.

Pontifex, J.—In this case the plaintiff sues for possession of certain land to which he claims title under the will of his uncle. He alleges possession during the uncle's lifetime, and also after his death, until he was dispossessed by the defendant.

The Moonsiff gave a decree for the plaintiff, believing that the evidence sufficiently established the validity of the will, although the defendant denied its validity.

On appeal, the Subordinate Judge, without going into the merits of the case, reversed the Moonsiff's decision, and dismissed the plaintiff's suit on the ground that plaintiff had not taken out probate under section 187 of Act X. of 1865. That section is to the effect following:—

"No right as executor or legatee can be "established in any Court of Justice, unless "a Court of competent jurisdiction within "the province shall have granted probate

"of the will under which the right is "claimed, or shall have granted letters of "administration under the one hundred and "eighteenth section."

We are of opinion that the Subordinate Judge was right in so deciding.

The decision of the Subordinate Judge is objected to before us on three grounds. It is said that section 187 does not apply to this case, because the will under which the plaintiff claims does not appoint him executor, and section 181 declares that "probate can only be granted to an executor appointed by the will." We are of opinion that this must be read along with section 182, which says that such appointment "may be express, or by necessary implication." But apart from that, we think that section 187 is not to be interpreted by construing it with section 181, but with reference to the general scope and intention of the Act. The 3rd section defines "probate" to mean "the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of a testator."

We think that in construing the Act, we are quite entitled to construe the word probate by the clause in the 3rd section; and if that be so, the plaintiff being a legatee, being in fact the sole residuary legatee under the will, he might obtain a copy of it certified and sealed by a Court of competent jurisdiction; and this is the probate in our opinion intended by section 187.

It is further objected that section 187 will not apply, because in this case the will relates to land and not to moveable property, or personalty, and therefore the word legatee is inapplicable. But we think, looking to section 90, and the illustration appended to it in which the word zemindaree is expressly used, that this objection is untenable.

The third objection is that even if it was necessary to take out probate, as this point was not raised in the first Court, and was not one affecting the merits or relating to the jurisdiction of the Court, the Subordinate Judge was wrong in dismissing the plaintiff's suit and reversing the Moonsiff's decision upon that ground. We think, however, that the Subordinate Judge was bound to notice it, as he well knew that by the Act the Court of the District Judge was the only Court which was competent to deal with the matter of a will. He was, therefore, right in dismissing the plaintiff's suit, although no objection of this kind had been taken before the Moonsiff.

Under these circumstances the appeal must be dismissed with costs.

The 2nd June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Marriage Settlement—Wife's separate property —Act X. of 1865, s. 4—Act III. of 1874.

On Appeal from the judgment of the Honorable C. Pontifex, exercising the Ordinary Original Civil Jurisdiction of the High Court.

G. Peters (Plaintiff), *Appellant*,

versus

T. Z. Manuk and others (Defendants), *Respondents*.

Mr. Kennedy and *Mr. Lowe* for Appellant.

The Advocate-General and *Mr. Evans* for Respondent Manuk.

Mr. Hill for the Trustees of the Marriage Settlement.

The Indian Succession Act (X. of 1865), s. 4, cannot prevent the operation of a marriage-settlement restraining a wife from anticipating or alienating property settled to her separate use; such restraint being created not by the marriage but by the settlement.

By using the words "absolute owner" in the preamble of Act III. of 1874, the Legislature did not intend to make a declaration which would have the effect of extending the provisions of s. 4 of the Indian Succession Act, but to describe its legal effect: the word "absolute" is used with reference to the husband not acquiring any interest in the property.

Act III. of 1874 has not retrospective effect, and is not intended to affect contracts made before and to alter the rights of persons or the obligations arising out of them.

Obiter dictum.—Where a contract is made after Act III. of 1874 came into operation, there will be a remedy against the separate property of the wife, although there is a clause against alienation or anticipation in the marriage-settlement.

The judgment of Pontifex, J., which was appealed against, was as follows:—

On the construction of section 4 of the Indian Succession Act, I have no doubt whatever. The only effect of the section is to make every female who comes within the Act, and who was married after it came into force, enjoy her property for her separate use without a specific contract for that purpose. The doctrine of separate use having been established for the benefit of married women, Courts of equity, assuming them to be mentally as well as physically weaker than their husbands, found it necessary to protect them from the undue influence of their husbands, and accordingly recognized the clause restraining married women from anticipation

during their coverture. Without such protection the doctrine of separate use would have been, and would still be, a disadvantage instead of a benefit to married women. I see no reason why this protection is less needed since the recent legislation, or why it should not be continued. Females still require, and Courts of equity ought, in my opinion, to still afford them the protection which was originally afforded them. The clause in question is in fact part of a contract; and I see nothing in the Succession Act which makes such a contract illegal or invalid. For the Act to have that effect I think a deliberate legislative intention should appear, and I can find none such.

The plaintiff therefore cannot reach any property which was settled on the female defendant without power of anticipation.

The suit will be dismissed with costs on scale No. 2.

The 13th March 1874.—Mr. Kennedy mentions the Act just passed for the protection of the property of women married before the passing of the Indian Succession Act.

The Court considers it does not affect the case.

The plaintiff appealed from this decision on the following grounds:—

1st.—For that the learned Judge held that there was no cause of action appearing on the plaintiff's written statement against the defendant Ripsima Theodore Zorab Manuk, whereas he ought not so to have held.

2nd.—For that the learned Judge held that there being a restriction on anticipation in her marriage-settlement, the defendant Ripsima Theodore Zorab Manuk's property was not liable to her debts, whereas he ought not so to have held.

3rd.—For that the learned Judge held that the Indian Succession Act of 1865, and the Married Women's Property Act of 1874, have not altered the law relating to the power of restraining married women from alienating their estate, whereas he ought not so to have held.

4th.—For that the learned Judge dismissed this suit, whereas he ought to have made therein the decree prayed in the plaint.

Mr. Kennedy for the appellant contended that the respondent Ripsima Theodore Zorab Manuk was liable for debts incurred by her out of the property settled upon her on her marriage, in spite of the clause in the settlement restricting her from anticipating or alienating that property.

Section 4 of the Indian Succession Act says: "No person shall, by marriage, acquire "any interest in the property of the person "whom he or she marries, nor become incapa-"ble of doing any act in respect of his "or her own property, which he or she could "have done if unmarried."

Now, it was the respondent's marriage which rendered her incapable of alienating or anticipating her property, but section 4 of this Act seems to do away with this restriction on alienation. The true construction which is to be drawn from the words of the section is that a woman acquires absolute control and ownership over property which has been settled upon her on her marriage. Hence it follows that according to this section a married woman is placed precisely in the same position as a married man, and she can therefore deal with her own property as absolutely as her husband can with his.

In the case of Brandon *vs.* Robinson, 18 Vesey, p. 429, Lord Eldon decided that the clause against anticipation was inconsistent with the enjoyment of the property given, and was therefore void. And in the case of Newton *vs.* Reid, 4 Simon's Rep., p. 141, a testator gave a sum of money for the separate use of his daughter, a *femme sole*, and declared that she should not be at liberty to sell or dispose of it; and if she attempted to do so, that such sale would be void. The daughter afterwards married. *Held* that the restraint on alienation was void, there being no gift over.

In the case of Sanger *vs.* Sanger, 11 L. R., Eq., p. 470, Lord Romilly, M. R., said: "I have a distinct recollection that the "effect of this section" (section 12 of the Married Women's Property Act in England) "was pointed out while the Act was under "discussion, and it was said, and very for-"cibly, that as the liability of the husband "was taken away, it was only just that the "liability should be fastened on the whole "property of the wife. At all events, I "am of opinion that, on the true construction "of the Act, the 12th section extends to pro-"perty of a married woman which is subject "to a restraint on anticipation."

There is a similar section in the Married Women's Property Act here (Act III. of 1874). Section 8 says: "If a married woman (whe-"ther married before or after the 1st of Janu-"ary 1866) possesses separate property, and if "any person enters into a contract with her "with reference to such property, or on the "faith that her obligation arising out of "such contract will be satisfied out of her

"separate property, such person shall be "entitled to sue her, and to the extent of "her separate property, to recover against "her whatever he might have recovered in "such suit had she been unmarried at the "date of the contract and continued unmar-"ried at the execution of the decree."

Though this Act was passed in 1874, and the promissory note was executed in 1871, yet, as this section 8 appears to have a retrospective effect, it is applicable to the present case.

The Advocate-General for the respondents contended that inasmuch as in the marriage settlement there was a clause restraining the respondent Ripsima Theodore Zorab Manuk from alienating or anticipating her property, this property could not therefore be made liable for debts incurred by her during her coverture. Mr. Kennedy has argued that section 4 of the Indian Succession Act virtually abolished the clause against anticipation. Now, it appears to me that the only construction which can be given to this section of the Act is this: The first half of it has the effect of preventing the husband from acquiring any interest in the property settled upon his wife on her marriage, and *vice versâ;* and the second half of the section gives the wife or the husband absolute ownership and absolute power of alienating the property so settled upon them as if they had been unmarried. But there is nothing whatever in this section which shows that restraint on anticipation is abolished. The clause in the marriage settlement against anticipation is inserted, not only for the purpose of restraining the woman from disposing of the property settled upon her, but also for the purpose of protecting her from the undue influence of her husband; and unless there is an express enactment which renders this clause illegal or invalid, it will be held good in every such settlement. Section 4 of the Indian Succession Act does not at all touch the question regarding the clause against anticipation. But the way in which Mr. Kennedy attempts to show that section 4 disregards restraint on anticipation is this. He says that the property which the respondent Ripsima Theodore Zorab Manuk acquired, she acquired by virtue of her marriage, and that it was her *marriage* which gave effect to the prohibition against anticipation. But, he continues, inasmuch as section 4 of the Succession Act provides that a woman acquiring property on her marriage becomes, not only the absolute owner of that property, but possesses also absolute power of alienating it as she pleases, it follows therefore that section 4 completely invalidates the clause against anticipation. But the fallacy of Mr. Kennedy's argument lies in his contention that it was the respondent's *marriage* which gave effect to the prohibition against anticipation. This is not so. The restraint on anticipation was not caused by the *marriage*, but by the *marriage settlement*, and the clause which created that restraint does not seem to be affected in the slightest degree by section 4 of the Indian Succession Act.

In the case of Tullett *vs.* Armstrong, 4 Mylne & Craig, p. 390, and 1 Beavan, p. 1, a testator gave property to trustees in trust for his wife for life with remainder to M. A T., then a *femme sole*, for life, in such manner that it should not be anticipated, and that no husband should acquire any control over it. M. A. T. was unmarried at the death of the testator, but she married in the lifetime of the widow. The Master of the Rolls held that both the separate use clause and the restriction against alienation became effectual on her marriage. He also held that the restraint against alienation was annexed to the separate estate only, and that the separate estate had its existence only during coverture; but that, whilst the woman was discovert, the separate estate, whether modified by restraint or not, was suspended, and had no operation, though it was capable of arising upon the happening of a marriage. The case being appealed, the Lord Chancellor affirmed the decision of the Master of the Rolls, and at p. 407 of 4 Mylne & Craig's reports said :—

"In establishing the validity of the "separate estate with its qualification, which "constitutes its value, that is, the prohibition "against anticipation, I am not doing more "than my predecessors have done for similar "purposes, and I have much satisfaction "in finding myself justified, upon the grounds "I have stated, in doing what in me lies to "dissipate the alarm which has prevailed "lest the separate estate should be held not "to exist at all during the subsequent cover-"ture, or, what would in many cases be a "greater evil, that it should exist without "the protection of the clause against aliena-"tion." *Vide* also Watkins on Conveyancing, 9th edit., p. 436; Pybus *vs.* Smith, 3 Brown's Ch. Cases, p. 347; Sockett *vs.* Wray, 4 Brown's Ch. Cases, p. 485; and Beable *vs.* Dodd, 1 Term Rep., p. 193.

With regard to Act III. of 1874, it is clear the Legislature never intended to extend the provisions of section 4 of the Indian Suc-

cession Act by this Act. Mr. Kennedy relied upon the preamble to Act III. of 1874, and stated that the words, "and whereas by "the force of the said Act all women to "whose marriages it applies are absolute "owners of all property vested in or acquired "by them," give women absolute power of disposition over their property. Very likely the words might be construed to have that effect, but certainly not when there is an express clause in the marriage settlement which restricts her from anticipating or alienating the property. It is very probable however that section 8 of this Act makes a married woman, who has separate property, liable for debts incurred by her, in spite of the clause against anticipation in the settlement; but as the promissory note here was given by the respondents in 1871, and inasmuch as this Act was passed in 1874, and as there is nothing in the Act which seems to give it a retrospective effect, section 8 cannot be held to be applicable to the present case.

Mr. Hill, for the trustees of the marriage settlement, contended that if the respondent Ripsima Theodore Zorab Manuk acquired any property at all, it was acquired by her, not by reason of her marriage, but by reason of the marriage settlement. Section 4 of the Indian Succession Act does not apply to cases where property has been acquired by a woman by virtue of a settlement which contains a clause against anticipation or alienation. It only applies to cases where there is no such restriction. In the present case it is clear that the respondent Ripsima Theodore Zorab Manuk did not acquire any property whatever till her marriage, and then, too, she had only a limited interest in that property. She had no power to alienate it, owing to the clause in the settlement which expressly prohibited her from doing so. Under the circumstances, therefore, the appellant's claim cannot be satisfied out of the property so settled upon her on her marriage.

The judgment of the Appeal Bench was as follows:—

Couch, C.J.—This suit was brought to recover the balance due for principal and interest upon two promissory notes made by the first and second defendants, who are husband and wife, by which they jointly and severally promised to pay, in one note Rs. 450, and in the other Rs. 2,000, with interest at the rate specified in the notes. The plaint alleged that the defendant Ripsima Theodore Zorab Manuk is an Armenian by race, born at Dacca in Bengal, from Armenian parents born in Calcutta, and was married on or about the 22nd of June 1868 after the passing of the Indian Succession Act; that a large sum of money was settled upon her upon her marriage for her separate use in the names of the two defendants Johannes George Bagram and Simon Johannes Bagram; and prayed that the plaintiff might have judgment to recover "the amount due for "principal and interest on the said pro-"missory notes from the defendants Theo-"dore Zorab Manuk and Ripsima Theodore "Zorab Manuk, his wife; and that the "defendants Johannes George Bagram and "Simon Johannes Bagram might be directed "to pay to the plaintiff the amount so "adjudged to him out of the income "of the said trust fund." The suit was dismissed by Mr. Justice Pontifex: no objection is taken in the grounds of appeal that the suit ought not to be dismissed as against the husband. The object of it was to have the balance which is due on the notes paid out of the separate property of the wife; and the question we have to decide is whether the separate property of the wife is liable, and the trustees ought to pay the amount due.

The section of the Indian Succession Act that is relied on is the 4th, which says that "no person shall by marriage acquire any "interest in the property of the person "whom he or she marries, nor become "incapable of doing any act in respect of his "or her own property which he or she "could have done if unmarried." It was contended that the effect of this is to prevent the operation of the clause in the marriage settlement by which the female defendant is restrained from anticipating or alienating the income of the property which was settled to her separate use. Now, the inability to anticipate or alienate the income is not an incapacity which is caused by the marriage. Under the settlement she takes a limited interest. The money was given to be held by the trustees upon trust to pay the interest to her for life for her sole and separate use, free from the debts of her husband, and without power of anticipation or alienating the same; and her incapacity to anticipate or alienate is caused by the limitation of the interest which she takes under the settlement. It is true that, according to the authorities by which the law on this subject has been settled in England, a restraint or limitation of this kind can operate only during the marriage; but this does not make the marriage the cause of it. The restraint is

created by the settlement. If there were no such words in the settlement, and the property was given to the wife for life, the marriage would make no difference, although it was said to be for her separate use. Unless the husband acquired an interest in it, she would have the same power of alienation or anticipation as if she were single. The words of the section are: "No person shall by mar-"riage acquire any interest in the property "of the person whom he or she marries, nor "become incapable of doing any act in respect "of his or her own property which he or she "could have done if unmarried."

She does not by the marriage become incapable of anticipating or alienating. In this case she never was capable of anticipating or alienating the income arising from this money, because she had no right to it until the marriage, and then she had no power to anticipate or alienate. I think, therefore, that upon this section the contention for the appellant cannot be supported.

But Mr. Kennedy, who appeared for the appellant, referred to Act III. of 1874, and relied upon the preamble to it and upon section 8. The preamble recites section 4 of the Indian Succession Act and continues: "And whereas by the force of the said Act "all women to whose marriages it applies "are absolute owners of all property vested "in or acquired by them, and their husbands "do not by their marriage acquire any inter-"est in such property; but the said Act "does not protect such husbands from liabili-"ties on account of the debts of their "wives contracted before marriage, and does "not expressly provide for the enforcement "of claims by or against such wives." I think the words "are absolute owners of all "property vested in or acquired by them" must be read not alone but in connection with the words which follow, "and their "husbands do not by their marriage acquire "any interest in such property." What is meant to be declared is with reference to the effect of the marriage on the property of the woman in giving to the husband an interest in it. I do not think that the Legislature, when using the words "absolute owner," intended to make a declaration which would have the effect of extending the provisions of section 4 of the Indian Succession Act. It was intended to describe the legal effect of section 4, and the word "absolute" will have a fair meaning given to it as used with reference to the husband not acquiring any interest in the property. Supposing the preamble can have the meaning which Mr. Kennedy contended for, and can be treated as a declaration by the legislative authority of the law—a declaration that a woman is the absolute owner of property, notwithstanding that in the settlement by which she acquires it there is a restraint against anticipation and alienation, I think that as a declaration by the legislative authority of what the law is, it ought not to have a retrospective effect any more than any other provision in the Act. The Legislature may declare that such is the law, but without something showing that it was intended to give to the declaration a retrospective effect, it ought not to have it.

If section 8 were applicable to this case, I should say it would make the separate property of the wife liable notwithstanding this clause in the settlement, because the words there are very different from the words in the Indian Succession Act. They are: "If a married woman (whether married "before or after the 1st day of January "1866) possesses separate property, and if "any person enters into a contract with her "with reference to such property, or on the "faith that her obligation arising out of "such contract will be satisfied out of her "separate property, such person shall be "entitled to sue her, and, to the extent of "her separate property, to recover against "her whatever he might have recovered in "such suit had she been unmarried at the "date of the contract and continued unmar-"ried at the execution of the decree." These words are substantially the same as the words in section 12 of the 33 & 34 Vict., c. 93, upon which the late Master of the Rolls held in Sanger *vs.* Sanger, L. R., 11. Eq. 470, that the separate property of a married woman was liable, notwithstanding any clause against anticipation. The question, then, is whether section 8 of Act III. of 1874 applies to the present case—whether it is retrospective and applies to a contract made before the passing of the Act. I think it does not. The words, "if any "person enters into a contract with her with "reference to such property, or on the faith "that her obligation arising out of such "contract will be satisfied out of her separate "property," appear to me to point to contracts entered into after the Act had been passed, and not to be intended to affect contracts made before, and to alter the rights of persons or the obligations arising out of them. If it could be considered to be a law of procedure only, it might be held to have a retrospective effect. But it is not a law of

procedure. It is a law by which an effect is given to a contract with a married woman which it had not before, and it declares that a contract entered into on the faith of its being paid out of the separate property shall be so satisfied. I think therefore that section 8 does not apply to this case, and that the decision of Mr. Justice Pontifex should be upheld. It may be (and I strongly incline to think that I should adopt the opinion of the late Master of the Rolls in the case I have referred to) that where a contract is made after Act III. of 1874 came into operation, there will be a remedy against the separate property of the wife, although there is a clause against alienation or anticipation in the marriage-settlement. I have said I incline to this opinion, because what I may now say cannot be considered as a decision. Being of opinion that the Act has not a retrospective effect, it is not necessary to decide that question in the present case.

The appeal will be dismissed with costs. As Mr. Justice Macpherson says that trustees are generally allowed separate costs in this Court, the trustees will have a separate set of costs in this appeal.

Macpherson, J.—I also am of opinion that nothing in the Succession Act renders a provision against anticipation nugatory, and that the Act III. of 1874 is not applicable to this case.

The 3rd June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Joint-owners—Partition.

Case No. 875 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 24th February 1873, affirming a decision of the Additional Moonsiff of Atteea, dated the 26th June 1871.

Oodoy Tara Chowdhranee (Plaintiff), *Appellant,*

versus

Khaja Asanoollah (Defendant), *Respondent.*

Baboo Sreenath Doss for Appellant.

The Advocate-General for Respondent.

An arrangement come to between the joint owners of land, not being a joint Hindoo family, by which some parts of the property were to be exclusively in the possession of one or other of them, is sufficient to bar one of them from suing for the profits derived from any portion allotted to the exclusive possession of any other.

Couch, C.J.—In this suit the plaintiff alleged that a 4-anna share of a zemindaree belonged to her, and another 4-anna share to the 1st and 2nd defendants, and were held by her and them in joint possession, and that the remaining 8-anna share was the talook of the Roy Chowdhry defendants; and she further alleged that a haut had been established upon land which was in the joint possession of the plaintiff's predecessors and the defendants, and that the defendants had dispossessed the plaintiff's predecessors of the land. And the plaintiff claimed possession of her share.

The Moonsiff held that the plaintiff had shown her title to the land upon which the haut was established; but he considered that she was not entitled to have khas possession, and he decided that she ought only to receive the rent of the land from the defendants who were her co-sharers, and ought not to derive an additional benefit from it on account of the haut having been established. He accordingly decreed that the plaintiff, "by receiving from the defendants the rent according to her share, do get "possession of the land under claim," and "that the land in question, with the two "hauts standing thereon, do remain in the "khas possession of the defendant No. 2."

There was an appeal from this decree which was heard by the Subordinate Judge. The plaintiff appealed against the part of the decree which was in favour of the defendant, and the defendants against it so far as it was in favour of the plaintiff. The Subordinate Judge in his judgment says: "I think, from all the circumstances of the "case, that the conclusion of the original "Court is not based upon a proper discretion, and the very nature of the claim and "the contention fully demand either that "plaintiff should have her share in the land, "or that the defendant should be allowed to "occupy it as his exclusive interest.

"It is evident, and has not been denied, "that in 1262 the haut was established over "the land, and in 1267 plaintiff alleges to "have been ousted from it, and since then "ten years and three months have elapsed "before she has resorted to this law-suit. But "there is no satisfactory evidence in the "case that she or her father-in-law had any "connection with the haut, or with the land

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"which lay admittedly waste or *poteet*, "contiguous to the defendant's cutcherry "compound. Certain witnesses have been "produced to support her possession ante-"cedent to the ouster; but the Moonsiff was "perfectly right in discrediting them, since "plaintiff is a person of influence and they "are her creatures.

"As regards the documentary evidence "produced by her it is plainly spurious, and "there is not an atom of proof that she ever "got any profit from the haut. Now, to "consider how far plaintiff could gain by the "admitted fact that the lands of the mehal "are in ijmalee, I should observe that, under "the ruling of the precedents cited above, "she cannot get any advantage, unless she "can make out her joint possession in the "haut, which is an estate of value and has "been created by the defendant and another "co-sharer without any aid from the plaintiff. "Had the contention been merely for the "*poteet* land, the question would have been "somewhat different, but still plaintiff would "have very little chance of success when "her own pleader has clearly admitted that "other definite lands are similarly in her "exclusive possession." And he ordered the appeal of the plaintiff to be dismissed, and apparently allowed the appeal of the defendant, the result being that the plaintiff's suit was dismissed.

This is not a case of a joint Hindoo family: the parties are not both Hindoos. It is a case of joint ownership, and considerations which might be admissible in any question of partition of property between members of a joint Hindoo family may not be applicable here.

We consider the finding to be that these persons, being joint owners of certain property, had come to an arrangement by which some parts of it were to be exclusively in the possession of one or other of them: the land upon which this haut was established was to be in the possession of the defendants, and the other lands in the exclusive possession of the plaintiff.

It is not necessary for us to determine now, supposing there should hereafter be a suit for the partition of the whole estate, what effect should be given to this arrangement. It is sufficient in our judgment to bar the plaintiff from bringing this suit, by which she claims to treat the land on which, on the faith, probably, of this arrangement, the haut has been established, and which land has been given by it into the exclusive possession of the defendant, as property to the profits of which she is entitled jointly with them. Upon the finding, it appears to us that she has no ground for bringing this suit, and that it has been properly dismissed by the Subordinate Judge.

The appeal will be dismissed with costs.

The 4th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Sale-certificate—Construction.

Case No. 1792 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 26th June 1873, affirming a decision of the Subordinate Judge of that District, dated the 21st April 1873.

Lalla Bissessur Dyal (Plaintiff), *Appellant,*

versus

Doolar Chand Sahoo and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Mohinee Mohun Roy* and *Moonshee Mahomed Yusoof* for Appellant.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondents.

The Court refused to go to facts lying behind a sale-certificate for the purpose of contradicting its terms.

Phear, J.—On the admitted facts of this case the plaintiff is entitled to a 12-anna share

of the property for which he brings this suit, unless the defendant obtained by an auction-sale, held on the 25th July 1872, the whole 16 annas of the property of which this 12 annas is a part.

The burden, therefore, of the case does substantially fall upon the defendant.

The plaintiff had bought the 12 annas on the 24th July, that is, the day preceding the day of the defendant's purchase. The defendant's case is that the Court sold to him, on the 25th July 1872, the whole tenure, and had the right and authority on the facts of the case to do so, notwithstanding the sale of the 12 annas on the previous day to the plaintiff.

A question was raised in the present suit as to whether this position taken up by the defendant is capable of being maintained. And the Lower Appellate Court has discussed the point at some length. But we think it unnecessary to dwell upon this topic now, because the first question is—even if it be assumed that the Court had the power of selling the whole tenure on the 25th July notwithstanding the previous sale to the plaintiff on the day preceding—the first question is whether or not the Court did, in fact, sell the whole tenure to the defendant. And we think that this question must be answered in the negative.

The best evidence of that which the Court sold to the defendant is the defendant's certificate of sale. And the certificate of sale says expressly that the Court sold to the defendant only the rights and interest of the judgment-debtor on the 25th July. And those rights and interests were undoubtedly of a substantial character, because the sale of the previous day had left to the judgment-debtor a 4-anna share in the tenure.

It has been argued before us that, notwithstanding the words of the defendant's sale-certificate, yet taking that certificate in connection with the application of the judgment-creditor for execution, and also in connection with the decree itself, we ought to come to the conclusion that the Court did, in fact, sell the whole tenure to the defendant on the 25th July, that is to say, we are asked to go to facts lying, so to speak, behind the sale-certificate for the purpose of contradicting its terms and showing that it means something entirely different from that which its express words convey. And we are referred to the decision of the Judicial Committee of the Privy Council, which is reported in X. Bengal Law Reports, p. 294,* as an authority for so doing. With regard to this decision, it seems enough to remark that the Court in that case was obliged to inquire from outside what the meaning of the words of the sale-certificate was, because if the strict literal meaning of those words was adhered to, it was clear, not only that nothing passed to the purchaser, but that the parties concerned in the sale must have known at the time that nothing was being sold, and it could not be assumed that that was the case. Under those circumstances, it became necessary to inquire from sources outside the sale-certificate what it was that the Court had in fact sold and intended to sell.

There is no such necessity in the present case, because, as has been already remarked, the rights and interests of the judgment-debtor on the 25th July were very substantial, and there is no *à priori* difficulty in understanding that the Court might have intended to sell those, and those alone, at the auction sale. It is not because the Court had the power to sell the whole tenure, if it chose to do so, that it must be assumed that it did in fact sell the whole tenure, notwithstanding that the sale-certificate granted by it expresses that it merely sold his interest in it, *i.e.*, a portion of the tenure. The question is simply a question of fact. What did the Court in its discretion, as a matter of fact, do? Did it sell the whole tenure, or did it not?

It seems to be clear, whatever were the wishes of the judgment-creditor in this respect, that the Court did not, in fact, sell the whole tenure; it did not put up for sale the whole tenure; it did not expressly or by implication profess to sell the tenure over the heads of anybody who might make a claim of priority of right to it through the judgment-debtor. On the contrary, according to its sale-certificate, it expressly sold the rights and interests of the judgment-debtor alone.

It seems to us, therefore, very plain that the defendant has failed in this case to make out a defence against the plaintiff's case, and that, on the facts which are admitted by both parties, the plaintiff is entitled to a decree. Accordingly we reverse the decision of the Lower Appellate Court, and give a decree to the plaintiff for possession of 12 annas, with costs in all the Court.

* 17 W. R. 459.

The 4th June 1874.

Present :

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Review—Appeal—Act VIII. of 1859, s. 378.

Case No. 1625 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 12th May 1873, affirming a decision of the Moonsiff of Pundooah, dated the 24th September 1872.

Joy Kishen Mookerjee (Plaintiff), *Appellant,*

versus

Purbutty Churn Ghossal (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Kalee Mohun Doss and *Umbika Churn Banerjee* for Respondent.

The Full Bench Ruling (20 W. R., p. 84), that a special appeal would lie to determine whether, in an order granting a review, there had been any irregularity, and that the word "final" in Civil Procedure Code, s. 378, would not prevent the Appellate Court from considering afterwards the legality of the order, was held to apply to cases in which a regular appeal is preferred on the ground that the admission of the review was not justified by the evidence.

Ainslie, J.—THE question in this case is whether the Lower Appellate Court was bound to satisfy itself that the Moonsiff had good grounds for admitting the review of judgment. The special appellant relies upon a Full Bench Ruling reported in 20 Weekly Reporter, page 84, in which it was held that a special appeal would lie to determine whether, in an order granting a review, there had been any irregularity, and that the word "final" used in section 378 of the Civil Procedure Code must be taken only to exclude an appeal at the time, but not to prevent the Appellate Court from considering afterwards the legality of the order admitting the review as well as any other part of the case. We think that we must follow this ruling, and that it does apply to cases in which a regular appeal is preferred on the ground that the admission of the review was not justified by the evidence before the first Court; but, although we agree with the special appellant on this point, it seems to us that the Judge was not precluded from looking into the whole of the facts of the case, and that, when he found from the Moonsiff's judgment that there was a distinct ground on which the review ought to have been admitted, *viz.*, that the Moonsiff had by mistake misconstrued a portion of the evidence, he was quite justified in refusing to set aside the order admitting the review. The appeal is therefore dismissed with costs.

The 5th June 1874.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Ameen—Local Investigation—Special Appeal.

Case No. 57 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 18th December 1873, affirming an order of the Moonsiff of Satkaniah, dated the 14th July 1873.

Kristo Chunder Goopto (Petitioner), *Appellant,*

versus

Brojo Mohun Dey Chowdhry and another (Decree-holders), *Respondents.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Sreenath Banerjee for Respondents.

The deputation of an Ameen to ascertain the respective liability of several judgment-debtors is not an improper course for a Court to pursue, and at all events is not a ground for interfering in special appeal with the concurrent judgments of two lower Courts.

Kemp, J.—THE judgment-debtor is the appellant. The decree was obtained, on the 19th of July 1862, against the father of the appellant and others. The father of the appellant alone appealed, and on the 3rd of September the order was that the appellant's father was to pay the wassilat appropriated by him during the period of his wrongful possession. When the wassilat was ascertained, the appellant applied to the Court for an inquiry as to what amount he was individually liable for as one of the judgment-debtors in the suit. An Ameen was deputed to inquire into this, and found that the appellant alone was liable for wassilat, and his father was the only party who had been in possession, and enjoyed the profits, and the other judgment-debtors were merely *pro-forma* defendants in the suit.

The grounds of special appeal are that the deputation of an Ameen was illegal, inasmuch as the Court ought itself to have decided the amount of the individual liability

of the judgment-debtors; *2nd*, that the question respecting the other judgment-debtors being the tenants of the appellant was taken for the first time in the execution-stage, and ought not to have been entertained.

With reference to the first point, we think that the deputation of an Ameen to ascertain the respective liability of the several judgment debtors was not an improper course to pursue, and at all events it is not a ground for interfering in special appeal with the concurrent judgments of both the Courts below.

On the second ground, it has been found on the evidence by the lower Courts that the other debtors were merely *pro-formâ* defendants in the case, and that the appellant's father appropriated all the profits during the period of his wrongful possession. The appeal must be dismissed with costs. Pleader's fees, two gold mohurs.

The 5th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mahomedan Law—Pre-emption—Tullub-ishtishad.

Case No. 1823 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 30th May 1873, affirming a decision of the Moonsiff of Begoosurai, dated the 29th March 1873.

Sham Lall Sahoo (Defendant), *Appellant,*

versus

Bibee Afsuroonnissa (Plaintiff), *Respondent.*

Baboo Boodh Sen Singh for Appellant.

Moonshee Mahomed Yusuf for Respondent.

In a suit to establish the right of pre-emption, where the witnesses said that, on the refusal of the vendor, the pre-emptor had nominated them witnesses, the lower Courts were held to have been justified in their inference that he had complied with the exigency of the Mahomedan Law.

Phear, J.—ENTIRELY accepting the principle which is followed in the case reported in the 13 Weekly Reporter, page 177, and again in the case reported in the 6 Bengal Law Reports, page 165,* we think that no good ground of special appeal has been made out in this case. According to those cases, on the principles of Mahomedan Law referred to therein, no doubt, it is essential to the due performance of the preliminary ceremony *tullub-ishtishad*, that the pre-emptor should, upon making his claim to the vendor and being refused, immediately call upon persons standing by to be his witnesses. He should use precise language corresponding in substance with "Be you my witness or witnesses."

The evidence in this case is in effect this: The witnesses say, after narrating what took place and the refusal of the vendor thereupon, "We were nominated witnesses, or thereupon, he nominated me a witness," each person making use of a very different phrase to this effect. And both Courts below have inferred from this evidence that the pre-emptor, the person claiming the right of pre-emption, had complied with the exigency of the Mahomedan Law, that is, had said, "Be you my witnesses," or "Be you my witness." And we cannot say upon special appeal that this inference of fact is wrong. Indeed, speaking for myself, I should be disposed to expect that a witness telling the occurrence in his own words would probably use just such a phrase as the witnesses have used in this case in order to represent that the pre-emptor said, "You be my witness," or "You be my witnesses." It seems to us most certain that the witness would not give the pre-emptor's words in the first and the second person, but would state the result of them in the third person.

We are, therefore, of opinion that the principal ground of appeal in this case fails.

The objection made to the form of the decree ought to have effect given to it. But that can be easily done here. We will direct that the decree be varied by adding "on the money being paid within a month from the date of the decree."

The appeal must be dismissed with costs.

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* 14 W. R. 265.

The 29th May 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. F. McDonell, *Judge.*

Commensality—Limitation—Act XIV. of 1859, ss. 13 & 14.

Case No. 2445 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of 24-Pergunnahs, dated the 26th July 1873, reversing a decision of the Moonsiff of Alipore, dated the 19th September 1872.

Chunder Monee Debia (Defendant), *Appellant,*

versus

Meharjan Bibee (Plaintiff), *Respondent.*

Baboos Rash Beharee Ghose and *Kashee Kant Sen* for Appellant.

Baboo Tarucknath Sen for Respondent.

In a suit to recover possession of land alleged to have belonged jointly to plaintiff's late husband O and his late elder brother P, defendant pleaded limitation on the ground that neither plaintiff nor her predecessor was in possession within twelve years. It was found that the two brothers had lived in the same mess, the elder collecting the rents and profits, and therewith managing the family expenses:

HELD that if O did not receive money from P, he received money's worth, and that would suffice to bring the case within Act XIV. of 1859, s. 1, cl. 13, and that if cl. 13 did not apply cl. 14 must, and the suit was not barred.

Couch, C.J.—THE Subordinate Judge says it is clear from the evidence on the side of the plaintiff that the two brothers Poyt and Omar lived in the same mess, and that the former collected the rents and profits of the lands, which we must understand as including the land which was the subject of this suit, and therewith, that is, with the rents and profits of the land, managed the family expenses. If Omar did not receive any money from his brother, who managed for his share of the rents and profits of the land, he received money's worth in the payment of his part of the family-expenses. This would be sufficient to bring the case within clause 13 of section 1 of Act XIV. of 1859, assuming that this clause applies to such a case. We are inclined to think that it does; but we do not consider it necessary to decide it. If the 13th clause does not apply the 12th must, and to make that bar the suit, there must have been an exclusion of Omar from his share of the property, which there was not if his share of the expenses was being paid for him out of the rents and profits of the land. Whether clause 12 or clause 13 applies, upon the finding of the Subordinate Judge the suit is not barred by the law of limitation, and the objection now taken is bad. The appeal must be dismissed with costs.

The 4th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Suit for enhancement of rent—Technical objections—Act VIII. (B. C.) of 1869, s. 18.

Case No. 1803 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 15th May 1873, affirming a decision of the Moonsiff of Chuprah, dated the 28th December 1872.

Audh Beharee Singh (Defendant), *Appellant,*

versus

Dost Mahomed and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusuf for Respondents.

In a suit for enhancement of rent, the Court cannot uphold an objection as to the form of the notice or the

mode in which the suit has been brought, if prejudice has not thereby been worked to the defendant.

In trying a question of enhancement upon the first ground mentioned in s. 18 of the Rent Law, it is not allowable to a Court to strike an average on the rates of rent proved before it.

Phear, J.—We think we ought not to interfere with the decision of the Lower Appellate Court on the first ground which has been argued before us, because, in the first place, we find it is not specifically mentioned as one of the grounds of special appeal; and, in the second place, it does not appear that it was, even in substance, put forward in the lower Courts; and the great test whether or not the notice of enhancement and the suit of the plaintiff are insufficient and founded upon improper grounds is furnished by the trial itself. If there is reason arising out of the results of the trial for thinking that the form of the notice, or the mode in which the suit has been brought, has worked prejudice to the defendant, then this Court will always be anxious to give relief to the defendant. But, on the other hand, if it appears that the parties at the trial thoroughly well knew what was in contest between them, and each side had fair opportunity of putting his own case before the Court, then it would be only offering a premium to technicality to uphold an objection of this sort.

As to the other objection, there can be no doubt that the Court which is called upon to try a question of enhancement upon the first ground mentioned in section 18, namely, "that the rate of rent paid by such ryot is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent," would be wrong if it arrived at its conclusion by the mode of striking an average on the rates of rent proved before it. But it seems to us that the Lower Appellate Court, although it has used words which may favour such an hypothesis, did not really intend to place its conclusion upon an average of the rates spoken to by the different witnesses.

The first Court says: "From the evidence "of certain cultivators of the adjoining land "who have deposed in favour of the plaintiffs, "it has been shown that the rate of their "cultivation is at 3 rupees, 4 rupees, and "5 rupees per beegah. I think that the just "rate for defendant's cultivation will be "4 rupees per beegah."

The Judge affirming this decision says:—"The Moonsiff has considered 4 rupees sufficient, and I am not disposed to interfere with his order, for though it appears that some lands pay 5 rupees or so, yet that other lands pay only 3½ rupees, and I think the rate (that is, 4 rupees per beegah) the fair one."

The question which the Courts were called upon to consider in this case was, what was the fair and equitable rate of rent for the defendant to pay, regard being had to the old rate, and also to the evidence which was given in this case in order to establish the prevailing rate of rent in the neighbourhood of the defendant's land for lands of similar description paid by ryots of the same class with himself. And we understand the Judge to say that in view of the evidence which the different witnesses gave, some deposing that they paid 3 rupees per beegah, others 4 rupees and 5 rupees, and specifying to a certain extent the quality and the character of the land for which it was paid, he was of opinion that the fair and the just rate for the defendant's land was 4 rupees per beegah. It is not in any proper sense an average drawn upon the data of 3 rupees, 4 rupees, and 5 rupees, which is mentioned by the Subordinate Judge, but it is a conclusion as to fairness and justice placed upon the footing of the evidence which was before the Court. So far at any rate as the appealing defendant is concerned, it seems to us that the rate of 4 rupees per beegah is about the lowest which he could be well called upon to pay according to the evidence which is before the Court, and he has therefore little cause to complain in a Court of special appeal of the decree which has been made.

But the plaintiff prefers a cross-appeal, and we are inclined to think that he has somewhat more right upon this ground to complain of the judgment of the Lower Appellate Court than the special appellant has. Still we cannot, without entering into full consideration of the value of the evidence before the Court, say that the Judge has erred in law in coming to the conclusion of fact at which he has arrived. There certainly is evidence of a 4-rupee rate as the prevailing rate of rent for lands which, so far as we can see, are lands of the same character as the land in respect of which the present suit is brought. No doubt there are other rates spoken of, but they are, certainly in some instances, rates payable in respect of lands of a different quality, and it was the function of the Lower Appellate Court to exercise its discretion upon this evidence.

On the whole, we think that both the appeal and the cross-appeal must be dismissed—the appeal with costs.

b

The 5th June 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation—Cause of action.

On Appeal from the High Court of Judicature at Madras.

Rajah Sri Chaitanya Chundra Harischandana Jagadevu Bahadoor

versus

The Collector of Ganjam and another.

In a suit to recover possession of certain villages belonging to a talook which had been sold by Government for arrears of revenue, where plaintiff alleged that they ought not to have been sold as they were not subject to revenue, the second defendant, who was the purchaser and in actual possession, pleaded limitation as a bar. Plaintiff urged that a fresh cause of action arose in consequence of some proceedings of the Government, by which they made a new grant of the villages to the second defendant, at an increased revenue:

HELD that such grant would not give a new cause of action, and cannot affect the time when the only cause of action arose to plaintiff.

THIS is a very clear case: Both the Courts in India have decided that the claim of the plaintiff is barred by the limitation of twelve years. He brought his suit, as the adopted son of the late zemindar of Hautghur, to recover fifty villages which had belonged to the talook of Hautghur. That talook was sold by the Government for arrears of revenue. It is alleged by the second defendant, who was the purchaser, that the fifty villages were sold with the rest of the talook. It is alleged on the part of the appellant that those villages, although in some sense belonging to the talook, ought not to have been sold by the Government, inasmuch as they were not subject to revenue, but were Mocassa villages, which had been alienated from the zemindaree, and paid a quit-rent only to the zemindar. That is the question upon the merits, if the merits could be tried. The sale was in 1854. The second defendant was put into actual possession of the villages in 1855, and has remained in possession; ever since. This suit was not brought until the 28th September 1868, which is more than twelve years after he was so put in possession. *Primâ facie*, therefore, the Statute of Limitation is a bar. Mr. Cowie has endeavoured to show that a fresh cause of action arose in consequence of some proceedings of the Government, by which it is said they made a new grant of these villages to the second defendant, the present zemindar, at an increased revenue of Rs. 5,000. But such a grant, supposing it to have been made, would not give a new cause of action, and cannot affect the time when the only cause of action arose to the present appellant. The appellant is suing under the title he had in 1854 and 1855, and he has no other title, and he does not allege that he has had any possession, or that the Government has given him possession since his first dispossession. It is quite unnecessary, therefore, to go into those proceedings, into which Mr. Cowie went in some detail, for the purpose of raising the point. It is sufficient to say that all that passed between the Government and the second defendant, the present zemindar, does not at all affect the question of limitation. The bar applies if the cause of action has not arisen within twelve years. It is quite clear here that it did not arise within that period, and therefore the judgments of the Courts in India are right.

Their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court of Madras, and to dismiss this appeal with costs.

The 5th June 1874.

Present:

The Honble J. B. Phear and G. G. Morris, *Judges.*

Rent-decree—Execution-sale of rights and interests—Contract—Specific Performance.

Case No. 1809 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 7th June 1873, affirming a decision of the Subordinate Judge of that District, dated the 4th February 1873.

Lalla Sabil Chand (Plaintiff), *Appellant,*

versus

Goodur Khan and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Doorga Mohun Doss* for Appellant.

Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose, and *Bacharam Mookerjee* for Respondents.

Where the right and interest of one proprietor are sold in execution of a rent-decree, the sale does not convey the right and interest of other proprietors, although

these may be as much liable as the first for the arrears of rent.

Where a purchaser of a right to sue for possession brings a suit for specific performance, and it is not shown that he has left undone anything necessary to entitle him to what he claims, it must be taken in special appeal that plaintiff is entitled to insist on specific performance of his contract with his vendor.

Phear, J.—We think that the decree of the Court below is wrong. If the sisters of Goodur were themselves personally suing to recover two-thirds of the property from the defendant, there seems to be no sort of ground put forward by the defence upon which their claim could be resisted. The tenure originally belonged to their father, and upon his death, in 1861, descended to them jointly with their brother Goodur. And in July 1872, the zemindar, in execution of a decree for arrears of rent, sold the right, title, and interest of Goodur alone to the defendant. There is no dispute whatever upon this point.

The Lower Appellate Court says: "Even "supposing it held that it was not the tenure, "but only Goodur's right, which on 25th July "were sold, their rights as against the women "must be construed in a wide sense, to "include, not merely his personal interest, but "also the rights of his sisters, whose repre-"sentative and agent he was, who were as "much debtors as he was for the rent of "the holding."

As we understand this paragraph, the Judge here expresses the opinion that, although the rights and interests of Goodur were in terms sold and conveyed by the sale of July 1872 to the defendant, yet that sale had the effect of also passing the right, title, and interest of Goodur's sisters, because they were as much liable for the arrears of rent as he was.

We have, however, more than once had occasion to point out that the question in cases of this kind always is simply a question of fact—what was sold by the Court? If the Court advisedly only sold the right and interest of one proprietor of the property, then that right and interest alone is conveyed by the sale.

In the present case the tenure which the Judge supposes was sold under the words "right, title, and interest of Goodur," stood in the zemindar's books in the name of the father. Goodur's name was not there; and there was no reason to be found in the serishtah of the zemindar why his name should carry the rights and interests of his sisters. The terms of the conveyance effected at the auction-sale were confined to his interests, and his interests alone must have been passed by the sale held in July 1872.

This being so, and inasmuch as it is one of the facts of the case that the father was in the possession and enjoyment of this property in 1861, while the suit was brought on the 19th August 1872, had the sisters themselves been plaintiffs, there could have been no question as to their right to recover. The suit is manifestly brought within the period of limitation, and they are entitled to obtain from the defendant their own rights and interests in the tenure which were not sold to him by the execution-sale of July 1872.

But it has been contended before us that the present plaintiffs have no right of suit to recover the immediate possession of the property; and this argument has been placed upon a decision passed by this Bench, or rather by one of the Judges of this Bench, which is reported in 21 Weekly Reporter, p. 156, and upon another decision reported in the same volume, p. 101. In both those cases it was thrown out that a purchaser of a right to sue for the possession of property must, on bringing his suit, show that he is entitled to claim specific performance of the contract from his vendor.

In the present case the plaintiff has made his vendors parties defendant to the suit. And it was therefore competent to these vendors to raise the defence, or for the present respondents to set up the fact that the plaintiff had not done all that was necessary to entitle him to specific performance of the contract on the part of his vendors. It might have been asserted, for instance, that the plaintiff had not paid the amount of consideration-money which was stipulated to be paid in the contract. But it appears that no defence of this kind has been raised. And at this stage of the suit it must be taken that the plaintiffs are entitled to insist upon a specific performance of the contract with their vendors, provided their vendors have possession of the property, and can deliver it to them, the plaintiffs, in pursuance of that contract. And this being so, there is nothing in the decisions which have been referred to to prevent the plaintiffs from recovering in the present suit.

On these grounds it seems to us that the Lower Appellate Court was wrong in holding that the defendant had made out a good title to the property which the plaintiffs claim; and further, that the plaintiffs are in a position to ask for a decree in their favour upon the title of their vendors.

d.

We reverse the decision of the Lower Appellate Court. A decree must be given in favour of the plaintiffs for possession of the share of the property claimed by them, with costs in all the Courts.

The 5th June 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Execution-purchaser—Benamee Holder—Beneficial Owner.

Case No. 1646 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 16th May 1873, affirming a decision of the Moonsiff of Parcool, dated the 13th January 1873.

Massim Meah and others (Defendants), *Appellants,*

versus

Sham Doss (Plaintiff), *Respondent.*

Baboo Rajendro Nath Bose for Appellants.

No one for Respondent.

Where a purchaser in execution-sale of the rights and interests of a judgment-debtor takes property which was held benamee by that judgment-debtor without any beneficial interest therein, he has no defence against the claim of the real owner who was in possession up to the date of the sale.

THE defendant in this case is the special appellant. He claims to hold the land in suit by virtue of a purchase in execution-sale of the rights and interests of the Rajah of Jointeah. The plaintiff in this suit alleges that this property was held benamee for him by the Rajah; that in fact it was his hereditary rent-free tenure, and the Rajah had no beneficial interest whatever in it. The Lower Appellate Court has found as a fact that the Rajah had never been in receipt of the rent of the land, and that it had been in the possession of the plaintiff up to the time of the sale. Under these circumstances, the rule which was laid down in special appeal No. 1599 of 1873* applies to the purchase of the defendant. The Chief Justice in that case says: "The principle is that, if a purchaser, "although he may be a purchaser for value, "has actual or constructive notice of a trust, "he is bound by it to the same extent and "in the same manner as the person from "whom he purchases; and, when there is a "person in possession of the estate, other "than the nominal owner, the person in "whose name the title-deed is, the purchaser "is bound to inquire what is the nature of "his possession. If he does not think fit to "do so, he takes subject to the rights of the "person in possession." It is, therefore, quite clear that there is no defence against the claim of the plaintiff on the findings of fact which have been come to by the Courts below. Then it is said that no finding has been arrived at as to the lapse of service on which the tenure was originally held. It appears to me in the first place that the question whether the service was continued or not was never put in issue; and, secondly, that this matter is immaterial, because the question in the suit is not whether the plaintiff is bound to render any service, but simply whether the defendant had a right to eject him summarily.

The special appeal is therefore dismissed, but without costs, as the respondent did not appear.

The 5th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Probate—Act X. of 1865, s. 50, cl. 3—Attesting Witnesses to a Will.

Case No. 61 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 8th December 1874.

Nubo Kishore Doss (Petitioner), *Appellant,*

versus

Joy Doorga Dossee (Objector), *Respondent.*

* *Ante*, p. 8.

Baboo Joy Gobind Sen for Appellant.

Baboo Bama Churn Banerjee for Respondent.

The mere fact of an attesting witness to a will repudiating his signature does not invalidate a will, if it can be proved by the evidence of other witnesses of a reliable character that he has given false evidence.

Kemp, J.—THE appellant, Nubo Kishore Doss, the brother of the deceased Oommed Narain Doss, applied for a probate of the will of Oommed Narain Doss on the 29th of Assar 1281, the said Oommed Narain Doss having died in Assin 1277; so that there was great delay which has not been satisfactorily explained in applying for the probate. He was opposed in his application by the widow of Oommed Narain, Joy Doorga Dossee, who broadly said that the will was a forgery.

There are the names of two witnesses as attesting witnesses to the will, namely, Doolal Chunder Doss and Nil Ram Deb. The witness Nil Ram Deb on being examined admits that the signature on the will is his signature, and that he received from the testator a personal acknowledgment of his, the testator's, signature upon the will, and that he, Nil Ram Deb, signed the will as a witness in the presence of the testator. But the other witness Doolal Chunder Doss altogether denies all knowledge of the will; he denies that he ever signed his name on it, or that he ever saw the will, and says that the name written on the will was never written by him. The Judge in this state of affairs holds that the petitioner not having produced any evidence to show that Doolal Chunder signed the will as a witness, it has not been established that the will has been executed as required by clause 3, section 50 of Act X. of 1865, and therefore he held that probate could not be granted to the petitioner.

The pleader for the petitioner has argued that, as the will, on the face of it, bears the signature of two witnesses, that is a sufficient compliance with the requirements of clause 3, section 50 of Act X. of 1865. He then referred to section 71 of the new Evidence Act, and said that, even if one of the attesting witnesses should deny his signature, proof of his having signed the will as an attesting witness can be given by other evidence. These are the two principal objections taken by him, and he alleges that there is such other independent evidence which sufficiently proves that Doolal Chunder, the witness who repudiated his signature, did attest the will as required by the Act. Now clause 3, section 50, requires that the will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence, and by the direction, of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature or mark of such other person; and each of the witnesses must sign the will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. Now, in this case, we have, as already observed, the evidence of one of the witnesses, namely, Nil Ram Deb, who deposes that he received from the testator a personal acknowledgment of his signature to the will, and that he, the witness, signed the will in the presence of the testator. So far so good; but the other alleged attesting witness Doolal Chunder Doss distinctly denies that he signed the will, or that he received from the testator a personal acknowledgment of his, the testator's, mark, or that he signed the will in the presence of the testator. It is no doubt true that, if it could be proved by the evidence of other witnesses of a reliable character that the witness Doolal Chunder Doss has given false evidence, the mere fact of his having repudiated his signature would not render the will invalid according to the terms of this section; but in this case there is no evidence, at least no such evidence has been read to us, which goes to prove that the witness Doolal Chunder did sign his name to the will, or did receive a personal assurance from the testator that that was his will. Looking, therefore, to the fact that this will was impeached by the widow as a forgery, that the terms of it are contrary to the usual provisions of a Hindoo will, and deviating from the ordinary rule of succession under the Hindoo Law, as also to the fact that the application for probate was made some years after the testator's death and after the alleged will is said to have been executed, and that the terms of the Act have not been complied with, we think that the Judge was right in refusing the application, and we dismiss the appeal with costs. Pleaders' fees, two gold mohurs.

The 5th June 1874.

Present :

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Suit for Accounts—Procedure.

Case No. 2460 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 18th June 1873, modifying a decision of the Moonsiff of that District, dated the 20th January 1873.

Shushee Shekhur Audhikaree and others (Plaintiffs), *Appellants,*

versus

Suleem Biswas (Defendant), *Respondent.*

Baboo Rash Beharee Ghose for Appellants.

Baboo Shushee Bhoosun Dutt for Respondent.

In a suit against a gomashta to obtain accounts of moneys which had come into his hands, it was held that it was not enough for the lower Courts to make a decree ordering the defendant to render nikash papers to the plaintiff ; it was the business of the Court to have these papers brought before it and examined, and to determine whether they were correct and fair accounts between the parties.

Ainslie, J.—THE plaintiff in this suit sued the defendant who was his gomashta to obtain from him accounts for the years 1263 to 1277. He alleged in his plaint that there were cash balances of Rs. 215 which had not been paid over to him; that there were false entries in certain accounts of the gomashta to the amount of Rs. 574 which he was also entitled to recover; and that the outturn of rice or dhan in gola was short by a quantity, the value of which was Rs. 359. There was another item of claim for papers specified in a schedule attached to the plaint, and the plaintiff sought to recover from the defendant those papers valuing them at Rs. 50.

The Subordinate Judge gave plaintiff a decree to the following effect: "That the suit "be decreed in favour of the plaintiff; that "defendant do deliver to plaintiff within two "months from this date the papers and docu-"ments claimed, and nikash of his service "from 1263 to 25th Assar 1277, and value "of paddy Rs. 232-11-12; that, should he "fail to render nikash, and deliver the papers, "&c., he would pay to plaintiff Rs. 500 on "account of damages and cash balance." The rest of the decree is in respect of costs.

It appears that the item of the value of dhan not forthcoming was separately dealt with by the Subordinate Judge, and a separate value assigned to it, while in respect of the other items, *viz.*, the cash balances, false entries, and the valuation of the papers claimed, the Subordinate Judge considered that Rs. 500 would sufficiently represent the amount of damage sustained by the plaintiff, and he accordingly made the decree as given above. On appeal, the Judge has reduced this decree practically to one for Rs. 50. He has reversed so much of the order of the Subordinate Judge as gives plaintiff the value of the dhan said to have been misappropriated, and for the rest he says: "I "direct that the defendant do give the nikash "required or forfeit Rs. 50, and I set aside "the order for price of dhan said to have "been misappropriated. I also set aside the "order directing the payment of Rs. 500 in "the event of nikash not being rendered." Of course, it is possible that, under this decree the defendant might render what is called nikash, but it is perhaps not very probable that he would do so; and if he did give an account, we do not know how that account can be tested after the suit brought to obtain an account from him has been terminated by a decree. It seems to us quite clear, on looking at the decree itself, that it is one which cannot be supported. The case really was a suit for taking an account and for the recovery of any money found due to plaintiff thereon: it was not merely to obtain certain parcels of paper from the defendant, though it includes that; but to obtain from him a satisfactory account of all moneys belonging to the plaintiff that had come into his hand, and, in the event of any dispute between him and the plaintiff as to particular items, to obtain the decision of the Court thereon, and a final settlement and payment accordingly under a decree framed on the accounts as settled by the Court. As we understand the case, the plaintiff stated that to the best of his belief on such materials as he had to guide him, in the absence of full and proper accounts which ought to have been rendered to him by defendant, there were certain sums exceeding in all Rs. 500 due to him; and if the defendant has not produced and proved his accounts, the plaintiff was entitled to give such evidence as he could that these sums are due and to recover accordingly. He seems, however, to have accepted the decree of the first Court giving him a round sum of Rs. 500 as damages in default of the defendant rendering any proper account, and by so doing he has limited his claim against

the defendant to that sum of Rs. 500. Up to that amount he is entitled to a judgment of the Lower Appellate Court either upon accounts rendered by the defendant if there are any; or if none are rendered, upon such other evidence as he may be able to adduce to prove his claim. The Judge seems to us to be entirely in error in supposing that the plaint limits the plaintiff's claim to Rs. 50. That sum of Rs. 50 may possibly be an estimate of the value of the papers themselves which are mentioned in the schedule, or it may be—and we are inclined to suppose that it is—merely a valuation for the purpose of determining the stamp to be paid on the plaint; but, whether it is the one or the other, it is perfectly clear that it is not the amount which the plaintiff believed and claimed as probably due to him on taking account from the defendant. The items given in the plaint show that he claimed at least Rs. 789 as so due. The Judge says he thinks that the order of the first Court for the rendering of nikash papers is correct. No doubt it is, but this is not enough. It was the business of the Court to have these papers brought into Court and examined, and to determine whether they are correct and fair accounts between the parties, and this will still have to be done.

With reference to the claim for the value of the dhan appropriated, the first Court has given this judgment: "It appears that, at "the time of appointment of the new "gomashta, the paddy in the gola fell short "by two-third powries as is clear from his "evidence." The Judge in dealing with that matter says that he cannot uphold the order as to the value of the dhan. He says: "I "can find no evidence whatever upon which "reliance can be placed as to deficit in "quantity of dhan. I find a witness guess-"ing at the number of dhan golas and two "witnesses estimating that the quantity in "them might fall two or three powries short "of what it should have been, but I cannot "find that any such examination was made "as could enable the persons deposing to "come to any positive conclusion as to the "amount of deficit, or indeed from which "they could positively say there actually "was any deficit at all." Upon this judgment in respect of the value of the evidence, it is quite clear that the plaintiff's suit for the dhan must fail. The decree of the Lower Appellate Court is set aside, and the case is remanded to the Judge that he may direct the defendant to file accounts within a time to be specified in the order, and may determine on the correctness of such accounts, if any are obtained; if complete and satisfactory accounts are put in, he will declare thereon what, if any, is the balance due to the plaintiff. If the defendant do not furnish such complete and sufficient accounts, the Judge must, on the evidence which the plaintiff can give in support of his claim, determine whether he is entitled to the sum of Rs. 500 awarded to him by the first Court or to any portion thereof. We leave the costs of this appeal to the discretion of the Judge of the Lower Appellate Court.

The 8th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Road-cess Return—Evidence—Shareholder—Act X. (B.C.) of 1871.

Case No. 1883 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 19th July 1873, reversing a decision of the Moonsiff of Jumooie, dated the 15th April 1873.

Mussamut Nusseerun (Plaintiff), *Appellant,*

versus

Gouree Sunkur Singh (Defendant), *Respondent.*

Baboo Boodh Sen Singh and *Moonshee Mahomed Yusuf* for Appellant.

Baboo Rajendronath Bose for Respondent.

A road-cess return made by a shareholder under the schedule of Act X (B.C.) of 1871 is not admissible as evidence against another shareholder.

Phear, J.—We think that the road-cess return made by the 10-anna proprietor under the schedule of Act X. (B. C.) of 1871 was not admissible as evidence against the plaintiff who represents the 5-anna proprietor. The Act itself makes the return evidence against the person who filed it. And it is plain on the facts of this case that the 10-anna shareholder or proprietor filed this

return on behalf of himself only. There must have been another return or returns made on behalf of the 5-anna shareholder; and that return or returns would have been evidence against the present plaintiff, not so the return which was made by the 10-anna shareholder. The Judge has attached very great importance to this return as evidence against the plaintiff, and, in truth, has reversed the decision of the first Court almost entirely upon the strength of it. He says: "The witnesses cited by him (the defendant) speak very clearly to this holding being a nugdee one at the rate of Rs. 2-8 per beegha. When this evidence is corroborated by the road-cess return, it is difficult to believe plaintiff's statement that the holding was a bowlee one."

But the first Court, which had the best opportunity of judging of the value of this last-mentioned evidence, said that these witnesses were untrustworthy. And the Judge seems to have given credit to them, mainly because their testimony appeared to be corroborated by the road-cess return which he ought not to have looked at.

This being so, it appears to us that the whole ground upon which the Lower Appellate Court relied as a justification for reversing the decree of the first Court is gone.

The Moonsiff had expressed a very strong opinion as to the value of the plaintiff's evidence. And it appears that amongst the witnesses called by the plaintiff were two putwarees who had for some considerable period collected on behalf of the 10-anna shareholder, and also on behalf of the entire 16-anna holder. Those witnesses, if they are speaking the truth, are persons who are eminently well placed for giving the best information to the Court. The Lower Appellate Court makes no comment upon this body of evidence. The Judge does not say that he cannot concur with the Moonsiff in the estimate which he has formed of it. And, in short, he has reversed the decision of the Moonsiff, whom he has at the same time characterized as a most shrewd and careful officer, solely, so far as we can see, upon the foundation of the road-cess return corroborating, as it does, the testimony of the defendant's witnesses.

If then this road-cess return be put out of the way, as it must be, it follows that the judgment of the Lower Appellate Court must be reversed and the decree of the first Court upheld.

The appellant must have his costs in all the Courts.

The 9th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Obligee—Surety—Joint liability.

Case No. 223 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 21st July 1873.

Shushee Mohun Pal Chowdhry and others (Plaintiffs), *Appellants,*

versus

Ram Koomar Koondoo and another (two of the Defendants), *Respondents.*

Baboo Doorga Mohun Doss for Appellants.

Baboos Hem Chunder Banerjee and *Bykuntnath Doss* for Respondents.

Where an obligee sues some of the persons jointly liable to him under a bond, and takes another bond from the rest for what he considers to be their share of the debt, he does not discharge the latter from their liability to contribute according to the shares in which they are liable among themselves, nor does his transaction with them (they not being sureties) destroy the joint liability.

Couch, C.J.—We must reverse the decree of the Subordinate Judge and order that the plaintiff shall recover the amount which is claimed in the suit. No exception has been taken before us to the correctness of the claim.

The Subordinate Judge has not looked at the right part of the Contract Act for the law applicable to a case of this description. There was a debt which is admitted by the respondents, who have appeared before us, to have been due from five, but which is alleged by the plaintiff to have been due from all the eight, persons who signed the note or bond sued upon. The statement in that is evidence against them that they were all liable for the debt. No doubt, it is evidence which may be rebutted, but it does not appear to have been. Whether they were all liable for the debt, or only five were, the transaction was that the creditor, instead of insisting at once upon payment of the whole debt, agreed to payment by instalments and to take the note or bond as a security. This is a sufficient consideration for it.

Then it is said that he has sued only five, and, as he states in his plaint, has taken

a bond from the other three for what he considers to be their share of the debt. They were all jointly liable upon the note or bond. The plaintiff cannot and has not by the transaction which he has had with the three discharged them from liability to contribute to the payment of this joint debt according to the shares in which they are amongst themselves liable. The present defendants might, if they had thought fit to insist upon it, have had the other three made defendants. But they did not ask it. Apparently they did not wish that. They seem to have thought that if they could show that there had been a transaction with the three, the joint liability would in some way, not easy to be understood, have been destroyed. The joint liability has not been destroyed in this case, for there is no evidence that these persons were only sureties. It appears to us to be a case in which there is no defence. Neither on the ground of limitation nor on the other point is there an answer to the suit.

The plaintiff will have a decree for the amount claimed, with interest thereon at the rate of 6 per cent. per annum from the institution of the suit, and he will have the costs of this appeal and of the suit in the lower Court.

The 9th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Agreement not to enforce decree—Injunction—Act VIII. of 1859, s. 206.

Case No. 227 of 1873.

Regular Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 8th September 1873.

Nubo Kishen Mookerjee (Plaintiff), *Appellant*,

versus

Debnath Roy Chowdhry and others (Defendants), *Respondents*.

The Advocate-General for Appellant.

Baboo Ashootosh Dhur for Respondents.

Where a decree-holder agrees for a good consideration not to enforce his decree, the Court may legitimately, on the suit of the opposite party, issue an injunction against the former not to do what he has agreed not to do, Act VIII. of 1859, s. 206, notwithstanding.

Couch, C. J.—For the purpose of deciding this appeal, we must take it as a fact that an agreement was made on the 22nd of May 1872 by which the defendant agreed, in consideration of Rs. 2,500, not to enforce the decree against the plaintiff; but he was to be at liberty to continue his suit against the other parties, and to establish his right against them. We must also take it that the Rs. 2,500, if they have not actually been received by the defendant from Mr. Allan, can be received by him at any time.

Here, then, was an agreement by the defendant for a good consideration that he would not enforce his decree against the plaintiff. Section 206 of Act VIII. of 1859 does not appear to us to prevent his being obliged to perform this agreement. It says that the Court is not to recognize any adjustment which is not certified to the Court; but this is not to be construed so as to extend it beyond what is specified. For the reasons for which the Judicial Committee of the Privy Council* refused to extend what was called the principle of section 260 as to the certificate to a purchaser, we think the principle of section 206 should not be extended, and the section should be applied only in the case which is there mentioned. What is sought in this suit is what may be legitimately done by the Court, *viz.*, preventing the defendant from breaking his agreement by applying to the Court to execute the decree against the plaintiff. It is an injunction against him personally not to do what he has agreed not to do, and what, as the Subordinate Judge says, would render him liable to be sued for damages. A suit for damages would not be a perfect remedy in such a case as this. The proper course is to prevent the injury being done at all, and not to leave the plaintiff to be compensated by damages which might not be an adequate compensation to him.

We think the decree of the Subordinate Judge must be reversed, and the suit will have to be remanded to him for re-trial. The appellant will have the costs of this appeal; the costs in the lower Court of the re-trial and of the first trial will follow the result.

* P. C. Case at 18 W. R. 157.

The 9th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Tenancy—Ejectment—Right of occupancy.

Case No. 1909 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 2nd May 1873, reversing a decision of the Moonsiff of Buxar, dated the 29th January 1873.

Ramgut Panday (Defendant), *Appellant,*

versus

Radha Pershad Singh (Plaintiff), *Respondent,*

Baboo Bungsee Dhur Sen for Appellant.

Baboos Kalee Kishen Sen and *Tarucknath Paulit* for Respondent.

Where a tenant is rightfully occupying land under some one who represents the landlord, he cannot be ejected before his tenancy has terminated, even though he has no right of occupancy under Act VIII. (B.C.) of 1869, s. 6.

Phear, J.—In this suit the plaintiff seeks to eject the defendant from a plot of 5 beeghas of land which he says the defendant is occupying as a trespasser.

The defendant says, on the contrary, that he is a ryot having a right of occupancy in the 5 beeghas, and therefore the plaintiff is not entitled to turn him out.

The facts of the case, as exhibited by the plaintiff himself in his plaint, show that the defendant has been for some considerable period a ryot occupying these 5 beeghas as a tenant under the plaintiff's ticcadar; and the plaintiff has entirely failed to show that that tenancy has ever come to an end.

It is part of the plaintiff's case that the defendant was admitted into possession of the 5 beeghas in the year 1268 by the person who was at that time the plaintiff's ticcadar. Further, that this ticcadar having wrongfully turned the defendant out of that possession, the defendant brought a suit against him in which he was successful, and obtained a decree for re-possession; that thereupon a third person, claiming to have goozashta right over these 5 beeghas, brought a suit against the defendant as being the person at that time in possession of them, and this suit was dismissed.

It is plain that during the whole of this period of time the defendant was occupying the land rightfully as tenant under some one representing the plaintiff. The plaintiff, it is said, in the year 1274, took khas possession of the property of which these 5 beeghas form part. And although the subsequent state of facts is left very obscure, both by the plaint and the judgment of the Lower Appellate Court, it is certain that after this time, in 1278 and 1279, the defendant was still in possession of the 5 beeghas of land. The plaintiff does not profess to show that the defendant's tenancy has come to an end. He treats the defendant as a trespasser from beginning to end—an "usurper," as the Judge has termed him. And for that reason he does not offer to prove that he himself has done anything to put an end to the defendant's tenancy. But, as has been already stated, it is perfectly plain, on the plaintiff's own facts and upon the facts found by the Lower Appellate Court, that the defendant first obtained possession of the 5 beeghas, which are the subject of suit, as a tenant of the plaintiff's ticcadar; that he has maintained his right of occupation as tenant by more than one suit; and that there is nothing whatever on the record to show that his tenancy has yet terminated. This being so, the plaintiff has no right in the present suit to recover possession of the land from the defendant, even though the defendant may have failed to prove that he has a right of occupancy under section 6, Act VIII. (B.C.) of 1869.

For these reasons we think that the decree of the Lower Appellate Court was wrong and that of the first Court was right. The appeal is therefore decreed, and the decree of the Lower Appellate Court is reversed, and the decree of the first Court is affirmed, with costs.

The 9th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Zur-i-pesghee lease—Mortgage bond.

Case No. 1918 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 28th June 1873, reversing a decision of the Officiating Moonsiff of Sewan, dated the 6th March 1872.

Jewbundhun Singh and another (Defendants), *Appellants,*

versus

Radha Madho Pershad (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

Where land has been for many years in continuous possession under a zur-i-peshgee lease, it cannot be mortgaged to a third party to the prejudice of the lessee's interests: such mortgage can only be given subject to the zur-i-peshgeedar's right.

Phear, J.—We think that the Subordinate Judge is entirely wrong in his view that the plaintiff's mortgage-bond necessarily gives a good title, and takes effect against the property to which it relates in priority to the defendant's zur-i-peshgee lease alleged by the defendant to have been made in July 1826.

If the defendant's case be true, that is, if it be the fact that the plaintiff's mortgagor granted to the defendant a zur-i-peshgee lease in July 1826, and the defendant has been continuously from that time down to the time when the suit was brought in the possession and enjoyment of the land under the terms of that lease, then we think it is clear that the mortgage-bond which the defendants' lessor professed to grant to the plaintiff in 1869 or 1870 could not operate to the prejudice of the defendant's interests. It could only give the plaintiff rights in the property subject to the right which the defendant had upwards of forty years before obtained from his lessor, and had been throughout that period in the quiet and undisturbed enjoyment of. The ground of the Subordinate Judge's decision is therefore unsound, and the decree of the Lower Appellate Court must be reversed. But inasmuch as the merits of the case have not been dealt with by the Subordinate Judge, the case must be remanded for re-trial on the merits.

Costs will abide the event.

The 9th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Possessory suit—Cause of action—Execution-sale for arrears of rent.

Case No. 109 of 1873.

Regular Appeal from a decision passed by the Judge of East Burdwan, dated the 19th February 1873.

Banee Madhub Bukshee (one of the Defendants), *Appellant,*

versus

Radha Madhub Mojoomdar and another (Plaintiffs), *Respondents.*

Mr. G. Gregory and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboos Mohinee Mohun Roy and *Hem Chunder Banerjee* for Respondents.

Plaintiffs sued to recover possession by declaration of right to certain chur lands as accretions to a putnee talook and for damages, alleging that they held possession under a mokurruree lease granted by defendant No. 3, but were ejected by defendant No. 1, who had purchased at a sale in execution of an *ex parte* decree for arrears of rent obtained by defendant No. 2 against defendant No. 4 (who was the heir of defendant No. 3's vendor), the ejectment having been effected under proceedings taken by the Deputy Magistrate under Act XXV. of 1861, s. 318:

Held that plaintiffs' cause of action accrued from the date of their ejectment.

Held that what was sold to the defendant No. 1 was the tenure itself, and not the rights and interests of defendant No. 4, who was the defaulter in the rent suit.

Kemp, J.—There were four defendants in the Court below. One of them only has appealed to this Court, *viz.*, No. 1, Banee Madhub Bukshee. The suit of the plaintiffs was for recovery of possession by declaration of right of 1,000 beeghas of chur lands as accretions to a putnee talook, Mouzah Dain Hât, and for damages. The suit is valued at Rs. 10,192. The plaint alleges that the defendant No. 3, Mookta Keshee Dabee, granted a mokurruree lease, dated the 10th

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May 1870, of the disputed land to the plaintiffs; that they held possession of the same; that the defendant No. 2, the Rajah of Burdwan, obtained an *ex-parte* decree for arrears of rent against Bhubo Soonduree, defendant No. 4, and caused the sale of 35 beeghas 16 cottahs 12 chittacks 13 gundas of the said chur lands which had been separately assessed after a suit by the zemindar, the defendant No. 2; that the defendant No. 1 purchased this land in execution of the *ex-parte* decree for rent, and, under cover of that purchase, brought about proceedings in the Deputy Magistrate's Court under section 318 of the Code of Criminal Procedure; and further, under an order of the said Deputy Magistrate, dated the 18th July 1871, ejected the plaintiffs from 1,000 beeghas of land on the 24th July 1871, carried off the indigo plant cultivated on a portion of these lands, some 400 beeghas, and otherwise caused damage to the plaintiffs.

The boundaries of the land claimed are set out at the foot of the plaint. The profits of the land claimed are estimated at Rs. 557-9, which at fifteen years' purchase are calculated to amount to Rs. 8,363-7, *plus* 1,828-9, value of the indigo crop, grass, and fish misappropriated; total valuation Rs. 10,192.

The defendant No. 1, appellant before us, in his written statement, states that the suit of the plaintiffs was barred, as more than one year had elapsed from date of their purchase and the institution of the suit; that the plaintiffs are the servants and benameedars of the defendant Mookta Keshee; that the rights of the plaintiffs and their lessor Mookta Keshee, if any, have been extinguished by the sale under Act VIII. of 1865; that the plaintiffs were never in possession of the disputed lands, and their averment, that they cultivated 400 beeghas of land with indigo, is false; that no claim for damages on account of grass or fish can be maintained, as the defendant Mookta Keshee's servants set fire to the grass grown on the lands, and sold all the fish in the bheel before defendant No. 1 took possession under his purchase.

The Rajah of Burdwan, defendant No. 2, also pleads limitation, and on the merits he avers that neither the plaintiff nor his lessor, Mookta Keshee, has any right to the disputed chur lands, save and except to 35 beeghas 16 cottahs 12 chittacks 13 gundas; that he, the Rajah, as zemindar, is the only person who has any title in the remaining lands.

The defendant Mookta Keshee states that the defendant No. 1 has acquired no right in the disputed lands under his purchase of 35 beeghas 16 cottahs 12 chittacks 13 gundas sold by auction for the recovery of arrears of rent; that the answering defendant, by purchase from the former putneedar Joy Chunder, under a conveyance dated the 13th Pous 1270 B. S., obtained possession of the putnee with the chur accretions in their entirety; that the only portion of the chur lands which fell into arrears was 35 beeghas 16 cottahs 12 chittacks 13 gundas as described above. Then there is a plea that the right of the plaintiffs under the mokurruree has lapsed as per terms of the mokurruree pottah; and that the answering defendant ought to be made a co-plaintiff.

One of the plaintiffs, *viz.*, Shushee Bhoosun Roy, and the defendant No. 1, appellant in this Court, were examined. The Judge laid down four issues for trial:—

1st.—Whether the suit of the plaintiffs is barred as not being instituted within twelve months from the date of the sale, *viz.*, the 13th September 1869, or within twelve months from the date of the Deputy Magistrate's order under section 318 of the Criminal Procedure Code, *viz.*, the 19th July 1871?

2nd.—Whether the defendant No. 1, Banee Madhub Bukshee, acquired a title to any of the lands in dispute by virtue of his auction-purchase in execution of a decree in suit No. 115 of 1869 against Bhubo Soonduree Dabee, supposing the said Bhubo Soonduree Dabee to have had no title or interest in the property sold?

3rd.—Are the plaintiffs or Mookta Keshee Dabee, defendant No. 2, entitled to possession of the 1,000 beeghas claimed, or to any portion of them?

4th.—Are plaintiffs entitled to damages for indigo, grass, &c., and, if so, to what amount, and from which defendant?

The Judge is of opinion that the plaintiff and the defendant No. 3, Mookta Keshee, possess one and the same interest for the purposes of this suit; that, although Mookta Keshee alleges that the lease of the plaintiffs has lapsed, that is more with the view to strengthen her position than to oppose the plaintiffs. The case was, therefore, allowed to proceed as if brought jointly by Mookta Keshee and the plaintiffs.

Upon the issue in bar, the Judge held that certainly no limitation runs as against the plaintiffs from September 1869, and that, with reference to Mookta Keshee, she would have twelve years within which to sue to

establish her title from the date of the sale under the provisions of Act VIII. of 1865; that three years is the period within which a suit can be instituted to set aside a summary order under the provisions of section 318 of the Criminal Procedure Code, and that period has not elapsed. The suit was, therefore, declared not to be affected by the Statute of Limitations. The second and third issues were tried together, and the Judge was of opinion that the points for decision were:—

1st.—Was Bhubo. Soonduree, defendant No. 4, in possession of a jumma of Rs. 19-13¼ when it was sold under Act VIII. of 1865?

2nd.—Did anything pass to the defendant No. 1, Banee Madhub Bukshee, by that sale?

3rd.—What order should be passed with reference to the lands claimed?

On the first point, the Judge says that nothing could be clearer than that Bhubo Soonduree had neither possession, title, nor interest in the jumma at any time.

On the second point, the Judge finds that the defendant Banee Madhub purchased a jumma of Rs. 19-13¼, provided that tenure was the property of, and in possession of, the defaulter in the rent-suit in execution of which the sale was made. The Judge was of opinion that the defaulter Bhubo Soonduree had no interest in the tenure, as she was not the recorded proprietor, and it had not been shown that she ever assumed the position of heiress of Joy Chunder, the original putneedar; on the contrary, that Mookta Keshee was the proprietor. For these reasons, and applying the principles laid down in a decision published in the 10th volume of the Weekly Reporter, p. 434, the Judge held that the defendant No. 1 purchased nothing.

On the third point, the Judge finds it impossible to believe that the defendant Banee Madhub Bukshee cut a single bundle of indigo plant; that the crop was submerged by the river, but that the defendant Banee Madhub was responsible for this, as he obstructed the plaintiff in his possession by resorting to proceedings before the Deputy Magistrate under section 318 of the Criminal Procedure Code. Therefore, striking the best balance he could, to use the Judge's own words, he finds for the plaintiffs for 350 beeghas of indigo plant at Rs. 3 per beegha, or Rs. 1,050.

The decretal order is that it be declared that the defendant No. 1, Banee Madhub Bukshee, has no title or interest in any of the accretions to the Dain Hât estate, but that the plaintiffs recover possession thereof according to the boundaries stated at foot of the plaint as tenants of Mookta Keshee. The plaintiffs will also recover Rs. 1,050 as damages from the defendant Banee Madhub Bukshee with 6 per cent. interest from date of decree and costs on that amount; the plaintiffs and Mookta Keshee being entitled to one set of costs from the said defendant; the other defendants to pay their own costs.

Before us, the following points were raised in the argument by the Counsel and pleader of the appellant, defendant No. 1:—

1st.—That the suit of the plaintiffs is barred, as it has not been instituted within one year from the date of the defendant's purchase at a sale in execution of a rent-decree.

2nd.—That the whole of the chur lands passed to the defendant No. 1 under the sale, and that, if it be held that only 35 beeghas 16 cottahs 12 chittacks 13 gundas passed, the defendant is still entitled to the remaining lands claimed in the plaint, equal to about 965 beeghas, as an accretion to the 35 beeghas.

3rd.—That the plaintiffs are not entitled to any damages.

There is a cross-appeal on the part of the plaintiffs on the question of costs.

On the first point, we are of opinion that the plaintiffs' cause of action accrued from the date upon which the defendant No. 1, under cover of the Deputy Magistrate's order, ousted them from the disputed lands. The suit is not for reversal of the sale, but for possession by declaration of title, and it is brought well within the period prescribed for such an action.

On the second point, it is clear that what was sold to the defendant No. 1 was not, as held by the Judge, the rights and interests of the defendant No. 4, Bhubo Soonduree, who was the defaulter in the rent-suit, but the tenure itself. The ruling in Volume X., which the Judge alludes to, was considered and modified with other decisions by the Full Bench in their decision, to be found in Volume XXI., Weekly Reporter, p. 94. This ruling is of date long subsequent to the decision in Volume X, and was not passed when the Judge decided this case. Turning to the sale-certificate, we find that the defendant No 1 purchased a jumma of Rs. 19-13¼ in the possession of Bhubo Soonduree. The present putnee belonged to Joy Chunder, who sold it, including all accretions which had formed at the time of

the sale, or that might hereafter form, to Mookta Keshee. She, on two occasions, when the zemindar, the Rajah of Burdwan, sued for the rent of the 35 beeghas 16 cottahs 12 chittacks 13 gundas, which was the only portion of the chur land which had been assessed, separate from the parent putnee, with rent, although other portions had from time to time been declared to be liable to assessment on the suit of the zemindar, paid the rent. The Rajah, for a third time, sued for the rent of the 35 beeghas 16 cottahs 12 chittacks 13 gundas of chur land, making Bhubo Soonduree, as heiress of Joy Chunder, the defendant in the rent-suit. An *ex-parte* decree was passed, and that tenure, *viz.*, the 35 beeghas 16 cottahs 12 chittacks 13 gundas, was sold and passed to the defendant No. 1, and he is entitled, under his purchase, to that quantity of land and to nothing more.

On the third point, *viz.*, the damages, we have read and considered the evidence. It certainly shows that a large portion of land was cultivated with indigo; that the plaintiffs were unable to cut the plant owing to the action taken by the defendant No. 1, which resulted in the Deputy Magistrate binding down both the plaintiffs and the defendant No. 1 in heavy recognizances to keep the peace, and not to cut the plant, the consequence being that, before the Deputy Magistrate decided on the question of possession under the provisions of section 318, the river destroyed the crop. We have not been shown that the damages assessed by the Judge are excessive. Three rupees per beegha is a very moderate rate, and we have no data upon which we could come to a conclusion that the Judge was wrong in his estimate.

With reference to the cross-appeal of the plaintiffs, we are clearly of opinion that the plaintiffs are entitled to costs as per valuation of the plant, which was not objected to in the Court below. Deducting, therefore, 35 beeghas 16 cottahs 12 chittacks 13 gundas which the defendant No. 1 is entitled to, the plaintiffs are entitled to costs on the valuation of Rs. 8,363-7, *minus* the costs in proportion of 35 beeghas 16 cottahs 12 chittacks 13 gundas which the defendant No. 1 is entitled to under his purchase, *plus* Rs. 1,050 on account of damages.

With these trifling modifications, we affirm the decision of the Judge, and dismiss this appeal with costs payable on the above calculation, with interest at 6 per cent. by the defendant No. 1, Banee Madhub Bukshee.

The 9th June 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Act I. of 1845, s. 21—Joint Hindoo Family—Purchase by Managing Member.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Toondun Singh

versus

Baboo Pokhnarain Singh and others.

Notwithstanding anything contained in Act I. of 1845, s. 21, the members of a joint Hindoo family may sue to enforce rights acquired by them under a purchase, at a sale for arrears of revenue, made by the managing member in his own name, but on behalf of the family, though he is the sole certified purchaser.

The point in this case has been reduced now to the question as to what is the proper construction to be put upon the 21st section of Act I. of 1845. The High Court expressed their opinion "that a purchase at "a sale for arrears of revenue under Act I. "of 1845 made by the managing member of "a joint Hindoo family in his own name, "but on behalf of the joint family, is not "affected by the 21st section of that Act, "and that, notwithstanding anything con-"tained therein, the members of such joint "family may sue to enforce rights acquired "by them under such a purchase as against "the managing member, though he is the "sole certified purchaser." Their Lordships entirely concur in that view of the construction of Act I. of 1845. It appears upon the record that this judgment was pronounced on the 20th April 1870, and that the appeal was preferred and allowed to Her Majesty in Council on the 14th May 1870. The judgment in review, which has been sent up and notified to Her Majesty in Council, and put upon the record in this case, was passed on the 29th August 1871 after the appeal was preferred. It does not appear that any appeal has been preferred against the judgment which was pronounced in review, and, under those circumstances, their Lordships, being aware that such a judgment has been passed, will humbly recommend Her Majesty to affirm, with the

* From the judgment of Bayley and Norman, JJ., in Regular Appeal No. 38 of 1869, decided on the 20th April 1870—13 W. R. 347.

costs of this appeal, the original decree passed by the High Court so far as it finds the properties in question to be part of the joint family-estate, but without prejudice to the subsequent judgment which was passed by the High Court in review, or to any proceeding which may be taken thereunder. That will leave all the questions open as to carrying it out.

The 10th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rights of Occupancy.

Case No. 2665 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 21st August 1873, reversing a decision of the Moonsiff of Sulkea, dated the 31st January 1873.

Ram Chunder Roy Chowdhry (Plaintiff), *Appellant,*

versus

Bholanath Lushkur (Defendant), *Respondent.*

Baboo Umbika Churn Bose for Appellant.

Baboo Tarucknath Sen for Respondent.

A right of occupancy under the Rent Law not being transferable, tenants who have such a right, by quitting the land, sever all connection between themselves and it, and the landlord is entitled to re-enter.

Jackson, J.—THE judgment of the Lower Appellate Court cannot be maintained. Both the Courts concur in finding that the plaintiff had taken the property in this land by good and valid purchase from the late owner. The Lower Appellate Court also finds that the defendant had purchased from the previous tenants some right which he relied upon as entitling him to occupy the land. Those previous tenants appear to have been in occupation for twelve years, and the Subordinate Judge appears to have put it upon the plaintiff to show that their right was not transferable. Now, if the former tenants had had a right of occupancy in this land, as has been lately held by a Full Bench of this Court,* such right is not transferable. It does not matter whether the alleged transferor is alive or not. If the former tenants have quitted the land, they have severed all connection between themselves and the land, and the landlord would be entitled to re-enter. It has been suggested that there ought to have been an inquiry whether the tenure was one which by custom was transferable. In point of fact what the defendant set up was that it was a mowrosee mokurruree holding, and that question has been determined against him. It appears to us that the defendant has no right of possession which he can successfully maintain against the plaintiff. The judgment of the first Court was right and must be restored, and that of the Lower Appellate Court set aside with costs.

* *Ante*, p. 22.

The 10th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Lunatic's Representatives—Right of Suit.

Case No. 1964 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 3rd June 1873, affirming a decision of the Moonsiff of Arrah, dated the 18th February 1873.

Syud Mahomed Abdool Hye (Plaintiff), *Appellant,*

versus

Lungut Singh and another (Defendants), *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

A suit to recover compensation in respect of rents due, according to the terms of a bond, may be brought in the name of a lunatic, while he is yet alive, by the manager of his estate acting as his next friend, or, for arrears accruing after his death, by the successor of the lunatic.

Phear, J.—IT appears to us that there is no ground whatever upon which this suit can be supported.

The plaintiff is described as Syud Mahomed Abdool Hye, manager, under the Court of Wards, of the estate of Baboo Bindessuree Pershad Singh, deceased; and in this suit he sues two defendants, Lungut Singh and his brother Sheo Churn Lall.

The case of the plaintiff is that Lungut Singh, in December 1867, entered into a security-bond by which he undertook to

be answerable to the Court of Wards for any default in the payment of rent and otherwise which a person of the name of Sheo Sahoy might make in performing the stipulation of a certain contract of lease which Lungut Singh, as was recited in his security-bond, had himself perused and had satisfied himself with regard to. It was described in the recitals as a lease of 8 annas of Mouzah Suleempore at a rent of Rs. 243, and of 8 annas of another mouzah at a rent of Rs. 170, to Sheo Sahoy; and it is plain that it was the terms of this lease, and of no other, which Lungut Singh guaranteed the due performance of.

Now, at the outset, it is manifest upon this statement that Sheo Churn Lall had no liability of any kind towards the plaintiff or anybody else under the terms of this security-bond. And, therefore, so far as anything goes which appears in the plaint, it was certainly gratuitous on the part of the plaintiff to make Sheo Churn Lall a defendant in this suit.

But, further, there is no ground shown in the plaint whereon Syud Mahomed Abdool Hye can maintain a suit for the purpose of enforcing the security-bond which Lungut Singh made in December 1867. The bond was not made with Syud Mahomed Abdool Hye. Indeed, it is somewhat difficult to satisfy one's self as to the person with whom the bond was supposed to have been made. The words of the bond are exceedingly general; and all that can be gathered from it is that Lungut Singh undertook to be responsible to the Court of Wards, in whose charge the property of one Baboo Bindessuree Pershad Singh, a lunatic, was at that time when the bond was made, for the due performance of rents, &c., which might become due under the specified lease of a portion of that property to Sheo Sahoy. If the bond be construed strictly, then the Court of Wards is the only person who could sue to enforce its terms. But we are not aware that the Court of Wards has any such personality as would enable it to sue in this way.

It is, however, perhaps possible to construe this security-bond as having been, in the intention of the parties concerned, made by Lungut Singh with the lunatic Bindessuree Pershad through the intervention of the Court of Wards in whose charge his property was. And in that case a suit could of course be brought upon the bond in the name of Bindessuree Pershad Singh, while he was alive, by any one who was manager of his estate, acting as his next friend, for the purpose of recovering compensation, according to the terms of the bond, in respect of rents which had become due to the lunatic from Sheo Sahoy. But the present suit is not even framed in that way. Syud Mahomed Abdool Hye does not bring this suit in the name of the lunatic, acting for the lunatic as his next friend, and seeking to recover money which had become due to him. In truth, it was almost impossible for the present plaintiff to have brought this suit in that form, because he could not well have styled himself the next friend of the deceased person. Thus a grave difficulty meets him at the outset of the case, and that difficulty is really the test of the merits of the present suit. It shows that the plaintiff has no right to make the claim which he has preferred in the present suit. So far as any of the arrears of rent which are sought to be made good by this suit are arrears which accrued due during the lifetime of the lunatic Bindessuree Pershad Singh, these arrears and the compensation in respect of them must be debts which the lunatic's personal representative is entitled to recover; and so far as they are arrears which accrued due after the death of the lunatic, they must be debts which the successor of the lunatic, whoever he may be, is entitled to recover. It is plain, therefore, that in this suit two perfectly independent claims have been united; and there is nothing disclosed in the present plaint or elsewhere on the record to show that Syud Mahomed Abdool Hye is entitled to sue for the enforcement of either of them.

Again, if Abdool Hye had established his right under a certificate or otherwise to represent the deceased lunatic, still it seems quite plain that the surety is not, by virtue of his bond of December 1867, bound to make good the liabilities which Sheo Sahoy had incurred and failed to discharge under the kubooleut executed by him in 1868.

It has been argued before us by the learned Government Pleader that the liabilities of Sheo Sahoy under his kubooleut of 1868 are substantially the same as the liabilities which he was under in respect of this particular mouzah according to the terms of the original kubooleut or agreement of 1867. This may be so. But still it is not the liability which Lungut Singh undertook, by his bond of December 1867, to guarantee. It is admitted by the learned Government Pleader that the original contract which Sheo Sahoy entered into in 1867 was for a single lease to him

alone of 8 annas of one mouzah at a specified rent, and 4 annas of the other mouzah at another rent. Whereas the lease which was finally agreed upon and accepted in 1868 was a double lease, *i. e.*, a lease of the 4 annas of the one mouzah to Sheo Sahoy alone, and a lease of 8 annas of the other mouzah to Sheo Sahoy with others; that is, the contracts of lease into which Sheo Sahoy entered in 1868 were different from the single contract of lease into which he entered in 1867, and which was recited in the security-bond as the contract which Lungut Singh guaranteed the due performance of. There can be no doubt on these facts that Lungut Singh is not liable, on his bond of December 1867, to make good the liabilities of Sheo Sahoy under his kubooleut of June 1868. And therefore, for every reason, the present suit fails and ought to be dismissed.

Accordingly we are of opinion that the decree of the lower Courts is correct, and this appeal will be dismissed with costs.

The 10th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Joint Hindoo Family—Suit for Account.

Case No. 1945 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 21st May 1873, reversing a decision of the First Subordinate Judge of that District, dated the 17th June 1872.

Mussamut Nowlaso Kooeree (Plaintiff), *Appellant,*

versus

Lalljee Modi (Defendant), *Respondent.*

Baboo Kalee Kishen Sen for Appellant.

Baboo Boodh Sen Singh for Respondent.

One member of a joint Hindoo family sued another, who was the manager, for a moiety of two items pertaining to the ancestral estate which she alleged that the defendant had misappropriated:

HELD that the form of the suit was wrong, and that plaintiff should have sued for an account of the joint family-property.

Phear, J.—IT seems to us beyond doubt that the decision of the Lower Appellate Court is substantially correct. The plaintiff, upon the facts set out in his plaint, is only entitled to have an account from the defendant. He is not entitled to sue for the two particular items of money which he claims in the plaint. As he has, therefore, brought his suit in an entirely wrong form, and has asked for a remedy to which he has no right, the suit ought to be dismissed, but it will be without prejudice to his right to bring a suit against the defendant for an account of the joint family-property; and, if such a suit should be brought, there is no reason whatever why the items which form the subject of the present suit should be excluded from the account. On the contrary, they must, in such a suit, appear as the most prominent items, for which the defendant is to account.

The appeal is dismissed with costs.

The 10th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

High Court's Judgment—Construction.

Case No. 2715 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 16th September 1873, reversing a decision of the Subordinate Judge of that District, dated the 27th January 1871.

Tara Chand Biswas, auction-purchaser (Defendant), *Appellant,*

versus

Ram Jeebun Moostafee (Plaintiff) and others (Defendants), *Respondents.*

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Baboos Hem Chunder Banerjee and *Mohinee Mohun Roy* for Appellant.

Mr. T. N. Palit and *Baboos Umbica Churn Banerjee, Aubinash Chunder Banerjee*, and *Kisto Komul Bhuttacharjee* for Respondents.

Where the final sentence in a judgment of the High Court made no mention of a matter specified in the previous words, and the District Judge had the option of taking the latter to throw light on the former, or the former to be controlled by the latter, he was held to be entitled to follow the effect of previous judgments delivered by the same Judge of the High Court.

Jackson, J.—THIS case was before this Court on special appeal on the 6th June 1873, and on that occasion a Division Bench remanded the case to the Lower Appellate Court with instructions, of which the concluding words are as follow: "But there "was an objection taken by the special "respondent in the Court below which ought "to have been determined by the Judge. "The plaintiff claimed to have the sale set "aside on the ground that notice had not "been properly served, but the Moonsiff "decided against him, and found that notice "had been served. The Judge makes no "mention of the objection, no doubt because "he had already decided against the validity "of the sale on other grounds; but, as we "think him wrong in that decision, it remains "to be decided by the Judge whether or no "the plaintiff, appellant, had made out his "case that notice had not been served "according to law; and whether, supposing "non-service to be proved, the irregularity "was material, and produced injury to the "putneedar. If the Judge finds that notice "was not served, he will set aside the sale, "and order the purchase-money to be return-"ed to the purchaser." On the case coming before the Zillah Judge with these directions, he was pressed by the party before him, who had to support the sale, with the necessity of finding, not only that notice had not been duly served, but also that the failure caused material injury; and on that the Judge was of opinion that he was to be guided by the order of the High Court, and as the concluding order of the judgment made no mention of resulting injury, he thought he was bound to exclude that from his consideration. If the matter before us had been of a different kind, we do not think we should have been disposed to agree with the Judge in his mode of construing the order. He ought to have taken all its terms together. But it was open to him, we think, to reason in this way—either that the previous words must be taken as throwing light on the meaning of the final sentence, or the final sentence must be taken to control the previous order. In this choice of interpretation we think he would be fairly entitled to follow the effect of the previous judgments delivered by the same Judge, which, as shown to us in the course of the argument, appear in several reported cases. It is shown that Mr. Justice Glover, sitting with other Judges of this Court, has held that non-service of notice in cases prescribed by the law is fatal to the validity of the sale; and we think the Judge was entitled to hold from these decisions that what Mr. Justice Glover meant to order was that which is contained in the concluding sentence, *viz.*, that, if notice was not served, the sale was to be set aside, and the purchase-money returned to the purchaser. Now, the Judge has found, not only that the notice had not been duly served, but that the service failed in more than one particular, and *that* we are bound to say it appears to us clearly distinguishes this case from the one relied upon by the appellant, the decision of which is reported at page 36 of 14 Weekly Reporter, and to which I was a party. There is a considerable difference between the omission of an act which the law prescribes as essential to be done before a sale can take place, and the omission or misplacement of some formalities in the sale itself. In the one case, the probability would always be that failure in one of the important particulars would affect the sale by keeping purchasers away. In the other case, as the defaulter and all probable purchasers had notice of the sale, and had come together for the purpose of attending it, we think it would have to be shown before setting aside the sale that some material injury in consequence of the irregularity in publishing or conducting it had taken place. But, in point of fact, all consideration of this point appears to us to be really unnecessary, because, if it were necessary to find whether any injury had resulted from non-service of notice in this case, we think the Judge has found that injury did result. He says: "I see reason to believe that, had the notice really been published on the property, no sale would have taken place, and this being the case, I do not think the ruling of the 8th June 1870 must guide me now."

On all grounds, therefore, it appears to us that this special appeal fails, and the judgment of the Court below must be affirmed with costs.

The 11th June 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Co sharers in a Decree—Execution.

Case No. 82 of 1874.

Miscellaneous Appeal from orders passed by the Subordinate Judge of Dacca, dated the 8th and 9th January 1874.

Auseemoonnissa Khatoon (Judgment-debtor), *Appellant,*

versus

Ameeroonnissa Khatoon (Decree-holder), *Respondent.*

Mr. C. Jackson and *Baboo Grish Chunder Ghose* for Appellant.

Baboo Sreenath Banerjee for Respondent.

Where execution-proceedings are carried on in respect of a fractional share of a decree, for all that remains of the assets after satisfaction of one party, the Court should take necessary steps to protect the interests of other parties entitled under the decree.

Jackson, J.—It appears to us that the only means of arriving at a proper decision in this matter is that the several decrees on which the appellant is liable to the respondent as representative of Abdool Guffoor should be brought together, and an account taken of the entire liability, and that the whole assets, which are shown to have come to the appellant's hand, and not to have been applied towards the payment of those debts or otherwise properly expended, should be applied to the satisfaction of the several decrees, of course, so far as is possible, by entering complete satisfaction of one or more decrees rather than partial satisfaction of all. It has been objected that the present execution-proceedings are carried on by the creditors in respect of a fractional share of the decree. That should be put to right in the course of execution, and for all that remains after satisfaction of one party, the Court shall take necessary steps to protect the interests of other parties entitled under it. The proceedings must go back to the lower Court in order that measures may be taken accordingly.

The 11th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII. of 1859, s. 206—Proceedings under Act X. of 1859.

Case No. 95 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Second Subordinate Judge of Moorshedabad, dated the 12th January 1874, modifying an order of the Moonsiff of Hurhurparah, dated the 15th August 1872.

Gour Gobind Sircar (Decree-holder), *Appellant,*

versus

Huree Mohun Banerjee (Judgment-debtor), *Respondent.*

Baboo Gooroo Doss Banerjee for Appellant.

Mr. J. S. Rochfort and *Baboo Bhyrub Chunder Banerjee* for Respondent.

The provisions of Act VIII. of 1859, s. 206, are applicable to proceedings under Act X. of 1859.

Jackson, J.—The decision of the Subordinate Judge in this case appears to be erroneous. He seems to have decided rather on scant consideration that the provisions of section 206 of Act VIII. of 1859 do not apply to proceedings under Act X. The proceedings under Act X. apparently mean execution-proceedings in respect of decrees formerly made by Revenue Courts, which decrees were transferred to the Civil Court by the operation of Act III. of 1870 (B. C.). In respect of such decrees it is provided that the same procedure which applies to suits and applications under Act VIII. of 1869 (B.C.) shall be held to apply to suits and applications transferred to the Civil Court. All provisions incidental to procedure are made in that way applicable. One of the incidents is that the Court executing a decree will not take cognizance of a satisfaction made out of Court unless it is certified to by the decree-holder. The order of the Lower Appellate Court will be accordingly reversed with costs—Rs. 16.

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The 11th June 1874.

Present :

The Hon'ble W. Markby, *Judge.*

Rent-suit—Title—Appeal.

Case No. 2316 of 1873.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 17th July 1873, modifying a decision of the Moonsiff of Bancoorah, dated the 19th May 1873.

Reedoynath Dooripa (Plaintiff), *Appellant;*

versus

Paddo Lochun Chuckerbutty (Defendant), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Umbika Churn Bose for Respondent.

In a suit for rent less than Rs. 100, the decision turned upon whether, in a former suit against plaintiff by a third party, a decree had been recovered for possession of a portion of the land now in dispute :

HELD that, as neither the land nor the rent of such portion was claimed by defendant, the question as to title was not decided between parties having "conflicting claims" thereto ; consequently there was no right of appeal.

In this suit, which was for rent less than Rs. 100, the decision has turned upon whether, in a former suit brought against the present plaintiff by a third party, a decree for the recovery of possession of a portion of the land for which rent is now claimed had been recovered against the plaintiff. The first Court found that none of the land for which rent is now claimed had been so recovered, and gave the plaintiff a decree for rent of the whole. The second Court found that one plot of the land for which rent is now claimed had been recovered in the former suit, and modified the decree of the first Court accordingly.

The question is whether a special appeal lies to this Court.

That depends upon whether a question relating to the title to land or to some interest in land as between parties having conflicting claims thereto has been determined by the judgment.

There is no doubt that in this case a question has been decided relating to the title to land or to some interest in land, namely, the title of the plaintiff to receive the rent of one of these plots of land; but it is also necessary in order to give an appeal that that question should have been decided between parties "having conflicting claims thereto," that is to say, between parties both of whom claim the land or the interest to which the decided question relates. But in this case neither the land nor the rent of the excluded plot is claimed by the defendant, and I am therefore unable to say that the case falls within the provision of the statute.

On this ground the appeal is dismissed with costs.

The 12th June 1874.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Remand—Special Appeal.

Case No. 2147 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 21st September 1872, reversing a decision of the Subordinate Judge of that District, dated the 9th May 1867.

Mussamut Rajeebun and others (Defendants), *Appellants,*

versus

Mullick Amanut Ali and others (Plaintiffs), *Respondents.*

Mr. J. H. A. Branson and *Baboo Debendro Narain Bose* for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondents.

Case No. 201 of 1872.

Special Appeal from a decision passed by the Judge of Patna, dated the 7th September 1871, modifying a decision of the Moonsiff of Behar, dated the 15th May 1871.

Mullick Amanut Ali and another (Plaintiffs), *Appellants,*

versus

Mullick Fuzul Hossein and another (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellants.

Baboo Boodh Sen Singh for Respondents.

Where an order of remand passed by the High Court on review was twice repeated on the District Judge having neglected to carry it out, the High Court declined, in special appeal, to go behind the remand-order, or hold that the District Judge had done wrong in finally carrying it out.

Kemp, J.—On the 29th of May 1872, this case was remanded by this Court, present, Justices Kemp and Glover, who remarked "that the case, which is a very simple one, depending upon the consideration of facts, has been unnecessarily complicated by an attempt on the part of the Zillah Judge to get behind the remand-order of this Court." We further observed that the case had been before us on a previous occasion, and that we had then directed the Judge in distinct terms to give the mortgagor credit for the proceeds of one-third of Pytunbeegah, and after giving credit for this to ascertain whether the mortgage-debt had been liquidated or not, for on that question depended whether the plaintiff was entitled to redeem the mortgaged property. We further remarked "that, instead of carrying out our order, "which is a distinct and definite one, the "Judge commences by making mistakes in "reading the decision of his predecessor, Mr. "Justice Ainslie;" and then, after observing "that it appeared clear that one-third of "Pytunbeegah comprises an area of 46 "beeghas," we directed the Judge "to carry "out our remand-order *implicitly*, to give "credit to the mortgagor for the proceeds of "one-third of Pytunbeegah, and after doing "so, if he found that the mortgage had been "paid off, to declare that the plaintiff is "entitled to redeem; and if, on the contrary, "he found that, giving credit for the proceeds "of one-third of Pytunbeegah, a sum is "still due to the mortgagee, he will dismiss "the plaintiff's claim."

The case then went down to another Judge, Mr. McDonell. This Judge states, and very properly so, that he has a definite order of this Court, which is repeated for the second time, to carry out. He observes that it had been argued before him that the accounts had been prepared on the footing that the plaintiff claimed a one-twenty-seventh and not a one-third of Pytunbeegah. But the Judge says that he cannot entertain that objection; that, if the defendants had any doubt as to the meaning of the High Court's order wherein the share is distinctly stated to be one-third, he should have applied for a review of that order, but that, so far as the Judge's Court was concerned, it was necessary to carry out implicitly the order of remand. Acting on this principle, he found, on taking an account, that Rs. 424-3-6 were due to the mortgagor, and that the plaintiff was entitled to redeem; that he was entitled to possession of the mortgaged property, and to recover the sum of Rs. 424-3-6 with interest and costs from the defendants.

The defendants appeal specially. Their grounds are: *1st*, that the learned Judge below is in error in calculating the profits of one-third of Mouzah Pytunbeegah, inasmuch as the property pledged is much less than that share; *2nd*, that the meaning of the remand-order of the High Court was to calculate wassilat on the share of the property pledged, which the learned Judge below has wholly misunderstood; and *3rd*, that the decree of the Lower Appellate Court is wrong in law, inasmuch as it is contrary to the plaint of the plaintiff

Now, upon the first ground of special appeal, it is clear that the Judge has acted strictly in accordance with the order of remand of this Court in calculating the profits of one-third of Pytunbeegah; and further, this ground of special appeal is vague in its terms, for it does not state what the share of the pledged property in Pytunbeegah was; the ground set forth is "that much less than one-third was claimed." Nothing can be vaguer than that.

On the next ground—that the meaning of the remand-order of this Court was to calculate wassilat on the share of the property pledged, and that the learned Judge below has wholly misunderstood that order—we think that this ground is also untenable, because the meaning of the remand order clearly was that he should calculate the profits of one-third.

Then we come to the third ground, and it is on this ground that the argument has proceeded, namely, that the decree of the Lower Appellate Court is wrong in law, inasmuch as it is contrary to the plaint. Mr. Gregory, who appears for the respondents, took a preliminary objection to this Court going behind the remand-order. We find on referring to the record of this Court that, on the 20th of August 1869, a decree of this Court was passed directing the Court below to take into account the profits of one-third of Pytunbeegah. That decree was passed upon an application for review filed by the

plaintiffs, respondents, and the terms of that decree were again insisted upon in our order of remand of the 29th of May 1872; but it has been contended by Mr. Branson on the other side that the Court has a discretion vested in it to rectify any error which is patent on the record, and that it is clearly patent on the face of the plaint that the suit was for one-twenty-seventh of Pytunbeegah, and not for one-third. We have looked at the original plaint, and we are not satisfied that it is so patent on the face of the plaint that the plaintiffs did sue for one-twenty-seventh only and not for one-third of Pytunbeegah, and we think that, taking into consideration the order which was passed by this Court directing the Judge to calculate the profits of one-third of Pytunbeegah, and to give credit to the mortgagor to that extent, an order which has been passed three times by this Court, once on review and twice on the Judge having neglected to carry out that order, we cannot go behind the remand-order, nor hold in special appeal that the Judge below has been wrong in carrying out that order. We therefore dismiss the special appeal with costs.

With reference to the Special Appeal No. 201 of 1872, that appeal was directed to stand over until we decided the Special Appeal No. 2147. The Appeal No. 201 is of 1872 and No. 2147 is of 1873. It appears that the plaintiffs, the mortgagors, had, without waiting for the result of the decision in Appeal No. 2147, which opened out the question whether the mortgage-debt had been paid off, and whether they were entitled to redeem and to get possession of the mortgaged property, deposited the amount claimed as unliquidated, and brought this suit for possession.

The Judge below, Mr. H. T. Prinsep, has held that this suit was premature, seeing that it was not impossible on the special appeal that the High Court might declare the mortgage-debt paid off. As, however, the Judge had just decided that case against the plaintiff, he saw no objection to take up the appeal. As we have dismissed the Special Appeal No. 2147, that dismissal is tantamount to affirming the decree of the Court below declaring that the mortgage has been redeemed, and that the plaintiff, the mortgagor, is entitled to a refund of Rs. 424-3-6 from the defendants; no further orders are necessary. This special appeal and suit must, therefore, be dismissed with all costs payable by the plaintiff, special appellant.

The 12th June 1874.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Act VIII. of 1859, s. 354—Remands—Arbitration.

Case No. 282 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 25th September 1871.

Gossain Dowlut Geer (Plaintiff), *Appellant,*

versus

Bissessur Geer (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Aubinash Chunder Banerjee* for Appellant.

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusuf* for Respondent.

Where an Appellate Court, in pursuance of Act VIII. of 1859, s. 354, sends an issue down to the first Court in order that such evidence as the parties desired to adduce upon it might be taken and returned, the result is not to remand the case for re-trial; the first Court being *functus officio* in respect to such portion of the matter as it had already considered and determined.

So much of the matter as it has already dealt with cannot be referred by the first Court to arbitration.

Phear, J.—We think that the arbitration-proceedings in the Court below were without

authority, and are altogether void. The consequence of these proceedings having been entered upon is that all the evidence which the parties desired to adduce upon the issue, which was sent down by us to the lower Court, has not been taken by the Subordinate Judge. And therefore we are not in a position to go on with the case at present.

This Court had the decision of the lower Court brought before it upon regular appeal, and the matter of appeal was entertained by this Court. During the hearing of the appeal an issue was framed which had not been framed or considered in any way in the first Court; and this issue was sent down to the first Court, in pursuance of section 354 of the Civil Procedure Code, in order that such evidence as the parties desired to adduce upon it might be taken by the Court of first instance, and returned to this Court.

The result of sending down an issue in this manner was not to remand the case to the first Court for re-trial. Although the record was transmitted to the first Court in order that that Court might take the requisite evidence upon this issue, yet the matter in dispute between the parties did not thereby become open for the consideration or determination of the first Court. A large portion of the matter in dispute had been already dealt with, considered, and determined by that Court, and so far as that had occurred, the first Court was *functus officio;* it had no authority whatever to re-consider it.

The sole matter which was placed before the first Court in consequence of our order was the matter comprised in the issue which was framed by this Court, and sent down in order that evidence might be taken upon it.

In this state of things, it appears that the parties, if they duly referred anything to the decision of the arbitrators, referred the *whole* matter in dispute between them. And it seems to us clear that it was not competent to them to do so. The late decision passed by a Full Bench of this Court* has laid it down that an Appeal Court has no authority, by consent of parties under Chapter VI. of the Civil Procedure Code, to refer matter in issue before it on appeal to the decision of arbitrators, and without saying whether the first Court could have referred the matter involved in the issue, which was sent down to it, to the decision of the arbitrators or not, it is sufficient for us to say that the parties did not refer that matter, and that matter alone. It is plain, as has already been said, that they referred, if they referred anything, the whole matter in dispute. And inasmuch as we think there was no jurisdiction in the first Court, even by the agreement of parties, to refer so much of the matter in dispute which that Court had already determined, and which was pending on appeal in this Court, and which this Court itself could not refer, it seems to us that the arbitration-proceedings have altogether failed and become of no avail.

It is, therefore, not necessary for us to say whether the objection, which the defendant has raised to the award, namely, the objection that he had withdrawn from his submission to arbitration before the award was made, is a good objection or not.

Then, if the arbitration-proceedings be put on one side, it seems plain that we have returned to us only a portion of the evidence which the parties desired to adduce upon the issue which was sent down to the Subordinate Judge. The order of the Subordinate Judge, dated 29th July 1873, after reciting the agreement of the parties to refer, goes on to say: "Whereas, under such circumstances, it appears proper to postpone the examination of the defendant's witnesses, and to forward the papers on record to the arbitrator for the determination of the plaintiff's claim, it is therefore ordered that the witnesses who are present be dismissed; that a perwannah be formally sent to the arbitrator along with copies of papers at the cost of the parties."

Therefore it is manifest that a portion of the evidence which the defendant at least desired to adduce upon this issue has not been taken by the Subordinate Judge, and for that reason is not ready to be brought before us in due course under the procedure of section 354. It seems, therefore, to be necessary, before we can give final judgment in this case, once more to send down the record in order that the testimony of the witnesses who were not examined, and such further evidence as the parties desired to adduce, might be taken.

Either party will have liberty to examine all the witnesses who have not yet been examined, and whose names had been sent to the Court before the 4th August 1873.

The costs of this hearing will be costs in the cause to be dealt with at the final hearing.

* 21 W. R. 210.

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The 15th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Execution-sale—House and land.

Case No. 2849 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 16th September 1873, affirming a decision of the Additional Sudder Moonsiff of that District, dated the 19th February 1873.

Mookta Soonduree Chowdhrain (Plaintiff), *Appellant*,

versus

Muthooranath Ghose (Defendant), *Respondent*.

Baboos Hem Chunder Banerjee and *Doorga Mohun Doss* for Appellant.

Baboo Sreenath Banerjee for Respondent.

Where a decree-holder who had attached certain land and a house upon it caused the land to be sold in execution and purchased it, and then caused the house to be sold to a third party, HELD that he had purchased the land on which the house stood, subject to the right of the person who bought the house to have it continued there.

Couch, C.J.—IN this case the land and the house upon it were attached in execution of a decree. The decree-holder caused the land to be sold first, and himself became the purchaser. He then caused the house to be put up for sale, and the person who sold to the present defendant became the purchaser of it. The sale-certificate may fairly be construed as purporting to transfer the house as that which would remain on the land and be capable of being used as a house, and not to transfer the materials of a building which was to be immediately pulled down. We must endeavour to put such a construction upon both the certificates as will, if possible, reconcile them, and prevent any fraud or imposition being practised upon the defendants, or rather the defendants' vendor. And the way in which they can be, and ought to be, reconciled is that the plaintiff must be considered as having bought only the land upon which the house stood, subject to the right of the person who bought the house to have it continued there. As far as we can see into this case, we think that if this were not decided, the decree-holder would be allowed to commit a fraud in the manner in which he caused the property of his judgment-debtor to be sold.

The appeal must be dismissed with costs.

The 15th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges*.

Contract of guarantee—Surety's signature—Set-off.

Case No. 2257 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 4th July 1873, affirming a decision of the First Subordinate Judge of that District, dated the 12th July 1872.

Mrs. C. Aguilar (Defendant), *Appellant*,

versus

Woomesh Chunder Shaw and others (Plaintiffs), *Respondents*.

Baboo Amerendro Nath Chatterjee for Appellant.

Mr. T. C. Paulit and *Baboo Romesh Chunder Bose* for Respondents.

The fact of a surety for the payment of the price of goods purchased signing a voucher of them cannot make him primarily responsible.

Where a debtor sells goods to his creditor, and requests that a portion only of the price should be appropriated to part payment of existing debts, and the remainder held against the price of goods to be afterwards purchased by the debtor from the creditor, such request is not binding on the creditor without his consent.

Phear, J.—WE are of opinion that we ought not on special appeal to interfere with the decision of the Lower Appellate Court, although at the same time we feel bound to say that the lower Courts have placed their judgments upon grounds such as serve in some degree to give countenance to this appeal.

There can be no doubt, upon the admitted facts of the case, that the letter signed by Mrs. Aguilar constituted simply a contract of guarantee; and we think that the Judge is wrong in the view which he expressed as follows: "Whatever passed between the "parties, it is acknowledged that Mrs. "Aguilar signed the voucher making herself "primarily responsible for the debt. Such

"being the case, no payment made by Mr. Reid "of debts due by him to plaintiff could be "appropriated as the payment of Mrs. "Aguilar's debt."

The signing of the voucher was merely a signification of Mrs. Aguilar's assent to its correctness. It is, we think, plain upon a little consideration that this signature could not alone make Mrs. Aguilar primarily responsible for the debt. The debt had already been incurred, the goods had been already sold and sent, not to Mrs. Aguilar, but to Mr. Reid on the guarantee which Mrs. Aguilar had originally given in her letter. This sale of the goods to Mr. Reid could not be converted into a sale of the goods to Mrs. Aguilar merely by the fact of her signing the bill which was sent in. There is on this statement of the facts, in consideration for the new contract which the Judge imports into the case, nothing which can bind Mrs. Aguilar and make her primarily responsible as the purchaser of goods for which she was antecedently to the moment when she signed the voucher only responsible as surety. For this reason we think that the decision of the Lower Appellate Court is wrongly justified, as the Judge justifies it, on the footing of that supposed new contract, and that therefore the present appellant had some ground for coming here on special appeal.

At the same time Mrs. Aguilar's liability to the plaintiff being that of a surety for the due payment by Mr. Reid of the price of these goods, she became liable on her contract of suretyship to make good to the plaintiff the price of the goods when Mr. Reid failed to pay the same. That failure has beyond question occurred. If there were no other facts to be added to those which have just been mentioned, it is plain that Mrs. Aguilar would be as much bound to pay the price of the goods to the plaintiff on her contract of guarantee as she would be upon the supposed contract of primary liability which the Judge mentions.

It has, however, been argued here and in the Courts below that Mr. Reid had, before this suit was brought, paid to the plaintiff a sum of Rs. 900, and had appropriated Rs. 600 out of that to the purpose of discharging this particular debt, *i.e.*, the debt guaranteed by Mrs. Aguilar. What actually took place appears to be this: Mr. Reid was very largely indebted to the plaintiff, that is to say, he was so to a sum very much greater than Rs. 900. In this situation a soda-water machine and a round table were sold by him to the plaintiff for a sum of Rs. 900, he making a request at the same time that of this Rs. 900, the plaintiff should appropriate only Rs. 300 to the payment of already existing debts, and should hold the other Rs. 600 against the price of goods which Mr. Reid should afterwards purchase. It is obvious at once that this is a very different matter indeed from the payment of Rs. 900 in cash by Mr. Reid to the plaintiff. Had he paid Rs. 900 in cash to the plaintiff, he would have had a right at the time of payment to appropriate the money in discharge of the existing debts due by him to the plaintiff as he chose. But it is quite otherwise in regard to the Rs. 900 which was the consideration to be paid by the plaintiff to Mr. Reid for the purchase of the soda-water machine and the round table. So far as the plaintiff was concerned in this matter alone, this supposed Rs. 900 took the form of a debt due from him to Mr. Reid. And although the contract of purchase might have been so worded and expressed as to put the plaintiff under obligations of some sort with regard to Mrs. Aguilar's contract of guarantee or other matters, still this was not done: all that was affected by Mr. Reid was this—that he asked the plaintiff to appropriate the credit of Rs. 900 in the mode which we have described. It is not even clear, upon the correspondence which passed on this point between Mr. Reid and the plaintiff, whether the plaintiff did profess at any time to bind himself to give this credit or not. But even if he did, it was at the most a contract to be fulfilled *in futuro*, which he could only be compelled to keep specifically by a suit to be instituted for the purpose if it became necessary to do so. However, whether the plaintiff undertook to do so or not, the plaintiff did not eventually comply with Mr. Reid's request in this matter. It seems that when he was asked by Mr. Reid to sell some fresh goods for the consideration of this Rs. 600 he refused to send the goods; and then it was that Mr. Reid directed him to hold the Rs. 600 against Mrs. Aguilar's surety debt. It is not even certain, so far as we can perceive from the judgments which are before us, that Mr. Reid made this direction or request to the plaintiff himself. But even if it be supposed that he did so, still this would not, we think, constitute a ground upon which Mrs. Aguilar could be relieved from the obligation of her contract of suretyship, and it is quite clear that the plaintiff never consented to the appropriation of the

money in this manner. The case would have been entirely different if Mr. Reid had paid a sum of Rs. 600 to the plaintiff, stipulating at the time when he did so that it was to be paid to the discharge of the debt for which Mrs. Aguilar was surety. Had this taken place, and the plaintiff had nevertheless, after having received the money, refused so to apply it, and then sued Mrs. Aguilar, this appropriation would have constituted payment of the debt which was guaranteed, and so afforded a good defence on Mrs. Aguilar's part against the plaintiff's claim. As things have happened, it appears to us on the whole that Mrs. Aguilar's original contract of suretyship is untouched; that the debt which she guaranteed has not been paid by Mr. Reid in any way; and that consequently she remains bound to discharge it.

This suit has been brought for the purpose of recovering from her the money so guaranteed, and a decree has been passed against her. We are of opinion that in substance the decision of the lower Courts is right, and that therefore this appeal should be dismissed. But regard being had to the manner in which the case has been dealt with by the lower Courts, particularly by the Lower Appellate Court, we think that each party ought to bear his own costs of this appeal.

The 15th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Over-payment of decree—Limitation.

Case No. 97 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 28th March 1874, affirming an order of the Subordinate Judge of that District, dated the 28th January 1872.

Muthoora Pershad Singh and another (Judgment-debtors), *Appellants,*

versus

Mohunt Shumboo Geer (Decree-holder), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Mutty Lall Mookerjee* for Appellants.

Baboo Kalee Kishen Sen for Respondent.

An application asking the Court to ascertain and determine how much a judgment-creditor has been over-paid is not barred by the lapse of the time allowed for execution of a decree if the applicant has not been guilty of laches and if he has come with due diligence.

Phear, J.—It is clear that this appeal has arisen altogether from a misapprehension on the part of both parties, and that this misapprehension has been in a great degree caused by the irregular form of the order which the first Court passed.

The application which the petitioner has made to the first Court is not an application for the execution of any already existing order or decree, but it is an application to the Court asking the Court to ascertain and determine how much, under the circumstances which have happened, the judgment-creditor in this suit has been over-paid, and to order the refund of so much money as shall, upon the investigation being effected, be ascertained to have been so over-paid. It is quite clear that an application of this sort is not barred by lapse of time, if the applicant has not been guilty of laches and if he has come to the Court with due diligence. And there is no ground in this case for saying that he has not acted with due diligence. He is therefore entitled to have an account taken by the Court from the judgment-creditor of the amount of money which the judgment-creditor has realized in execution of his decree over and above the amount which he ought to have realized. When that account shall have been duly taken, and the excess amount completely ascertained, then the Court will make the proper order for the refund of that excess.

This appeal must be dismissed, but the order of the first Court must be varied by simply making it direct that an account be taken from the decree-holder of the amount of money which he has realized under his decree in excess of the amount which he ought to have realized.

It seems hardly necessary to add that in taking this account the decree-holder cannot be held to have realized any money which he did not get into his hands either in specie or in the form of property purchased.

We think that each party must pay his own costs of this appeal.

The 15th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Regulation V. of 1812, s. 26—Regulation V. of 1827—Attachment—Jurisdiction.

In the matter of

Ram Runginee Dossee, *Petitioner,*

versus

Gooroo Doss Roy, *Opposite Party.*

The Advocate-General, Mr. C. Jackson, and *Baboos Sham Lall Mitter* and *Anund Chunder Ghossal* for Petitioner.

Mr. C. Piffard and *Baboo Ashootosh Dhur* for Opposite Party.

When a Judge has made an order in the terms of Regulation V. of 1812, s. 26, as modified by Regulation V. of 1827, he is *functus officio*, and it then lies upon the Collector, as manager and holder, to take, at his own proper risk and upon his own responsibility, everything that he finds to be part of the joint estate.

Jackson, J.—It appears that an application having been made to the Judge of Dacca in terms of section 26, Regulation V. of 1812, that inconvenience to the public and injury to private rights were likely to arise from disputes subsisting among the proprietors of the estate called Roopapat, the Judge, in conformity with a strongly expressed opinion of the High Court, made an order under the terms of that regulation, as modified by Regulation V. of 1827, that the estate in question should be placed under attachment. Section 4 of that regulation prescribes that the precept of the Zillah Court shall state specifically the property to be included in the attachment, and with that requirement the Judge complied when he ordered that the estate of Roopapat was to be attached. The Collector proceeded to carry out this order, and presently one of the parties concerned represented by petition to him that the attachment had not included a very important portion of the estate, *viz.*, certain mehals or jotes which the other joint owner, Gooroo Doss Roy, claimed to hold separately as holdings to which he was separately entitled and in which his co-sharer had no interest. The Collector satisfied himself that these alleged holdings were part of the joint estate, and were something to which the joint owners were jointly entitled. He thereupon attached these as well as the rest of the estate. An application was then made to the Judge, and the Judge held a sort of inquiry, and came to the conclusion that Ram Runginee had not made out that these were part of the estate attached. He says: "I think "some evidence is given to show that these "jotes were created and then resigned by the "descendants of the original grantees in "favour of the putneedar Chandy, who kept "them separate, and again, on the surrender "of the putnee, made them over to Gooroo "Doss Roy." He goes on to express some doubt whether the estate, even if surrendered, would not merge in the general estate, "but still," he says, "I think that these questions ought to be raised in a regular suit, and cannot be decided in a summary manner." Then he proceeds to decide in a summary manner, and orders that the tenures should be released. We are of opinion that the Judge, having made his order under the two regulations for the attachment of the estate of Roopapat, was *functus officio.* It then lay upon the Collector, who is the person indicated by the regulations as the manager and holder of the estate, to take, at his own proper risk, and upon his own responsibility, everything that he found to be part of the joint estate. If he takes anything beyond that, the party aggrieved has his remedy. If we were to hold otherwise, we should enable parties by the flimsiest pretexts to nullify orders of Court made for purposes of public convenience. We think the Judge had no power to make the order complained of, and in the exercise of our superintending authority we set aside that order with costs of this rule—five gold-mohurs.

The 15th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Documents—Witnesses.

Case No. 1802 of 1873.

Special Appeal from a decision passed by the Judge of Patna, dated the 16th May 1873, reversing a decision of the Subordinate Judge of that District, dated the 25th June 1872.

Shumshere Narain Singh (Defendant), *Appellant,*

versus

Baboo Rajkishore (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Gopal Lall Mitter* for Appellant.

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee* for Respondent.

Documents should not be used as evidence where they are at best statements made by a person who is alive, and who may be called as a witness.

Phear, J.—We are of opinion that the petitions A and B, which the Lower Appellate Court of its own motion sent for and used as evidence in this case, ought not to have been so used. So far as these documents are material and relevant to the case, they are at best statements made by a certain lady, a near relative of the plaintiff, who is alive, and who might have been called as a witness. And if these petitions are put on one side, then it seems that the Judge would not have been prepared to differ from the Subordinate Judge. He says: "Certainly, the evidence "given before the Subordinate Judge was "not as conclusive as it might be, still it did "seem strange that the plaintiff should have "allowed limitation to bar this suit, which he "might just as easily have brought a few "months before, when there could have been "no doubt as to his being within time. On "the case being heard in appeal, this Court "of its own motion sent for the petitions just "mentioned," &c.

And afterwards the Judge says: "There "has certainly been found strong evidence "in favour of plaintiff's assertion. Consi-"dering that from the evidence now before "the Court, the fact of the plaintiff not being "of age three whole years before the insti-"tution of this suit is clearly made out."

It appears to us from these expressions that, had not the petitions A and B been introduced in the Appeal Court as evidence between the parties in this suit, the Lower Appellate Court would not have reversed the finding of the first Court to the effect that the suit was not shown to have been brought within time. In this view, we think that the decree of the Lower Appellate Court must be reversed, and that of the first Court affirmed.

The appellant will have his costs in both Courts.

The 16th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree obtained by fraud—Procedure to set it aside—Rule of English law.

Case No. 1917 of 1873.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th May 1873, reversing a decision of the Moonsiff of Tajpore, dated the 19th September 1872.

Mewa Lall Thakoor (Plaintiff), *Appellant,*

versus

Bhujhun Jha and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Boodh Sen Singh* for Appellant.

Baboo Huree Hur Nath for Respondents.

To get a decree set aside on the ground that it was obtained by fraud and collusion, the proper course is to apply to the Court which passed the decree, either within the time specified in Act VIII. of 1859, s. 119, or at any time (so that it be done with due diligence), for a review and alteration of the judgment.

While no Court but a Court of appeal can interfere with the decree of a Court of competent jurisdiction, yet if the decree has been obtained by fraud, it shall avail nothing for or against the parties affected by it, even in another Court.

Phear, J.—We think that no ground of special appeal has been made out in this case.

The plaintiff in substance sues to set aside a decree which has been passed against him by a competent Court, and also to set aside the execution-proceedings and the sale which followed thereon.

The Judge has come to the conclusion upon the evidence that the decree was duly

passed, and that all the proceedings in the suit were regular and proper, and that there was no ground for setting aside the decree or subsequent proceedings. And we find no reason for disturbing this conclusion on special appeal. The Lower Appellate Court has given excellent grounds for the view which it has taken of the evidence.

We may perhaps add that it seems to us that this suit has been to a considerable extent misdirected. It has already been mentioned that the immediate aim of the plaintiff is to get a decree which was formerly passed against him by a competent Court set aside on the ground that it was obtained by fraud and collusion. But the proper course of obtaining such an object as that is to go to the Court which passed the decree, either within the time specified in section 119 of the Civil Procedure Code, if the circumstances are such as would justify action under that section, or at any time (so that it be done with due diligence) if the ground upon which the decree is sought to be set aside be a good ground for reviewing and altering the judgment upon which the decree was passed. And if the case of the plaintiff be, as it is in the present instance, that the decree was obtained by fraud, no better ground for review could be alleged. Though, of course, it need hardly be added that even in such a case as that supposed, it is necessary for the person aggrieved to apply to the Court for a review with due diligence, and without loss of time as soon as reasonably may be after the discovery of the fraud. In saying this, we do not in the least desire to question the right of every Court to disregard, or rather to consider of no force, decrees of other Courts which may be shown to its satisfaction to have been obtained by fraud.

The principle which governs Courts in cases of this kind may be found expressed by Lord Brougham in the case of Lord Bandon *vs.* Becher, 3 Cl. & F. 479. It is always a rule of the English Courts that while no Court but a Court of appeal can interfere with the decree of a Court of competent jurisdiction, yet if the decree has been obtained by fraud, it shall avail nothing for or against the parties affected by it, even in another Court.

So here, if the plaintiff had been the person attacked and had no choice of a course for obtaining his remedy, he might have asked the Court upon such evidence as he could put before it to disregard the *ex-parte* decree which the other side was using against him, and to treat it as a worthless decree on the ground that it had been obtained by fraud. But he is not in this suit the person attacked—he comes into Court of his own free will, asking for a declaration of title; and the proceeding which he ought to have adopted for the purpose of obtaining the relief he needs was to apply to the Court which passed the decree, and to get that Court to rectify the decree, or to set it aside, or to alter it in such a way as right and justice required.

We dismiss the appeal with costs.

The 17th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Ancestral property — Execution-sale—Remedy against a member of a joint family—Act VIII. of 1859, s. 205.

Case No. 33 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Cuttack, dated the 1st October 1872.

Kalee Pudo Banerjee (Defendant), *Appellant,*

versus

Choitun Pandah and others (Plaintiffs), *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

A sale in execution of a decree against some of the members of a joint Hindoo family of the interest of those persons in the family property does not give the purchaser a right to recover possession of a definite quantity of land.

Quære.—May not the creditor of a member of a joint Hindoo family have, under Act VIII. of 1859, s. 205, some remedy against the property to which his debtor may be entitled?

Couch, C.J.—The case of the plaintiffs, as stated in the plaint, is that there was

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sale by auction on the 24th of November 1867 of the land in dispute in this suit, as well as of other land, and that they purchased 29 batees 16 beeghas of land, and a sale-certificate was granted to them by the Court under which they held possession from the 18th of February 1868 by discharging the *tunkhee jumma*. It does not appear to have been proved that they actually had possession. They then allege that the defendants, under a purchase in execution-proceedings in another suit, had taken possession of the land and dispossessed the plaintiffs, and they ask that the defendant's kobala and the decree relating to the property in suit should be set aside, and that they may recover possession of the property by virtue of their purchase with mesne-profits for the period of dispossession.

The plaintiffs' right, they say, is founded in the first place upon a mortgage of the property by certain persons who were members of what is admitted to have been a joint Hindoo family; and it was also admitted that the property in dispute was the joint ancestral property of the family.

The mortgage was by some of the members of the family for Rs. 20,000. A suit was brought by the mortgagee, Mohun Doss Gossamee, against some persons, but all the members of the family were not included in it. The defendants were the persons who expressly executed the mortgage, and also the son of Anunt Doss, whose name was put to the mortgage, but in such manner as made it doubtful whether he put it as a mortgagor or merely as giving an assent to what was done.

It appears that a petition was then presented by the persons who were made defendants, together with Soobul Churn Doss, who was not a defendant, but who was a member of the family. This petition speaks of their having obtained six months' time from the plaintiff in order to liquidate the amount which was due, and engages that if the money is not paid within the time granted, the plaintiff may hold them and the mortgaged property, as well as other property belonging to them, liable for the satisfaction of the debt.

The money appears not to have been paid, and the plaintiff took proceedings in execution of his decree, the persons described as defendants being the same as he had made defendants in the suit, and the proceeding not being against all the members of the family, or purporting to be one by which the plaintiff sought to have execution of his decree against the whole of the family property.

The perwannah states that it is necessary to attach the property in the schedule below in order to realize the money that was due, and a direction is given for notices to be served. The schedule speaks of 125 batees 5 mans of land in one pergunnah, and of 40 batees 13 mans in another place in Mouzah Moolul Sahee. But it does not appear whether or not this is the land which was mortgaged. We are left in uncertainty about it, and no explanation is given why the execution was against the land which is scheduled.

There is a sale-certificate from which it appears that there was an order for the sale of 29 batees 16 mans 6 goonths and 15 biswas of land pertaining to Mouzah Beer Ramchunderpore out of the 125 batees that had been described in the schedule. No explanation is given why the sale was for the 29 batees, or what right the plaintiff had to have this quantity sold.

Then the certificate is that the purchasers had purchased whatever interest, right, or title the judgment-debtors had in the property, the judgment-debtors being the persons before described as defendants, and there being nothing to show that any other persons were to be treated as judgment-debtors. And it is ordered that the right, interest, and title which the judgment-debtors enjoyed in the purchased property should be vested in the purchasers.

In these proceedings there was a purchase by the plaintiffs of the right, title, and interest of some of the members of a joint Hindoo family in property admitted to be joint ancestral property, and there is no evidence of any transaction which would amount to a partition. The interest or share of the different members of the family appears not to have been fixed by any arrangement between them, and was what is described in the judgment in Appovier *vs.* Rama Sabha Aiyan,* 11 Moore's Indian Appeals 89. The question is whether a sale in execution of a decree against some of the members of a joint Hindoo family of the interest of those persons in the family-property can be supported where the family is subject to the law of the Mitakshara. The

*8 W. R. (P. C.) 1.

grounds upon which the judgment of the Court in the Full Bench decision was rested apply to a sale in execution of a decree. It appears to have been thought by the Court, in the case in 1 Madras High Court Reports 471, that the cases were analogous. In two decisions of this Court, it has been held that a sale of this description does not give the purchaser a right to a share of the property. It certainly does not give the purchaser such a right as the plaintiff claims to have, namely, a right to recover possession of a definite quantity of land. Jugdeep Narain Singh *vs.* Deen Dyal Lall and another, 20 Weekly Reporter 174, and 12 Bengal Law Reports 100, is an express decision on this point; and so is the case in 16 Weekly Reporter 31, Bhyro Pershad and another *vs.* Basisto Narain Panday and others. Seeing what is the claim of the plaintiff in this case, we have no difficulty in following these decisions.

Whether the creditor of a member of a joint Hindoo family may not, under section 205 of Act VIII. of 1859, have some remedy against the property to which his debtor may be entitled, although it may be the joint and undivided property of the family, and it cannot be predicated that he has a certain defined share of it, it is not necessary for us to determine in this case. We think the law will afford him some relief. In Syud Tuffuzzul Hossein Khan *vs.* Rughoo Nath Pershad, 14 Moore's Indian Appeals 50, the Judicial Committee say: "Mr. Leith "referred in his argument to the family-property of Hindoos, and urged that such a "share in such property may be attached "and sold in execution. No doubt can be "entertained that such a share is property, "and that a decree-holder can reap it. It "is specific, existing, and definite; but it is "not properly the subject of seizure under "this particular process, but rather by "process direct against the owner of it by "seizure, or sequestration, or appointment of "a receiver."

But we are of opinion that the title which the plaintiffs have relied upon in this case, and which they must prove, is not one which has been given to them by the proceedings in execution and by the sale under them. We think the decree which has been made by the Subordinate Judge, awarding to the plaintiffs possession of a fifteen-thirty-second part of the land in dispute, with mesne-profits, must be reversed, and that the appellant should have the costs of the appeal and of the suit in the lower Court.

The 17th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Act VIII. of 1859, s. 2—Res adjudicata—Objections and pleadings out of time.

Case No. 78 of 1873.

Regular Appeal from a decision passed by the Extra Assistant Commissioner and Subordinate Judge of Gowalparah, dated the 24th December 1872.

Protap Chunder Borooah, Rai Bahadoor (Plaintiff), *Appellant,*

versus

The Collector of Gowalparah on behalf of Government and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Hem Chunder Banerjee* and *Tarinee Kant Bhuttacharjee* for Appellant.

Baboos Unnoda Pershad Banerjee, Mohinee Mohun Roy, and *Tarucknath Palit* for Respondents.

In a suit to recover possession of a julkar in which defendant raised the plea of *res adjudicata,* basing it upon a judicial decision against a predecessor of the plaintiff, of which decision defendant filed a copy of a copy:

HELD that as plaintiff did not object to the admission of the document as evidence at the proper time, it was too late to raise the objection in the Appellate Court:

HELD that plaintiff could not for the first time in the appellate stage found his title on adverse possession for a long time when such case was not set forth in the pleadings and was inconsistent therewith.

Kemp, J.—THE plaintiff is the appellant in this case. During the argument of this appeal, which was a very able one, the state of facts originally alleged and pleaded by the plaintiff was considerably departed from, and points not to be found in the pleadings, and which are not involved in these pleadings and are inconsistent with them, have been touched upon during the argument. It will, therefore, be necessary to state briefly the nature of the pleadings in the Court below. The plaintiff sued on the allegation that under the permanent settlement he was entitled to the julkur of the river Brahmapootra, together with its branches Gopes and Koles, as per boundaries stated at the foot of the plaint; that the defendant No. 1, the Collector of Gowalparah, had no manner of right or ownership therein;

that the defendant No. 1 dispossessed the plaintiff by force and fraud in the month of June 1867 by colluding with, and by making an ijara settlement of the julkur with the defendant No. 2, Pirthee Ram Chowdhry, Rai Bahadoor. The plaintiff therefore seeks to obtain a decree for the property in question, together with costs and interest.

The written statement on behalf of the Government with reference to the point which is under consideration, namely, whether the suit of the plaintiff is barred under section 2, is to the following effect—(see para. 3 of the written statement, page 4 of the printed book)—that Joy Doorga Burooanee, the predecessor of the plaintiff, had before this brought a suit in the year 1823 against the zemindar of Chapore for possession of the julkur in question, but that her suit was dismissed by the Rungpore Court on the 26th of August 1823. Hence the plaintiff's suit is *res adjudicata*.

Pirthee Ram Chowdhry, the lessee of Government, merely supports the Government, and states that he has obtained an ijara lease from them, and beyond having obtained that lease and holding possession under it, he has not forcibly or fraudulently dispossessed the plaintiff, who has unnecessarily made him a defendant.

Then we have the written statement on behalf of the plaintiff, dated the 23rd of April 1872, the same day on which the written statement on behalf of Government was filed; and it is clear that this statement must have been filed when the plaintiff was in possession of the fact that the Government intended to raise the plea of *res adjudicata*, for that question is alluded to in para. 6 of the written statement of the plaintiff, page 8 of the printed book, in which the plaintiff attempts to get rid of the plea in bar by stating as follows: "Rohinee Debia "Chowdhrain, the zemindar of Chapore, "having raised a dispute in respect of the "julkur claimed, my grandmother, Joy Doorga "Burooanee, brought a suit in the Civil "Court of Rungpore and obtained a decree "on the 28th of November 1820. After-"wards my grandmother sued for mesne-"profits of the julkur extending from Dheer-"pahar to Boglamaree, but her claim was "rejected by Mr. David Scott on the 26th "of August 1823 on the ground that it had "not been established. My right to the "julkur decreed to me on the strength of "permanent settlement has not been pre-"judiced thereby, inasmuch as that suit "did not involve any question of title, but "was simply one for recovery of mesne-"profits. Hence it is no bar to the present "claim."

Therefore this written statement of the plaintiff with reference to the plea raised by the defendant No. 1, the Government, that the suit was barred as *res adjudicata*, is to the effect that the decision of Mr. Scott of the 26th of August 1823 "did not "involve any question of title, but was simply "one in a suit for recovery of mesne-profits."

The zemindar of Chapore, Kirthee Narain Chowdhry, appears in the suit as a petitioner, but we are informed that he was subsequently made a defendant. He also in the 2nd para. of his written statement at page 10 of the printed book refers to the former suit and says: "My predecessor, the late Rohinee "Debia Chowdhrain, made an appeal against "the order of the Commissioner of the Eastern "Division of Zillah Rungpore, and her "appeal was decreed. Hence no right "whatever in the julkur in question can "accrue to the plaintiff, and his claim cannot "be brought again in a Civil Court under "the provisions of section 2 of Act VIII. "of 1859."

The issues in bar were, 1st, is the suit barred by limitation? and, 2nd, whether the cause of action has been before heard and determined, and is consequently barred by section 2, Act VIII. of 1859?

The Deputy Commissioner of Gowalparah, after giving in great detail the statements of the parties, says: "I take the second "issue in bar first, that is, the question of *res* "*adjudicata*, and proceed to determine "whether or not the question as to the pro-"prietary right and title to the julkur has "already been heard and disposed of in "another suit, as if such prove to be the "case, it will be unnecessary to go into the "other issues raised;" and on that issue he finds that the defendant No. 3 filed a copy of a copy of a decision of Mr. David Scott, Commissioner, dated the 26th August 1823; that from that decision it appears that Joy Doorga Burooanee, the predecessor in the zemindary of the plaintiff in the present suit, brought an action against Rohinee Debia, the mother of the defendant No. 3 in this suit, to establish her proprietary right in the fishery, extending from Kandar Chowky to Kholamara Jyar Char; that in that suit the plaintiff obtained a decree in the Court of first instance, but that in appeal Mr. David Scott reversed the decision of the first Court. The decision of the Deputy Commissioner then proceeds to say: "We must see

"whether the fishery, the cause of the present "action, is one and the same, or portion of "the same, as that which plaintiff's prede-"cessor unsuccessfully sought to obtain pos-"session of from the mother of the defendant "No. 3 in 1823." On this point the Deputy Commissioner finds "that as the julkur now "in dispute is admittedly one of the four "portions into which plaintiff's fishery of the "Brahmapootra was divided, the whole "length of the julkur extending from Kandar "Chowkee to Kholamara Jyar Char, and "that as the whole julkur was in litiga-"tion in the former suit, the title of the "plaintiff was raised in that suit and decided "against him, therefore, as the portion of "the julkur which forms the subject of "the present suit is only a portion of the "whole julkur, and as the title to the whole "julkur was disposed of in 1823, the suit "is clearly barred under section 2 of Act "VIII. of 1859."

The grounds taken in the petition of regular appeal are with reference to the finding of the lower Court under section 2, Act VIII. of 1859; that the Court was wrong in holding that the suit was barred; that the lower Court has not rightly understood the cause of action upon which the present suit is brought; and that it is an error in holding that this cause of action has been already heard and determined; and then there is a further ground, which was raised in the argument before us, that the lower Court was in error in allowing the paper purporting to be a copy of a copy of a decision of the Commissioner, dated the 26th of August 1823, to be admitted and used as evidence. The pleader for the appellant referred the Court to the new Evidence Act, section 63, Illustration C, and urged that inasmuch as this document was a copy of a copy, it was inadmissible in evidence. Illustration C of section 63 says: "A copy "transcribed from a copy, but afterwards "compared with the original, is secondary "evidence; but a copy not so compared is "not secondary evidence of the original, "although the copy from which it was "transcribed was compared with the original."

Now, in this case the copy of a copy, or the second copy, was not compared with the original, but was compared with the first copy which had been compared with the original, and therefore the pleader contends that this document was inadmissible as evidence. It was contended on the other side by the Senior Government Pleader that this objection was not taken in the Court below, and therefore could not be taken at this stage of the case. On referring to the judgment of the Court below, we find that the objection to this document on the part of the plaintiff appears to have been taken only at the time of the argument before the Court and not before. The Deputy Commissioner says that the pleader for the plaintiff takes objection to the admission as evidence of the copy of judgment filed by the defendant No. 3. Then the Deputy Commissioner says that the rulings quoted by the plaintiff's pleader in his Court were not applicable to copies of proceedings of Courts; that the copy objected to bears the signature of the then Judicial Commissioner of Assam, Major Vetch; and that there is no reason whatever for rejecting it. Now, it is clear in this case that the objection was not taken at the proper time in the Court below. The issues in this case were fixed on the 19th of June 1872, and the decision of the Court was not passed until the 24th of December 1872. Six months, therefore, elapsed between the fixing of the issues and the decision of the case. In the issues the second issue in bar is whether the cause of action has been before heard and determined, and consequently barred by section 2, Act VIII. of 1859, and that issue was framed upon the written statement of the defendant No. 1, the Government, in which the Government clearly raised the plea of *res adjudicata* as a bar to the suit, basing that plea upon this very decision of the 26th of August 1823; and therefore the plaintiff had plenty of time between the 19th of June and the 24th of December to object to this document being received in evidence, inasmuch as it was a copy of a copy. Had he done so in due season, the Collector would have had an opportunity of producing the original from the Government offices, or of adducing evidence to prove that that copy of a copy had been compared and was admissible. The objection not having been taken in proper time, it cannot now be raised in this Court. We therefore admit this document and proceed to decide whether the suit of the plaintiff is barred under section 2 of Act VIII. of 1859.

Referring to the proceeding of Mr. David Scott of the 26th of August 1823, we find that a previous suit had been brought by the predecessor of the plaintiff against a ryot of the name of Mayaram Manjee. In that suit the plaintiff had stated that as against the ryot she was enti-

tled to the julkur of the Brahmapootra extending from Dheerpahar to Boglamaree, but she set forth her zemindary title as extending from Kandar Chowkee to Kholamara Jyar Char. Her suit against Mayaram Manjee was dismissed, and she was referred to a suit in the Civil Court to establish her title. She then brought a suit for that purpose, namely, to establish her title to the julkur from Dheerpahar to Boglamaree, and obtained a decree in the Court of first instance. On appeal, Mr. Scott called upon the plaintiff in that case, the respondent before him, to prove her zemindary title in the whole julkur, and time was given her for that purpose. She filed certain documents in support of her title, namely, an isteklalee perwannah and other documents which she said would prove her title. Mr. Scott, on the case coming before him, was of opinion that the plaintiff in the case, the respondent before him, had failed to prove her title to the julkur in question. He said that the quinquennial papers of 1202 made no mention of the julkur in suit as appertaining to the zemindary of the plaintiff before him. He also went into the question whether the plaintiff had been in possession of the julkur, and found on the evidence that the witnesses of the plaintiff were not to be believed; that one of them was her servant, and the others her shikmee ryots, and were not to be credited; and that the witnesses of the defendant, appellant before him, the zemindar of Chapore, were to be preferred. He therefore reversed the decision of the first Court, finding that the plaintiff had proved neither her title in the julkur nor her possession.

With reference to this decision, the argument before us has been that inasmuch as it only involved a portion of the whole julkur, namely, that portion extending from Dheerpahar as the starting point to Boglamaree, therefore the question as to the title of the plaintiff in the whole of the julkur was not decided in that case.

The pleader for the respondent referred us to the revenue survey pergunnah maps, and contended that they clearly show that the julkur now in dispute was part and parcel of that which was the subject of the former suit. These maps are admissible as evidence, and are prepared on a large scale of one inch to the mile. The appellant contends that the names therein given are not the same as those that were known at the time of the former dispute. Now, it may be the case that, in the course of the 30 years intervening between Mr. Scott's decision and the revenue survey, changes have taken place in the bed of the river. But the starting point of the original disputed julkur was far beyond the limits of Pergunnah Chapore to the north, and the point of termination of that dispute is down stream beyond the point given by plaintiff as the termination of julkur No. 3 in the present suit. So that we entertain no doubt that the julkur now sued for was included in the suit of the julkur originally instituted by the plaintiff's predecessor.

The pleader for the respondent also urged that the decision of 1823 not only decided the question of title adversely to the plaintiff's predecessor in the julkur from Dheerpahar to Boglamaree, but that the title to the whole julkur was decided. We think on referring to that decision that the whole title of the plaintiff in this suit to the julkur of the Brahmapootra, extending from Kandar Chowkee to Kholamara Jyar Char, was raised in that suit between the predecessor of the plaintiff and the predecessor of the zemindar of Chapore, and that the title of the then plaintiff was decided adversely to her.

Then another argument was raised by the appellant that, whatever might be the interpretation of the Court upon the decision of 1823, the plaintiff had been for a long time in possession, and that he has acquired an adverse title independent of any considerations arising out of that decision of 1823. This is an entirely new ground, and one which was not taken either in the plaint or in the written statement of the plaintiff in the Court below; and therefore on the principle laid down in the decision of their Lordships of the Privy Council in the case of Eshan Chunder Singh *vs.* Shama Churn Bhutto,* we cannot allow an argument which is founded upon a case which is not set forth in the pleadings, and is inconsistent with the case thereby made, to be raised for the first time in the appellate stage of the case.

Then another case was sought to be made out, also for the first time, in the course of the reply of the pleader for the appellant, *viz.*, that neither the Government nor the zemindar of Chapore were in a position to raise the plea in bar under section 2. It will be sufficient to say with reference to that point that the Court would not allow the pleader to argue it, inasmuch as it was not at all raised either in his opening in the grounds of

* 6 W. R. (P. C.) 57.

appeal or in the written statement in the Court below.

On the whole case, concurring, as we do, with the Deputy Commissioner in holding that the suit is barred under section 2 of Act VIII. of 1859, we dismiss the appeal with costs.

The 17th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Manager—Accounts.

Case No. 106 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 27th March 1874.

Huree Sunkur Mookerjee (Judgment-debtor), *Appellant,*

versus

Jogendro Coomar Mookerjee (Decree-holder), *Respondent.*

Baboo Nil Madhub Sen for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Where a manager had not filed accounts and the Judge found that the management could not be continued with any prospect of the debt being paid within three years, he was held to have done right in removing the manager and ordering the property to be sold.

Kemp, J.—In this case the appellant is the judgment-debtor, the decree-holder is the respondent, and they stand in the position to each other of father and son. The Judge after giving notice to the judgment-debtor and to the manager, a procedure which is enjoined by Rule 8 of the Circular Order of this Court,* No. 19 of the 11th of July 1871, was of opinion that regard being had to the claims upon the property of the judgment-debtor, the management could not properly be continued with any prospect of the debt being paid within the limit of three years. Now, although the Judge is perhaps wrong in saying that this Court has laid down that under no circumstances shall the limit of three years be exceeded, inasmuch as this Court in the above-quoted Circular Order, para. 3, says that in *ordinary cases* such period ought not to exceed two or three years, still the Judge having found that the management of the property could not be properly continued with reference to the claims on the judgment-debtor, and the prospect of these claims being satisfied by the management being continued; and looking to the fact that the Judge is correct in saying that upwards of Rs. 6,000 are still due, and that the profits of the property, taking everything into consideration, are not more than Rs. 1,400, we cannot say that the Judge was wrong in removing the manager, who had not filed accounts as he was bound to do under the law, and in ordering the property to be sold.

The appeal will be dismissed with costs, pleaders' fees two gold mohurs.

* 16 W. R. (Civil Cirs.) 2.

The 17th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Presumption of uniform payment of rent—Admission.

Case No. 2694 of 1873.

Special Appeal from a decision passed by the Judge of Jessore, dated the 22nd August 1873, modifying a decision of the Moonsiff of Khoolneah, dated the 28th February 1873.

Judoonath Roy (Defendant), *Appellant,*

versus

Rajah Buroda Kant Roy Bahadoor (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Sreenath Doss* for Appellant.

Baboo Ashootosh Dhur for Respondent.

In a suit for rent at an enhanced rate after notice, plaintiff set forth that defendant and his predecessors had been holding the tenure without any change in the rent, but alleged also that the tenure had its origin at a period long after the permanent settlement:

Held that defendant was not at liberty to avail himself of such portion of the admission as afforded a ground for the presumption of uniform payment from the permanent settlement without accepting the latter part of the admission which rebutted such presumption.

Jackson, J.—We think the special appeal in this case must fail. The plaintiff sued to recover rent at an enhanced rate after notice. In that notice the plaintiff said that the predecessor of the defendant had acquired a jote in the plaintiff's estate during the minority of the plaintiff, which is found to

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have extended over a period between 1816 and 1834, and that the rent which the defendant was paying therefor, which is said to be Rs. 68, was less than what other ryots with like advantages were paying. Plaintiff therefore claimed to enhance the rent to about Rs. 600.

The defendant alleged that he and his predecessor had paid rent at a rate unchanged for more than 20 years, and he therefore claimed the benefit of the presumption which the law raises in his favour, and contended that he was exempt from enhancement. Upon this point the defendant really gave no evidence of his own, but he produced dakhilas of five or six years. These dakhilas did not cover any thing like the required period of 20 years, but the defendant relied upon an admission contained in the plaint and in the notice to the effect that he and those who held before him had paid at the rate of Rs. 68 for a period of more than 20 years. The Judge, in dealing with this admission as to the rate, says: "Although appellant "has entirely failed to prove that he has paid "rent at a uniform rate for 20 years, I think "it is clear from the wording of the plaint "and the notice served on appellant that "appellant's jumma had been in existence "for considerably more than 20 years without any change of rent having ever taken "place, but I do not think that appellant can "gain any benefit from this fact, for it is also "clear from the plaint and the notice that the "tenancy commenced while plaintiff's estates "were under the management of the Court of "Wards, that is to say, about the year 1230, "and consequently long after the permanent "settlement." What the Judge means to lay down in that passage, which is in effect the view taken by the Moonsiff, is, we think, also the view of the law taken by Division Benches of this Court, especially in the judgments of the late Chief Justice Sir Barnes Peacock reported in 9 Weekly Reporter, pages 130 and 190, and also in another case in 7 Weekly Reporter, page 29. Sir Barnes Peacock there lays it down as a general rule that when a party is desirous of availing himself of an admission made by his adversary in his written statement, the whole of the written statement must be put in and considered. In this case the plaintiff with great honesty set forth that the defendant had been holding this tenure without any change in the rent, but at the same time also alleged that the tenure had its origin at a period comparatively recent long after the date of the permanent settlement. In that way the very evidence by which it is sought to bring the defendant within the benefit of the presumption of his having held from the date of the permenent settlement at an unchanged rate of rent is absolutely rebutted by the statement which is contained in the same paper that that tenure had its origin much later than the permanent settlement. There is no evidence whatever given on the other side to lead to the supposition that the allegation contained in the plaintiff's statement is untrue. We think, in this state of the evidence, the Court below was not bound to give defendant the benefit of the presumption he claimed, and that the plaintiff was entitled to a decree.

The appeal is dismissed with costs.

The 17th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Suit for Khas Possession—Multifariousness—Fraud—Cause of Action.

Case No. 231 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 16th July 1873.

Saheb Roy and others (some of the Defendants), *Appellants,*

versus

Gujadhur Pershad Narain Singh (Plaintiff), *Respondent.*

Baboo Aubinash Chunder Banerjee for Appellants.

Mr. R. T. Allan and *Baboos Nil Madhub Sen* and *Hureehur Nath* for Respondent.

In a suit for khas possession by a landlord, the tenant defendants set up a mokurruree title upon the footing of jumma-bundee papers which plaintiff alleged to be a forgery and to be fraudulently used. Failing to prove the allegation of forgery, plaintiff claimed a declaration that defendants had not a right to occupy the land at a fixed rent:

HELD that such a declaration could rightfully be asked for only in a separate suit against each separate occupant:

HELD, further, that having pledged himself to prove a specific fraud, and made his cause of action entirely dependant upon that, plaintiff failing there could not be allowed to succeed on a collateral matter.

Phear, J.—THE plaint in this suit is so ill-drawn that we have not found it easy to satisfy ourselves as to what precisely is the cause of action upon which the plaintiff has come into Court.

We think, however, that he sues to recover from the defendants possession of a certain 205 beeghas of land which are occupied by them, and to which they set up a mokurruree title upon the footing of some jumma-bundee papers bearing date 1251. The plaintiff says that these papers were fabricated by Ramessur Roy, ancestor of the defendants, while he, Ramessur Roy, was in a position of trust as servant of the plaintiff and had the opportunity of doing so. And he maintains that these papers have been fraudulently made use of by the defendants with the knowledge that they were forged for the purpose of supporting their alleged mokurruree title. On this ground he asks to have these papers declared forgeries, and also seeks, as before said, to recover possession of the land. This was the view taken by this Court as to the scope of the plaint when the case was last here, on the occasion when the remand-order was made. And, accordingly, the case was sent down to the first Court to be tried upon its merits as so understood.

On the remand thus made, there ought to have been but one principal issue, namely, the issue whether or not the jumma-bundee papers were forged by Ramessur Roy, as the plaintiff alleged they were, and whether or not the defendants fraudulently made use of them knowing that they were forgeries, as the plaintiff said they did.

Unfortunately, although an issue to some extent corresponding with this was framed in the Court below, other issues were also allowed to be raised questioning the defendant's right to hold possession of the land in suit at a fixed rate of rent. The result of the trial which has been had on remand has been that the Subordinate Judge finds "that the plaintiff, on whom the onus of "proof rests, has no direct or primary "evidence to show the fabrication of the "jumma-bundee of 1251F., but the defend-"ant's documents, Nos. 36 and 37, prove that "it was antedated when filed by Udheen "Doss Putwaree in the Court of Wards. "The delay with which it was so filed there, "would induce the supposition of its having "been so prepared by that Putwaree with "some latent object."

And upon a reference to the evidence, we see that the Subordinate Judge was entirely right in saying that the plaintiff has produced no direct evidence of the fabrication of the jumma-bundee paper. In truth, there is not a particle of evidence on the record tending in the slightest degree to show that that jumma-bundee paper is any thing but an authentic document. Although the Subordinate Judge said that the defendant's documents Nos. 36 and 37 prove that the jumma-bundee of 1251 was antedated, we cannot discover that this is so. All that these documents (put in by the defendants themselves) do show, appears to be this, that when in Jyte 1251, the jumma-bundee of the year was called for, the Putwaree at first said that it was not ready, but after a week's delay he produced it. Nothing is adduced to show that the document or documents when produced were in any true sense antedated; nothing to indicate that the Putwaree did prepare them, if he prepared them at all, from other than authentic materials. And if the jumma-bundee so produced was not the true jumma-bundee of 1251, and if the evidence on the record points in any way to the person who fabricated it, that person is the Putwaree, not Ramessur Roy who is charged by the plaintiff with the forgery.

Thus it seems quite plain upon the evidence which has been given by the plaintiff in this case that his charge of forgery against Ramessur Roy, of fraudulent conduct on the part of the defendants in availing themselves of the forged document, entirely falls to the ground. There is not a particle of evidence to support that charge. This being so, the suit ought to have been dismissed according to the terms of the remand.

Nevertheless it has been argued before us that on the foundation of the plaintiff's allegations, regard being had to the position taken up by the defendants in answering the plaint, the plaintiff was entitled to have a declaration that the defendants have not a right to occupy the land which is the subject of suit at a fixed rent. And it is further maintained that the evidence in the case and the decision of the Subordinate Judge makes out this claim of the plaintiff.

But it appears to us that the plaintiff is not entitled in this suit to have a declaration of this kind, for more than one reason. In the first place, it is plain that such a declaration could rightly be asked for only in

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a separate suit against each separate occupant of the land. The effect of construing the present plaint as amounting to so many suits against the different defendants would be to make the present suit multifarious. But that was precisely the objection which was made by the defendants against the suit when the case was last before this Court, and the objection had been allowed to prevail in the Court below. The plaintiff on that occasion succeeded in getting a remand-order from this Court on the ground that the suit was not in effect a separate suit against the separate individual defendants, but was a suit brought against the whole of them collectively upon one common ground of fraud. Inasmuch as the plaintiff asked the Court to take that view of the case when it was last here, it does not lie in his mouth now to pray for a declaration of right which could only be given to him with propriety after trial of a separate suit against each one of the defendants separately.

But there is a still stronger reason why the plaintiff ought not to be allowed in the present suit to succeed upon this ground. He advisedly charged the defendants with a gross fraud. He made it the foundation of his suit that Ramessur Roy had forged the jumma-bundee of 1251, and that the defendants had with full knowledge of this fraud for years persisted in maintaining themselves in the position of mokurrureedars, on the footing of the evidence furnished by the jumma-bundee of 1251. On this ground he placed his right to have the jumma-bundee papers of 1251 set aside as fabrications, and claimed to recover khas possession of the land from the defendants, who had thus wrongfully set up an invalid mokurruree title against him. Having thus pledged himself to prove a specific fraud against the defendants, and having made his cause of action entirely dependent upon that, he cannot be allowed at the trial to succeed upon a matter which was entirely collateral to the fraud, and in the face of a finding that no fraud had been established.

We are, therefore, on the whole, of opinion that the decision of the lower Court is wrong, and must be reversed. The plaintiff's suit must be dismissed with costs. At the same time we think that this decree ought not to operate to the prejudice of the plaintiff's right, if he has any such right, either to terminate the tenancy of the defendants, or to claim enhanced rent from them in respect of the land, which is now the subject of suit, or any portion of it.

The 17th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Bond—Penalty—Liquidated Damages.

Case No. 1930 of 1873.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 25th July 1873, affirming a decision of the First Subordinate Judge of that District, dated the 25th November 1872.

Boolakee Lall and another (Plaintiffs), *Appellants,*

versus

Radha Singh and another (Defendants), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Moonshee Serajul Islam for Respondents.

Where a bond stipulated for a higher rate of interest in the event of the money not being paid at the appointed time, the stipulation was held to be, not of the nature of a penalty, but of liquidated damages, for it provided not an unvarying lump sum, but a sum increasing with the time during which the obligee was kept out of his money, and was therefore very appropriate as a measure of the proper compensation.

Even where a stipulation is intended to operate as a penalty, it is incumbent on the Court to consider what amount of money would properly measure the damages consequent on the default.

Phear, J.—We think that the lower Courts are wrong in the view which they have taken to the effect that the stipulation for the higher rate of interest in the event of the money not being paid at the appointed time is of the nature of a penalty, and not liquidated damages.

The first Court says: "This bond was "executed on receipt of Rs. 1,900 in cash "stated in the bond, and interest at 1-8 per "cent. per mensem has been stipulated for "till the period of repayment, and, after the "expiry of the prescribed period, interest "shall run at the rate of 3 per cent. per "mensem; the second condition is evident-"ly a penalty."

And for this reason the Court gave the plaintiff a decree for Rs. 1,900 principal and

interest thereon at 1-8 per cent. per mensem only up to the date stipulated in the bond and subsequent interest on the principal up to the date of the decree at 1 per cent. per mensem.

It seems to us that the plaintiff is entitled, on his agreement in the events which have happened, to the full rate of 3 per cent. per mensem upon the principal sum of Rs. 1,900 from the date of the bond until the date of payment.

The general question whether a stipulation of this kind is intended by the parties to operate as a penalty, or is an assessment of liquidated damages, varies in each individual case. We lately had before us a case, which is reported in 20 Weekly Reporter, page 257, and in which we were of opinion that the particular stipulation which was then the subject of our consideration operated by way of penalty.

According to the terms of the ikrar in that case the defendant was to pay rent in certain kists, and, if he did not pay them precisely on the days and at the times named, he was afterwards to pay just double the amount of the unpaid kist. There was in that case no proportion apparent between the sum of money which was to be paid as the consequence of the default, and the loss or inconvenience occasioned by the default. Double the amount was to be paid in each instance of default, however soon or long afterwards this payment was made. And we were of opinion, taking all the circumstances of that case into consideration, that the stipulation for double payment operated simply by way of penalty, and that the plaintiff was only entitled to recover out of the penalty so much as would properly measure the amount of damage which he had sustained by reason of the default.

In the present case, the event which is to be secured by the stipulation is single, namely, the payment of a certain sum of money with a specified increase by way of interest on an appointed day. If that payment was not made, then the stipulation was to the effect that the debtor should pay interest upon the sum due at the higher rate of 3 per cent. instead of at the rate of 1-8 per cent. And this is not an unvarying lump sum which it would be unreasonable to suppose was intended by the parties as a measure of damages, but it is an amount of money which, from a small beginning, grows with a lapse of time, and therefore by its nature is very appropriate as a measure of the proper compensation due to the lender for the non-payment of the money. It increases with the time during which he is kept out of his money.

So that we have here one event only to be secured by the stipulation; and we have the sum by which this event is to be secured of such a character as makes it appropriate as a compensation for the non-payment of the money.

We, therefore, think on the whole that it was intended by the parties to be liquidated damages, and not merely a penalty.

In this view, the decree of the lower Courts is wrong, and the plaintiff must recover the Rs. 1,900 principal with interest thereon at 3 per cent. per mensem up to the date of the decree, and 1 per cent. per mensem upon this aggregate amount from the date of the decree to the date of realization.

The appellant must have his costs.

We may observe that, even if the Courts below had been right in interpreting this stipulation as a stipulation intended to operate by way of imposing a penalty, it was incumbent upon them to have considered what amount of money would properly measure the damages consequent on the default which this penalty was intended to prevent. Neither the first Court nor the Appellate Court addressed itself to this point.

The 17th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, s. 353—Remands.

Case No. 1815 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 9th July 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 22nd February 1872.

Mussamut Rama Kooer and others (Defendants), *Appellants,*

versus

Lalla Bhugwan Lall (Plaintiff), *Respondent.*

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Mr. R. E. Twidale for Appellants.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondent.

Where the Moonsiff dismissed a suit as barred after taking all the evidence offered on the merits, HELD that the Lower Appellate Court was not competent to remand the case for re-trial.

Phear, J.—THE Judge is no doubt right in the view which he has taken that the decision of the Collector which the Moonsiff thought stood in the way of the plaintiff's bringing the present suit does not operate as such bar. The plaintiff asks to have it declared that the property which is mentioned in the plaint is the joint property of himself and the other parties to the suit. And further that he is entitled to a certain share in it.

The ground upon which he asks for this declaration of right and title, is that he has lately applied to the Collector for a butwarra and has been opposed by the defendants or some of them. There is nothing in the Collector's decision of 1864 which should operate to effect a *res judicata* in regard to this claim. The present matter has not yet been tried by a competent Court, and the cause of action occurred long within the period of 12 years antecedent to the date of suit.

But it appears that although the Moonsiff dismissed the suit on the ground that it was barred, he took all the evidence which the parties offered upon the merits of the case. And this being so, it was not competent to the Judge to remand the case for a re-trial. Section 353 of the Civil Procedure Code says: "When the evidence upon the record "of the lower Court is sufficient to enable "the Appellate Court to pronounce a satis-"factory judgment, the Appellate Court "shall finally determine the case, notwith-"standing that the judgment of the lower "Court has proceeded wholly upon some "other ground." As was the case here, it proceeded upon a preliminary issue and not upon an issue affecting the merits.

The order directing the remand must be reversed, and the case must be sent back for re-trial.

The costs of this appeal will abide the event.

The 18th June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Maintenance grants—Zemindar's right of resumption—Adverse possession.

Case No. 2794 of 1873.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 4th September 1873, reversing a decision of the Deputy Commissioner of Manbhoom, dated the 6th May 1873.

Rajah Woodoy Aditto Deb (Plaintiff), *Appellant,*

versus

Mukoond Narain Aditto Baboo and others (Defendants), *Respondents.*

Mr. G. H. P. Evans and *Baboos Mohinee Mohun Roy* and *Ashootosh Mookerjee* for Appellant.

Baboos Chunder Madhub Ghose and *Umbika Churn Bose* for Respondents.

Land held as a maintenance grant is resumable by the zemindar at the death of the grantees, whether it is in the hands of more immediate, or in those of more remote, members of the family, the nature of such a grant being to make suitable provision for the immediate members, while it prevents the zemindary from being completely swallowed up by continual demands.

The successors of such grantee, paying rent to the zemindar, cannot be regarded as holding adversely to him.

Markby, J.—ALTHOUGH this special appeal raises questions which are undoubtedly of very considerable importance, and although the discussion has turned in some respect upon inquiries which are somewhat obscure, it appears to us that our judgment must be finally upon what are very simple matters. The suit is brought to recover possession of eight mouzahs in Pergunnah Patkoom, of which the plaintiff is the zemindar. The plaintiff alleges that these lands were held as a maintenance grant by the persons to whom the defendants succeeded; that their right under the maintenance grant had come to an end; and that he has a right to resume it. The defendants, on the other hand, contend that their ancestors were in possession of this property as a mokurruree tenure, paying rent at the rate of Rs. 101 a year. The issues drawn up were—whether the suit was barred by limitation; whether the land in

suit is a maintenance grant or it is held as a mokurruree tenure; and whether the plaintiff can resume this land and take khas possession of it? There was one other issue, but it is immaterial.

The first Court held that the eight mouzahs in question were granted by Rajah Satraghanadit, the Zemindar of Patkoom, to his brother Raghabadit, the great grandfather of the defendants. The document by which the original title was created is not produced; but the Deputy Commissioner says that "it "is quite clear and admitted by the defendants "(and there is no doubt that by that he "means the present defendants in this suit) "that these mouzahs with five other mouzahs "were granted by Satraghanadit to his "brother Raghabadit, who, according to the "custom of the country, was entitled to "receive a maintenance grant." Subsequently he says that it is admitted that if these mouzahs are held as a maintenance grant they would be resumable, as the defendants have no right to such a grant. Then he goes on to say: "Now, on this "point there can be no reasonable doubt that "such was the original nature of the grant "made to Raghabadit, the next elder brother "to Satraghanadit, who succeeded his father "in the Patkoom estate, and who, in accordance "with the custom of the country and this "estate, was obliged to give a maintenance "grant to the Hakim, his next elder brother, "who held it as his hakimalee khorposh "grant; and that such was the nature of this "grant we find was admitted by Jainathadit, "Radhanathadit, and even by Madhubadit, "who, although he appealed against the "compromise fixing the rent at Rs. 175, did "not object to the holding being considered "a maintenance grant." These are the findings of fact of the Deputy Commissioner. The compromise here spoken of is the solehnama executed about the year 1835, under which no doubt the immediate predecessors of the defendants held. A dispute having arisen between the then Rajah and the three brothers whom the present defendants represent as to whether these lands were resumable, that dispute was ultimately terminated by this solehnama. But the view which the first Court, we think, substantially took of that deed was that it left the parties in *statu quo*, that is to say, it merely came to this that whatever rights the parties had they should continue to hold. Now, the result of this, taking it with the previous finding of fact that these lands were originally held as a resumable maintenance grant, is to establish the case which the plaintiff desires to make out. Upon these grounds the Deputy Commissioner gives the plaintiff a decree.

Then the case came in appeal before the Judicial Commissioner, and the Judicial Commissioner raises the same issues. Upon those issues he also finds that the villages in dispute were given as a maintenance grant by Satraghan to his younger brother Raghab. He also puts the same construction upon the solehnama, namely, that it left the parties in the same position as they had been before. He nowhere expresses any dissent from the finding of the first Court that maintenance grants are resumable in this family as a general rule. But he engrafts upon that rule a distinction, namely, that the plaintiff has not shown that he possesses "a constantly "recurring right to resume on the death of "each holder of a maintenance grant."

Now, the only way in which we can understand that is that the Judicial Commissioner thought that whereas the Rajah would have a right to resume the first time that any specific portion of the zemindary was granted to a member of the family as maintenance, yet that if for some reason or other the same identical piece of land was re-granted to the heir of the original grantee, then the new grant is not resumable. Now, it appears to us, in the first place, that such a distinction is repugnant to the nature of the right which is under consideration. The nature of a maintenance grant is obviously that whilst it makes for the immediate members of the family a suitable provision, it prevents by means of the exercise of the right of resumption the zemindary from being completely swallowed up by the continual demand upon it; and it would be certainly most strange if grants which were resumable in the hands of the more immediate members of the family should not be resumable when they came into the hands of the more remote members of the family. But, besides that, we think that if it was intended to engraft that distinction upon what was found to be the general custom with regard to maintenance grants, that case should have been distinctly made and raised by the defendants in the first Court. No doubt, it was the duty of the plaintiff to prove the custom to resume; but that custom the first Court says was established, and the defendants ought then at least to have asserted that there was such a distinction as this. We think there is no doubt whatever that, if there had been any such distinction put forward, it would have been cleared up by evidence. We do not

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think it is sufficient for the Judicial Commissioner now to look at the evidence and to say that there was no evidence to show that that distinction did not exist when such a distinction was not suggested. It seems to us, therefore, that the only ground upon which we understand the Judicial Commissioner to reverse the decision of the Deputy Commissioner is invalid; and that inasmuch as he agrees in all other respects with the decision of the Deputy Commissioner, the judgment of the Deputy Commissioner ought to be restored.

But, then, the special respondents have objected that the findings, both of the Judicial Commissioner and of the Deputy Commissioner, upon the two main questions of fact in this case, are wholly unsupported by the evidence. Now, we think, in discussing this, we must carefully bear in mind what course was taken by the parties in the Court below. It appears from the judgment of the Deputy Commissioner that neither of these two points were really contested before him. He, as we have already pointed out, speaks of both of them as having been admitted by the defendants, and although no doubt he does go on to consider the evidence to a certain extent, we think this admission explains why it is that the evidence should be, as no doubt it is, meagre upon these points. We do not think there is anything to justify us in special appeal in saying that there was not before the Courts below evidence upon both these points. That this property has always been spoken of as held by the defendants in some way or other for maintenance, there cannot be the least doubt. More than one passage was pointed out from the documents upon which these defendants or their predecessors have relied in which it is so described. But the argument of Baboo Chunder Madhub Ghose was that, though it may have been that the defendant's ancestors got this land for maintenance, yet there is nothing to show that it was obtained by them from the Rajah; and no doubt they did at one time say that their real title was derived from some independent person, that is, we believe, from the Government. But we think that, upon the evidence before the Court below, they were justified in coming to the conclusion, even independently of the admission of the defendants, that it was a grant from the Rajah. It is, as we have said before, perfectly clear that the land was held in some way or other for maintenance, and the very fact of its being held for maintenance certainly to our minds points strongly to the inference that it was a grant from the Rajah rather than from the Government. If it was originally a grant from the Government, the notion of its being held for maintenance would not have been perpetuated. But, more important matter still is, we think, this: that it is at any rate perfectly clear that this property was at one time part of the zemindary of Patkoom, and we do not quite see how it is suggested that the Government could have any right whatsoever to detach a portion of the zemindary of Patkoom and make it over to any person whatsoever. Therefore, it seems to us that if this property was held as a maintenance grant at all, as it clearly was, then upon these facts we do not say it would be impossible to come to any other conclusion; but certainly it was quite open to the lower Courts to come to the conclusion that this was a grant, not from any stranger, but from the Rajah of Patkoom, as alleged, to his brother for maintenance according to the custom of the country and the family. As regards the question as to whether the maintenance grants are themselves resumable, upon that we have a distinct record of the first Court of the admission made by the defendants. We have also the general evidence, that is, the evidence of the witnesses, that that was the custom of the country and of this family, and it is therefore impossible to say that there was no evidence upon which the Court could find that the maintenance grants were resumable. This being so, the judgment of the first Court appears to us to be well founded upon the evidence. Then it comes to this, that three persons, Madhabadit, Radhanathadit and Jainathadit, from the date of the solehnama, by the express agreement of the parties, held this land upon the terms upon which they previously held it, namely, as a maintenance grant resumable at the death of the grantees. That we think completely answers any general question which might be raised upon the Statute of Limitation.

But it is also contended that inasmuch as two of the grantees died more than twelve years ago, and since that time at any rate the defendants have been holding adversely to the Rajah, therefore the suit as to two-thirds of the property was barred. But it appears to us that the defendants cannot say that they have been holding this land adversely to the Rajah. They came in admittedly as the successors of Madhabadit, Radhanathadit, and Jainathadit as sons or as nephews, and ever since that time they have paid an annual rent

of Rs. 101 to the Rajah. It seems to us therefore that they cannot now say that they have held, as they now wish to say they have held, as trespassers so as to give themselves the benefit of the Statute of Limitations. It is not shown that they distinctly set up a mokurruree title more than twelve years ago so as to bring the case within the ruling in the 8th Bengal Law Reports referred to by the respondent.

Upon these grounds, therefore, we think that the decisions of the Courts below upon the facts were right, but that the ground upon which the Lower Appellate Court has reversed the judgment of the first Court is not a valid ground. The result is that the decision of the Lower Appellate Court will be set aside, and the decision of the Court of first instance restored and affirmed. The plaintiff will get his costs of the first Court, but, under the circumstances, we think each party may bear his own costs of this appeal and of the Lower Appellate Court.

The 18th June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Right of occupancy—Tenancy of a portion.

Case No. 1999 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 15th April 1873, reversing a decision of the Moonsiff of Shibgunge, dated the 30th November 1872.

Amar Chand Lahatta (Plaintiff), *Appellant,*

versus

Bukshee Pyekar (Defendant), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

Land which is held as one tenure is either subject to a right of occupancy as a whole, or it is not subject to any right of occupancy as to any part of it. If the whole land has been held for more than twelve years, then the tenant has a right of occupancy; but if within twelve years the tenant has been allowed to take possession of fresh lands, and such addition was intended to create a fresh tenure, then as regards the whole a right of occupancy has not been acquired, although a portion has been held for more than twelve years.

Markby, J.—If the objection as to the form of the notice had been insisted upon, it might have led to the dismissal of the suit. But the parties have very wisely agreed not to insist upon that objection, but that we should deal with the case upon the other questions that have been raised. Now, it appears to us that both the judgments of the Courts below are incapable of being supported and must be set aside; and the case must be remanded in order to a fresh trial, and, as the parties agreed, with liberty to give any fresh evidence if either party may desire. But for the future determination of the case, it is desirable that we should express our reasons for coming to the conclusion that the judgments of the lower Courts cannot be supported. In the first place, the Moonsiff has found that even if the defendant did actually occupy more land in excess of the 43 beeghas 10 cottahs and 10 dhoors, he must be considered as a trespasser with regard to the excess lands, for he has not paid rent for them, and the zemindar is in every way competent to eject him from those lands. Now, it certainly seems quite impossible to maintain that, when we find that (how long we do not know exactly, but certainly for some time) rent has been received by the zemindar, not the original rent which was fixed by the jummabundee for the land then held, but for the whole land in the defendant's possession. Therefore, it is quite clear that the finding of the Moonsiff that these lands were held by the defendant as trespasser, and that he had not paid rent for them, cannot be supported. On the other hand, the Judge's opinion seems to be that, as soon as it appeared that there was any occupancy of any part of the tenure for more than twelve years, that at once disposed of this suit. That, we think, is also going too far. What we think to be the proper view of the case is this, that either the whole tenure, which was clearly one tenure and held as one tenure, is subject to a right of occupancy as a whole, or else that it is not subject to any right of occupancy as to any part of it. The parties, we think, have agreed to treat this as one tenure, and if the *whole* land now held by the defendant has been held by him for more than twelve years, clearly he has a right of occupancy. If, however, this is determined in the negative, then the question whether the land should be held subject to a right of occupancy or not must entirely depend upon the intention of the parties to be gathered from the circumstances of the case. If it appear that within twelve years the tenant has been allowed to take possession of fresh lands, and that the parties by such addition intended to create a new tenure, then it must

be held that as regards the whole a right of occupancy has not been acquired, although it may be established that a portion has been held for more than twelve years. But, on the other hand, if it be established that by such addition the parties intended to increase the bulk of the old tenure, and not to interfere with its existing rights, then the tenant must be deemed to have acquired a right of occupancy to the whole, although a portion of it may have been in his possession for a period of less than twelve years In order to arrive at a proper conclusion upon this matter, it seems to us most important to inquire into and obtain as much information as possible as to the mode in which the lands now held were originally taken possession of by the defendant in order to ascertain what are the rights of the parties.

The result, therefore, is that if any portion has been held for less than twelve years, the lower Court will have to inquire whether the right of occupancy has by agreement of the parties been extended to the whole tenure, or whether that right of occupancy which, but for the agreement to hold all the land as one tenure, would have extended to a part has been entirely lost. Whatever view is taken of this matter, there must be now no separation of the tenure. There must be a right of occupancy for the whole tenure or none whatever. The case will be accordingly remanded to the first Court. Costs will abide the result.

The 19th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Intervenors—Plaintiffs against their will.

Case No. 2144 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 4th September 1873, reversing a decision of the Additional Sudder Moonsiff of that District, dated the 29th April 1873.

Beharee Lall Doss and others (Defendants), *Appellants,*

versus

Radha Nath Doss (Plaintiff), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Mr. R. E. Twidale for Respondent.

In a suit for arrears of rent certain parties intervened, alleging that they were co-sharers with plaintiff. They were placed by the first Court on the record as defendants and the suit was dismissed. The Lower Appellate Court transferred the intervenors against their will to the side of the plaintiffs, and remanded the case for re-trial:

HELD that this proceeding was without authority or jurisdiction, as a person cannot be made a plaintiff against his will, unless there is such an equity on the part of another as to compel him to be such.

Phear, J.—IN this suit one Radha Nath Doss seeks to recover from persons who are called the ryot defendants arrears of rent to the entire amount of 16 annas in the rupee upon the footing of jumma-wassilbakee papers prepared by his putwaree.

Upon this plaint being filed the present special appellants intervened, saying that they are co-sharers with Radha Nath Doss, and that he is not entitled to the 16 annas of the rent which he claims.

The Moonsiff placed the intervenors upon the record as defendants; and their statements being admitted by the plaintiff, the Moonsiff was of opinion that the plaintiff's suit ought to be dismissed. And it seems to us very plain that this opinion was right.

On appeal from this decision of the Moonsiff to the Lower Appellate Court, the Subordinate Judge transferred the present special appellants from their situation as defendants, in which they had been placed by the Moonsiff, to the side of the plaintiff, not only without their concurrence, but entirely against their will, and having done this remanded the case for re-trial.

It seems to us that this proceeding was without authority or jurisdiction. It is a general rule that a person cannot be made a plaintiff against his will, although no doubt there are some cases in which third persons may have such an equity against the person objecting to be made plaintiff as entitles them to ask the assistance of the Court in order to compel him for their sake to take up the part of the plaintiff. No such equity is pretended on the part of Radha Nath Doss. He brought the suit in his own name, and said nothing whatever about his co-sharers, and he sought to recover the arrears of rent claimed in this suit upon the footing of his own right alone. He has neither put forward nor has he, on the admitted facts, any equity upon which he could ask the Court to compel the special appellants to join with him as plaintiffs in

this suit. And the inconvenience of the union of these two sets of persons as plaintiffs is very manifest. because, when the present special appellants intervened, they did so, not only on the ground that Radha Nath Doss was not the person solely entitled to the arrears of rent, but because they were at issue with him as to the shares in which he and they were respectively entitled to those rents. The Court had no right under these circumstances to place them in the position of being co-plaintiffs with Radha Nath Doss against their will, the result of which would eventually be, supposing the plaintiffs succeeded in obtaining a decree, that the two sets of plaintiffs would eventually have to contend with one another as to their respective rights to share in the produce of the suit.

It appears to us very plain that the view taken by the Moonsiff was the correct view, and that as soon as the plaintiff admitted that he was not solely entitled to the 16 annas arrears of rent which he claimed, his suit ought to have been dismissed. Accordingly we reverse the decision of the Lower Appellate Court, and affirm that of the first Court with costs.

The 22nd June 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Collector's certificate of sale—Re-formations—Accretions.

Case No. 3 of 1874.

*Application for review of judgment passed by the Hon'ble Justices Louis S. Jackson and W. Ainslie on the 16th December 1872 in Special Appeals Nos. 1209 and 1237 of 1873.**

Radhika Mohun Roy and others (some of the Defendants), *Petitioners,*

versus

Gunga Narain Chowdhry and another (Plaintiffs), *Opposite Party.*

The Advocate-General and *Baboos Hem Chunder Banerjee, Sreenath Banerjee,* and *Lall Mohun Doss* for Petitioners.

Baboos Sreenath Doss and *Tarinee Kant Bhuttacharjee* for Opposite Party.

* 21 W. R. 115.

Where a Collector's certificate of sale conveyed to the purchaser a mehal and all proprietary rights which the Government formerly had in it:

HELD that although it specified only a certain quantity of land, it conveyed all the mehal with all rights of every kind thereto appertaining, and that the purchaser could claim land re-formed on the original site of lands forming part of the mehal or such accretion as he would be entitled to under the law.

Jackson, J.—THE Advocate-General has moved for a review of our judgment in this case upon two principal grounds. One is that we were wrong in holding the plaintiff to have taken under his conveyance from the Government anything beyond the 14,496 beeghas specified in the certificate of sale; and, further, that as to what is described as the third portion, which is marked on the map by the Bengalee letter (ঘ), it ought not to have been given to the plaintiff supposing our judgment to have been right on the other point, inasmuch as there is no evidence to show that it came within the limits of the plaintiff's property upon any ground on which he sought to claim it. The learned Advocate-General in supporting his application sought to show that whereas we observed in our judgment on the former occasion that it had not been shown that the present sudder jumma is different from that originally assessed on the mehal, in point of fact this mehal had been the subject of repeated settlements, the fifth of which was made in 1864, in which the area was declared to be 17,000 beeghas, and the sixth, which was the settlement existing at the time when the plaintiff purchased, showed the mehal to consist of only 14,496 beeghas, and the rent had varied accordingly. Now, it seems to us that these circumstances really have no bearing on the question which we pointed out as being unproved, *viz.*, that on the sale—the absolute sale of the proprietary rights to plaintiff—there had been any alteration in the fixed sudder jumma or permanent rent payable to Government on account of the estate. The varying jummas fixed in 1854, and on the other settlements now referred to, were only temporary fluctuating rents of farming leases, and those leases being only for short periods, the rents would of course fluctuate (and might vary very greatly) with the quantity of land of which the farmer was on each occasion put into possession. That question, therefore, stands exactly as it did when we last gave our judgment.

Then we are referred to a case in 20 Weekly Reporter, p. 211, case of Ranee Shurno Moyee *vs.* Watson & Co.,

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decided by the Judicial Committee, which the learned Advocate-General considers to be a case very closely resembling the present one, and the decision in which appears to him to call for an alteration in our judgment. That case appears to us to be very clearly distinguishable from the present case. The plaintiff there purchased a khas mehal called Chur Doomriah Island, Pergunnah Goas, with a sudder jumma of Rs. 2,409, and in virtue of that purchase he claimed a further quantity of 15,000 beeghas of land which is described to be land to the east of Chilmaree Dara. The Judicial Committee observes: "If the plaintiff "could satisfy us that she did buy, and that "the Government did sell and had the right "to sell that quantity, she would make out "her case." Then their Lordships go into the facts of the case, from which it appears that so far from the Government having had any intention of selling that quantity, special care was taken to exclude it from the sale. The present case is the converse of that. In it there is no indication either by way of implication or otherwise of any intention to exclude the land. On the other hand, the Collector's certificate conveys to the purchaser the mehal and all proprietary rights which the Government formerly had. No doubt there is a specification of 14.496 beeghas, but we in our previous judgment have shown what we consider to be the meaning of that, and we see no reason to alter the opinion which we then formed on that point. We think, therefore, as we thought then, that the Collector sold and had power to sell all the mehal chuck Nasseerpore with all rights of every kind thereto appertaining, and that, if the plaintiff could show that the land claimed in this suit was either land re-formed on the original site of lands forming part of the mehal sold to him, or such an accretion to the lands of that mehal as he would be entitled to claim under the Regulation, he ought to recover. As to the portion of land which goes to make up the 17,000 beeghas, that seems to be indisputably shown to be land which is his by re-formation on the old site. As to the 70 beeghas separately dealt with by the Court below, that is also found by the Judge to be plaintiff's by re-formation.

Then it is said that we were wrong in declaring that the plaintiff was entitled to a decree in full of all the land claimed, inasmuch as with regard to the third portion, that which is marked as (ঘ) in the Ameen's map, there is no evidence to show that the plaintiff was entitled to it, and the Judge had found, whether rightly or wrongly, upon the evidence, that the land was not plaintiff's by right of accretion; but then, although the Judge had so found, the question undoubtedly also arose whether this land was not the property of the plaintiff as being a re-formation on the original sites, and inasmuch as the Judge finds this 70 beeghas to be such re-formation, and there is no reason to quarrel with his decision on that point, because it fell within the line which the Judge held on the Ameen's inquiry as the boundary line of the mehal as it stood at the plaintiff's purchase, we think it certain that, if the Judge had decided on the principle now laid down, *viz.*, that the plaintiff was entitled to the whole mouzah whatever it may contain, he would also have found that it fell within the boundary line of the estate as it is shown to have existed at the time of the former measurements. We do not think, therefore, that there is any reason for altering the judgment which we arrived at when we last heard this case in special appeal.

We think that this application must be refused with costs—rupees two hundred.

The 23rd June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Evidence — Special Commissioner's Report — Written Statement — Admissibility—Rule of Evidence.

*Appeal under section 15 of the Letters Patent against an order of the Hon'ble W. Markby, one of the Judges of this Court, dated the 18th April 1874, in Privy Council Appeal No. 11 of 1869.**

Rajah Leelanund Singh (Respondent to England), *Appellant*,

versus

Mussamut Lakhputtee Thakoorain (Appellant to England), *Respondent*.

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* *The judgment of Markby, J., appealed against, was as follows:—*

The 18th April 1874.

Present:

The Hon'ble W. Markby, *Judge*.

In the Matter of
Privy Council Appeal No. 11 of 1869.

Mussamut Lakhputtee Thakoorain, *Appellant*,
versus
Rajah Leelanund Singh and the Government, *Respondents*.

The Advocate-General for Appellant.

Mr. Montriou for Respondent.

The report of a Special Commissioner was held to be inadmissible as evidence as it did not come within any provision of the Evidence Act which would make it admissible.

The principle upon which the admissibility of a written statement is determined is whether it has been made under such circumstances as make it reasonable to suppose that it was done *bonâ fide*, and that the allegations it contains are true. And if as a whole it is against the interest or the proprietary right of its author, such parts as are in his favour cannot be rejected.

Couch, C.J.—THIS is an appeal from an order made by Mr. Justice Markby in execution of an order of Her Majesty in Council, by which it was ordered that, out of the money received by the Government of Bengal in respect of the lands included in the tenure of the appellant before Her Majesty in Council, the zemindar, who is appellant before us, should receive the amount of the rent payable under the ghatwalee tenure during the period in respect of which the moneys in the hands of the Government were received as revenue, and that the remainder

Mr. Montriou and *Baboo Luckhee Churn Bose* for Appellant.

Mr. R. E. Twidale for Respondents.

THE question which I have to decide in this case is how much the zemindar is entitled to under the order of Her Majesty in Council which directs "that out of "the moneys received by the Government of Bengal in "respect of the lands included in the tenure of the "appellant, the zemindar is to receive the amount of "the money-rent payable under that tenure during the "period in respect of which the moneys in the hands of "Government were received as revenue." And the question before me has reduced itself to this: Whether the rent payable to the zemindar during this period was Rs. 75 or 175? Now, it appears that in consequence of the disputes which have been going on for upwards of thirty years in respect of this matter, the present zemindar has never been in actual receipt of any rent whatsoever, and is compelled to go back to the history of the property before it came into his possession.

Now, the place where we should of course naturally look to see what the rent payable was is the sunnud, under which the ghatwals hold the tenure. The only sunnud, however, which had been produced is that of 1780, and that fixes the rent at Rs. 75. That being the only sunnud we have before us, we must assume, I think, that that was the rent of the tenure, unless something appears to the contrary. Now, there is probably some evidence that there were subsequent sunnuds, but the zemindar cannot produce those sunnuds, nor have the ghatwals produced them after a notice to produce has been served upon them. I have not gone into the question whether or no the zemindar is in a position to give secondary evidence of those sunnuds. Mr. Montriou insists that he is not; and he has filed affidavits in which the ghatwals deny that they ever heard of any such sunnuds. But, apart from this, it appears to me that the evidence which the zemindar offers is not such as I am at liberty to receive. It consists of two classes. The first is a series of documents, two of which have been shown to me, and which purport to be statements of the ghatwalee villages of Mehal Khurruckpore: The first document that was offered to be put in covered the period from 1211 to 1216 F.S., and is printed at page 15 of the paper-book of the Privy Council Appeal. Now, assuming that there was such a document as this at some time or other in the Collector's office (which is disputed by Mr. Montriou), still I do not think that the zemindar can make any use of it in this inquiry. Mr. Twidale says that it must be taken as a return made by the then zemindar Rajah Kadir Ali. But, even supposing it to be so, as far as I have anything before me, it only appears to be a statement made by him of the various matters therein contained, and I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put in in evidence. It does not appear to me to be a statement in any way detrimental to his interest; on the contrary, so far as regards the rate of rent, of course, it would be his interest to state it to be as high as possible. On the other hand, it is not shown to be a statement made in the ordinary course of business. What was the occasion of making this or any of the subsequent statements does not appear. No rule or order requiring the zemindar to make these statements has been produced before me. Indeed, there is nothing to show that the zemindar made them at all. It seems to me, therefore, that testing these documents by the rules of evidence, they do not satisfy the condition upon which statements by deceased persons are admissible.

The other document offered appears to be a report made by an officer called a Special Commissioner in the year 1833 to the Commissioner of Revenue. That again does not appear to be a document which I can admit under the rules of evidence. If admissible at all, it is under section 35, as an official register or record. But it does not seem to be so admissible. From what has been read to me, it appears to be a report made upon a sort of preliminary inquiry instituted with a view of enabling the person to whom it was made to decide whether a more formal inquiry into the matter should subsequently take place. I think it would be scarcely safe to assume that there was such a careful inquiry of all the matters therein stated as to lead us to the conclusion that the statements therein made are true; but that it is not necessary now to consider, because the document according to the rules of evidence is not admissible.

I may add that, although the zemindar may be in some difficulty as to proving the rent payable, yet it does not seem that this is a matter wholly incapable of being proved by more satisfactory evidence than this; because, until the year 1840, when the Government made the first attempt to resume this property, the presumption is that the rent was regularly paid. I think it might be fairly expected that evidence should have been given as to what was then actually paid by the ghatwals to the zemindar; and in fact, Mr. Twidale has now asked that the zemindar should have an opportunity of producing oral evidence upon this point which, he says, he is instructed that he will be able to do. I think, however, that this application comes too late. When the last adjournment was made, it was strenuously opposed by the ghatwals who insisted then very strongly that the zemindar ought to have come prepared with all the evidence that he could give on the subject; but it seemed to me then that the zemindar was under some difficulty, and that he was entitled to the indulgence which he asked for. The case was therefore adjourned in order that he might produce such evidence as he could upon this point. I think, however, that it would be contrary to all rules of practice, and also a great hardship upon the ghatwals, if the zemindar, having again failed on the evidence which he thought fit to produce, should have another opportunity of proving his case. I must, therefore, decide this case on the evidence now before me, and as the evidence now offered by Mr. Twidale cannot be received as showing what the rent was, I have nothing to act upon but the original sunnud, which shows that the rent of this tenure was Rs. 75. Upon that footing the account will be made up.

should be paid to the appellants to Her Majesty in Council and the respondents in the appeal before us.

It was necessary for the present appellant to show what was the amount of the rent which was payable to him under the ghatwalee tenure. It might be a nice question upon which party, in a case like the present, is the onus of proof. But it is not necessary to decide that, as the appellant appears to have given such evidence as he was able to give. A sunnud dated in the year 1780 had been filed by the present appellant in the suit, which showed that the rent of the ghatwalee tenure was Rs. 75; and the respondents relied upon that.

The appellant contended that there had been subsequent sunnuds, and that the rent had been increased. And he alleged that these were in the possession of the respondents, and sought to have it inferred from their non-production that they would show that there was an increase of the rent.

That there were subsequent sunnuds appears to be, if not certain, at least, most probable; because there was in 1813 a perwanna which recites a petition for a sunnud, and it would seem that the sunnud *in* 1780 was limited to the person named in it, and that, on his death, a fresh sunnud would be issued. The respondents, by affidavit, denied that they had any sunnuds in their possession, and the appellant was unable to show that this was untrue. We cannot assume that they had sunnuds which they did not think fit to produce.

In this state of things the appellant relied upon a document which was in evidence in the suit, and purports to be a statement of the ghatwalee villages in Mehal Khurruckpore in 1211 and 1216 Fuslee by the zemindar. In this there is in the last column against the name of the property in question the statement "original rent Rs. 74; increased rent Rs. 101." He also tendered in evidence the report of a Special Commissioner made in 1835.

Mr. Justice Markby held that neither of these documents was admissible in evidence, and he also expressed an opinion that, if they had been, they would not have made any difference in the decision which he came to that the rent must be fixed at Rs. 75, the sum named in the sunnud of 1780.

In the course of the argument we stated our opinion that the report of the Special Commissioner was not admissible. It does not come within any provision of the Evidence Act which would make it admissible. The question which we reserved for consideration is whether the statement was admissible; and, if so, whether it would make any difference in our decision.

We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mehal of the person making it is reduced or affected; it is against his interest and against his proprietary right. The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him. But, when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is whether, taking the document as a whole, it is against the interest or the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done *bonâ fide*, and the statements are true.

But, although it is admissible, it appears to us that it is not sufficient to prove what the appellant contends for, that there was an increased rent of Rs. 101, and that sunnuds were granted at that rent. In the first place there is a discrepancy between the statement and the sunnud which we have in the proceedings. There the rent is said to be Rs. 75; here the original rent is stated to be Rs. 74. This may be a mistake, but the fact that a mistake has been made affects the value of the evidence.

But its value is much more affected by the circumstance that this return or statement does not appear to be one which might come to the knowledge of the parties interested in disputing the truth of this part of it. We have nothing to show that the ghatwal who was liable to pay the rent would know what was here inserted, or if he knew it would have any means of having it corrected. This makes its value comparatively little. It is not such that we can take it as evidence for the present appellant that a new sunnud was granted before this time by which the higher rent which he claims was made payable.

Therefore, although we do not concur in the view which the learned Judge took of the admissibility of the statement in evidence, we think that the conclusion which he came to, that the present appellant had failed to prove the rent to be other than what the respondent contended for, is right, and that the appeal ought to be dismissed with costs, which we fix at Rs. 100.

The 23rd June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Compensation—Principle for determining Value —Occupied and Unoccupied Land.

Case No. 65 of 1873.

Regular Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 30th September 1872.

The Collector of Hooghly on behalf of Government (First Party), *Appellant,*

versus

Raj Kristo Mookerjee and others (Claimants), *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellant.

The Advocate-General and *Baboos Mohinee Mohun Roy* and *Umbika Churn Banerjee* for Respondents.

In determining the compensation to be allowed for land taken for public purposes, the Court distinguished between the occupied and the unoccupied land. In the case of the former, the income yielded was taken into account with a view to consider the number of years' purchase to be allowed for the land, and in estimating the value of godowns yielding rent, a deduction was made for the chance of some of them being unoccupied for part of the year, as well as for periodical repairs and municipal taxes.

In the case of unoccupied land, it was held that the thing to be looked at was not the cost of what had been done to preserve the land or the money spent on improvements, but the market-value at the time, with an allowance for the manner in which the land was taken from the claimant.

Couch, C.J.—In considering what amount ought to be allowed for compensation in this case, we are obliged to follow the method which has been adopted by Mr. Prinsep and the Assessor, for the evidence in the case does not furnish materials for any other. If it had done so, it would have been useful at least to use both methods, and compare the results. We mean that, if we could see what is the income arising from the occupied land, and the quantity of it now yielding income, we might consider what number of years' purchase should be allowed for it, and then estimate the value of the remaining land in the manner in which Mr. Prinsep has. But he has not given us the means of determining what quantity of land is yielding income. He has taken a certain quantity of land as covered by buildings, and has treated all the rest as unoccupied land, when in fact there is some land not covered by buildings which produces rent.

Following the mode adopted by the Judge and the Assessor, with whom he agreed, we think that the allowance for six godowns at Rs. 5 a month, and deducting only six months' rent of one of them, is much more than ought to have been made. In considering the value of these godowns, we must see what is the annual rent that they are likely to produce. In estimating that and their consequent value to the owner, it would be a great mistake to assume that every one of them would be always let, always producing rent. A fair deduction must be made for the chance of some of them being left unoccupied for part of the year. A deduction of only six months' rent is certainly not sufficient. Considering the description of the property, we think that, for the purpose of ascertaining what these godowns are worth, we ought not to assume that more than two-thirds of them would be constantly let, and, instead of allowing five and a half of them as always producing rent, we would only allow four. This will reduce the amount to Rs. 4,800. Mr. Prinsep has allowed Rs. 7,200 less 600. We think we should substitute for it Rs. 4,800.

Then he has allowed six months' rent for putting the godowns in thorough repair. We have nothing before us to show that this is improper, and that deduction will be made. But we think that in allowing two months' rent in every year for the periodical repairs, Mr. Prinsep has gone beyond what he ought to have allowed. The estimate of the Assessor for the claimant is one month's rent, which, as far as we are able to judge (and we are obliged to do it without any evidence), is a fair allowance, and a more proper one than what Mr. Prinsep has allowed. The municipal tax has not been objected to. Thus the value of the buildings and the land upon which they stand will be Rs. 4,800, less Rs. 180 to put them in repair, Rs. 600 for the periodical repairs, and Rs. 22-8 for the municipal tax.

Then we have to determine what shall be allowed for the value of the unoccupied land. There is a deal of evidence on this subject, some of it not properly evidence at all, and some of it to my mind of not much value. Mr. Prinsep and the Assessor chosen by the claimant have fixed the value at Rs. 100 a cottah, and they appear to rely very much upon the fact that this was given for the purchase of land for the Post Office.

We think they have given too much importance to that instance. The evidence shows that there has been a very great increase in the value of land at Ootterparah within the last ten years. Dino Nath Bose, one of the witnesses, says that the lands are worth now half as much more than what they were worth ten years ago, the enhancement in value being due to the disputes and rivalry between the two brothers. There is another witness who puts the advance at less than that. But, allowing that this has been the increase in the value of the land there, we think, looking at the whole of the evidence, that this land would not formerly have been worth more than Rs. 40 a cottah; and, if we allow that increase, we think we shall be giving quite a sufficient compensation for this land. We would allow for the land at the rate of Rs. 60 a cottah, which will give, instead of the Rs. 7,606 allowed by the Judge, Rs. 4,563.

Then Mr. Prinsep has disallowed what the Collector had included in his estimate and in the offer which he made, and also what the Assessor for the claimant has allowed, namely, the costs of the *poshta* which has been erected for the purpose of preserving this land. We entirely agree in what Mr. Prinsep says as to the grounds upon which that ought to be disallowed. What we are to look at is the market-value of the land. The party is to have the market-value and also a certain allowance on account of the manner in which the land is taken from him. The market-value is not to be estimated by the costs of what may have been done to preserve the land. It is not to be estimated by the money the owner may have spent in improving the land; for a man might spend a great deal of money on improvements, and yet the result might be that the market-value was not increased to the amount which he had thought fit to spend. We are to see what, at the time the land is taken, is the market-value of it, and we think that may be fairly estimated at Rs. 60 a cottah. The cost of erecting the *poshta* cannot be allowed. Five rupees, the value of a tree, will be allowed.

The result is that for the unoccupied land and the tree we shall allow Rs. 4,568, and for the land and buildings, Rs. 4,800, less Rs. 600, Rs. 180, and Rs. 22-8 (which the Advocate-General agreed to take as Rs. 20), or Rs. 4,000, the two sums making a total of Rs. 8,568, to which must be added the 15 per cent. allowed by the Act, the whole amounting to Rs. 9,853.

Costs will be allowed in the same way as if this were an appeal in a suit, the respondent having the costs as the sum awarded exceeds the offer of the Collector.

The Rs. 9,853 will carry interest at the rate of 6 per cent. per annum from the date of possession to the date of payment.

The 23rd June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, ss. 208 & 209—Assignment of Decree—Act XXIII. of 1861, s. 11—Set-off.

Case No. 1992 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 25th July 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 22nd December 1871.

Rughoo Nundun Ram (Defendant), *Appellant,*

versus

Somessur Panday and others (Plaintiffs), *Respondents.*

Baboos Kalee Kishen Sen and *Chunder Madhub Ghose* for Appellant.

Mr. R. E. Twidale for Respondents.

X, Y, and Z obtained a decree in the Sub-Judge's Court against B, who subsequently obtained a decree in the Moonsiff's Court against X, Y, and Z. Shortly after this, X, Y, and Z applied to the Sub-Judge for an attachment of the decree of B, who, pending the application, assigned it to R, after which the attachment was effected. R then applied to the Moonsiff, and obtained an order for full execution. X, Y, and Z on this sued R to have their title to a set-off declared. Their suit was dismissed in the first Court, but the Lower Appellate Court decreed their claim:

HELD that, as the assignee of B's decree, R must, under Act VIII. of 1859, s. 208, be considered and treated in all respects as if he were the original decree-holder, and in that character party to the suit:

HELD that the question raised by X, Y, and Z was one raised between the parties relating to the execution of the decree within the meaning of Act XXIII. of 1861, s. 11, and therefore the present suit cannot lie:

HELD that, on R's application to the Moonsiff for execution, the Moonsiff ought to have refrained, in the absence of authority from the attaching Court, from substituting R's name for B's in the decree, and if he did alter the decree, he ought even then to have given reasonable effect to the application of X, Y, and Z for a set-off, *e.g.*, staying proceedings to enable X, Y, and Z to get their decree transferred to his Court.

Phear, J.—THE material facts of this case appear to be as follows:—

On the 25th December 1866, the three persons, who were the original plaintiffs in this suit, obtained a decree in the Principal Sudder Ameen's Court against one Mussamut Busgitta for a sum of Rs. 700 by way of compensation for the loss of certain mesne-profits. On the 2nd February 1870, the same Mussamut Busgitta obtained a decree for Rs. 534 in the Moonsiff's Court against these three persons, whom we may call the plaintiffs in the present suit, although since the date of the first trial, one of them is dead and is now represented by his widow as guardian for his infant son. A few days after Mussamut Busgitta had obtained this decree in the Moonsiff's Court, namely, on the 25th February 1870, the present plaintiffs applied to the Subordinate Judge, in whose Court they had the decree for Rs. 700 against the Mussamut, for an attachment of the Mussamut's decree in the Moonsiff's Court. Some delay took place in obtaining this attachment. In the meanwhile, namely, 28th March, the Mussamut assigned her decree to the present defendant Rughoo Nundun Ram. And it was not until two days after this assignment had been completed, that the Mussamut was served with notice of the application for attachment, or the attachment itself was effected which had been applied for by the plaintiffs in the Subordinate Judge's Court on February 25th. These attachment-proceedings were followed by action taken on the part of Rughoo Nundun for the purpose of obtaining execution of the Mussamut's decree in the Moonsiff's Court. And in spite of the attachment of that decree effected by the present plaintiffs, and also of the attempt of the present plaintiffs to get their decree set off against the Mussamut's decree, on the 19th September 1870 the Moonsiff made an order in favour of Rughoo Nundun for the execution of the Mussamut's decree against the plaintiffs to its full extent. The plaintiffs, having thus failed to obtain in the Moonsiff's Court the relief which they thought they were entitled to, brought the present suit against the defendant Rughoo Nundun for the purpose of having it declared that they were entitled to the benefit of having their decree set off against the decree of the Mussamut which Rughoo Nundun was proceeding to enforce.

The first Court, it may be shortly stated, dismissed the plaintiff's suit. But the Lower Appellate Court arriving at the conclusion upon the evidence that the plaintiff's right was entirely made out, reversed the decision of the first Court, and passed a decree in favour of the plaintiffs for the whole amount of their claim.

Now it seems to us plain that the parties and the Courts below have entirely misapprehended the nature of this suit. When the Mussamut assigned her decree to Rughoo Nundun, he only became entitled to execute the decree under the provisions of section 208 of the Civil Procedure Code, because he was not the original decree-holder. And the terms of that section are very explicit. They are as follow:—

"If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder."

The Moonsiff's Court seems to have entertained the question whether Rughoo Nundun was entitled under this assignment which he had obtained from the Mussamut to execute the decree which she had formerly obtained against the present plaintiffs, and to have come to the conclusion that there was sufficient cause within the meaning of this section for allowing him to execute that decree.

That being so, he could have only executed it in the manner in which the original decree-holder would have executed it had the assignment not been made, and in the matter of the execution he must be subject in all respects to the same considerations as regards the execution as the original decree-holder would have been. In short, for the purpose of executing this decree, he must be considered and treated in all respects as if he were an original decree-holder, and in that character party to the suit.

Then section 11, Act XXIII. of 1861, enacts that all "questions arising between "the parties to the suit in which the decree "was passed and relating to the execution "of the decree shall be determined by order "of the Court executing the decree, and not "by separate suit, and the order passed by "the Court shall be open to appeal."

It is, therefore, plain that the question which was raised by the present plaintiffs upon the application of Rughoo Nundun to execute the decree of the Mussamut, namely, the question whether they were entitled to have the benefit of a set-off of their decree against the Mussamuts in the Subordinate Judge's Court, was a question relating to the execution of the decree. And it was a question which, within the meaning of section 11, Act XXIII. of 1861, arose between the parties to the suit, although Rughoo Nundun was not the person who had originally obtained the decree, but only became a party to the suit as assignee of the Mussamut and for the purpose of executing the decree. This being so, the present suit cannot lie. It is forbidden by the express words of section 11, Act XXIII. of 1861. On this ground we think that it ought to be dismissed. But as this objection was not put forward in the first Court or in the second Court, nor was indeed anywhere raised by any of the parties, we think that each party must bear his own costs.

We will add further that it seems to us that the course which the Moonsiff has taken on the application of Rughoo Nundun for the execution of the Mussamut's decree has not been a well-considered course, or altogether conformable to the provisions of the Civil Procedure Code. When Rughoo Nundun came to the Moonsiff's Court and asked under section 208 to be allowed to execute the Mussamut's decree, because he had obtained an assignment of that decree from her for valuable consideration, the Moonsiff ought to have given notice of that application to the present plaintiffs. And upon the present plaintiffs showing in answer to that application that they had a decree in the Subordinate Judge's Court against the Mussamut to a higher amount than her decree against them, the Moonsiff ought not to have considered it proper to grant the application of Rughoo Nundun: he ought not, under such circumstances as those, to have placed any unnecessary element of complication between the present plaintiffs and Mussamut Busgitta.

The situation of the parties at that time seems to have been as follows: The debt under the decree of the Moonsiff's Court in favour of Mussamut Busgitta had been attached by the plaintiffs in execution of their decree against Mussamut Busgitta in the Subordinate Judge's Court. Now, the effect of an attachment of a debt is to prohibit the debtor from paying it to the creditor and the creditor from receiving it, and also to found authority in the attaching Court either to sell it or to appoint a manager to sue for the realization of it. In the case of a judgment-debt, whichever of these alternatives is followed by the attaching Court, the vendee in the one, and the manager in the other, is entitled to claim execution of the attached decree. Moreover, the attachment of a decree-debt, although probably it does not of itself prevent the Court in which the decree is from enforcing the execution of it as against the debtor, still obliges that Court, under section 237 of the Civil Procedure Code, to hold the money which may arise from its execution until the further order of the attaching Court, and perhaps in the ultimate event to consider and determine conflicting claims to it.

At the time therefore when Rughoo Nundun applied to be allowed as the Mussamut's assignee to execute her decree against the plaintiffs, the Moonsiff knew that he could not lawfully execute that decree as it stood and pay over the proceeds thereof to the Mussamut herself until he should obtain authority so to do from the attaching Court, that is, from the Subordinate Judge; and consequently, in the absence of such authority, he ought not to have taken the step of, in effect, altering the decree by the substitution of Rughoo Nundun for the Mussamut, and allowing process of execution to issue in his name, which step would almost certainly lead to Rughoo Nundun realizing the amount of the attached decree without the attaching creditor being heard in the matter. He ought, under the circumstances, to have refrained from granting Rughoo Nundun's

application under section 208, and have left him to his remedy against his assignor. But even if he did think it right and proper to allow Rughoo Nundun, by virtue of his assignment, to stand in the shoes of the Mussamut for the purpose of executing this decree, he ought even then to have given reasonable effect to the application of the present plaintiffs to have the benefit of their decree in the Subordinate Judge's Court in the shape of a set-off. It is true that section 209 only applies to cases in which the two decrees are or have in some mode come to be as it were decrees of the same Court: still the Moonsiff might reasonably have stayed proceedings for a time sufficient to enable the plaintiffs to get a transfer of their decree from the Subordinate Judge's Court to his own Court for execution if the facts admitted of such transfer; or in the alternative to enable the attaching creditor (*i. e*, the present plaintiffs) to prefer a claim to the proceeds of the attached decree in priority to Rughoo Nundun, and to enable this claim to be heard and determined under section 237 before the money was actually levied. This has not yet been done. The question whether or not the attaching-creditor is entitled to the proceeds of the attached decree, supposing it realized, in preference to the judgment-debtor's assignee notwithstanding that he gave consideration for the assignment, has not yet been entertained and tried, and it obviously ought to be tried before process of execution is issued in favour of Rughoo Nundun, because if it is determined in the affirmative the process ought not to be issued. It would be absurd to levy from the present plaintiffs money which when levied must be paid over to them again. And it seems clear that if at the time when Mussamut Busgitta made her assignment to Rughoo Nundun, the present plaintiffs, or their predecessor, could have effectually pleaded set-off in a suit brought by her against them to recover the amount of her debt (had such a suit been then brought), Rughoo Nundun, her assignee, cannot be in a better position; and therefore he must fail on the trial of the question raised under section 237, which is in effect only a summary suit for the same purpose.

We do not of course intend to say that there can be no circumstance under which it is not right for a Court to execute a decree between the parties while a counter-decree exists between the same parties in another Court. We confine our observations entirely to the facts of the present case.

The decree of the Lower Appellate Court is reversed, and the plaintiff's suit is dismissed for want of jurisdiction. And each party will bear their own costs in all the Courts.

It need hardly be stated that the present decree will not put any obstacle in the way of the parties applying to the Moonsiff's Court for a review of the order which he has already made.

The 10th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Regulation XI. of 1825, s. 4—Diluviated soil—Re-formations—Ownership of site—Accretion.

Case No. 25 of 1873.

Regular Appeal from a decision passed by the Judge of Shahabad, dated the 29th July 1873.

The Court of Wards on behalf of Dewan Ram Jeeawun Singh and others (Defendants), *Appellants*,

versus

Radha Pershad Singh (Plaintiff), *Respondent*.

Mr. G. H. P. Evans for Appellants.

Mr. L. P. Pugh for Respondent.

If the re-formation of diluviated soil can be identified with the original site, and the owner of such site is known, Regulation XI. of 1825 does not deprive him of his property in the re-formed land.

Whether the re-formed land begins in the middle of the stream or from either bank, and whether the re-formation is by accretion to other land or not, makes no difference in the principle of the law that if the site can be identified, the land shall belong to the owner of the site.

Land which has become the property of a party by the operation of the first clause of section 4, Regulation XI. of 1825, cannot be taken away from him by the operation of the second clause. But the second clause cannot give him property which he has not acquired by accretion.

Where clause 2 says that in cases of sudden change in the course of a river, the land on being recognized shall remain the property of the original owner, the term "original owner" does not mean the person who may for a time have had possession of the accreted land without acquiring a right to the site of it, but includes the ownership of the site.

A party failing to prove a title by original ownership of site cannot be allowed to fall back upon a title by ownership for twelve years

Couch, C. J.—THE general facts in this and the other cases which were heard with it are that Mouzah Nowrunga, the property of the plaintiff, is situated above the northern bank of the Ganges in Zillah Ghazeepore, and the other ancient bank of the river is to the south below Mouzah Segowlee in Zillah

Shahabad. These two banks, north and south, are about six miles distant, and the disputed lands in this and in the other suits are in both zillahs. I take this statement of facts from the proceeding of the Deputy Collector in 1864. He says that within the six miles the river Ganges generally changes its course, that is, sometimes it flows below the northern bank and sometimes below the southern bank, and occasionally between the two banks in various directions. During the period of the permanent settlement, the river Ganges appears to have been below the northern bank, because at that time the area of Mouzah Nowrunga used to amount to 1,975 beeghas, about as much as existed in the northern bank in 1264 when this proceeding was had; and the entire lands and mouzahs to the south of it belonging to Zillah Shahabad were excluded from the boundary of Nowrunga. After that cutting away of the mouzahs of Zillah Shahabad, the river became current in the south. At the time of the measurement of the lands under Regulation XI. of 1833, which was completed in 1841, the northern bank of the river was situated in the place where there is a mark with blue paint in the map prepared by the Revenue Surveyor, that is, the place from which from the period of the permanent settlement the river had receded about four miles, causing the lands of the other mouzahs of Zillah Shahabad, which were washed away by the recession of the river, and lay on the northern bank thereof, to be mixed up with the area of Nowrunga. Including this, during the measurement under Regulation XI. of 1833 the area of the said mouzah amounted to 5,369 beeghas. And after that measurement, the course of the river remained in the same direction as it originally was, that is, towards the south. Accordingly, in 1845, when the survey-measurement of Zillah Shahabad was made, the river receding further to the south was current in the spot where it is marked by a red line in the map of the Revenue Surveyor (this map is in the proceedings), and the lands which were washed away from the south, and accreted on the north, were included in the area of Nowrunga. After the year 1845, the course of the river also continued in the direction towards the south. And in 1264, corresponding with A. D. 1857, the river reached its former southern bank, which was below Mouzah Segowlee, and about six miles distant from the northern bank. The entire piece of land situated on the northern bank of the river had become included in Mouzah Nowrunga. What quantity of land was included in Mouzah Nowrunga in 1264 (1857) cannot be ascertained, because, subsequently to 1841, no survey-measurement was made. But, from a map and *khusra* prepared by Lalljee Mull Ameen upon the institution of proceedings by the zemindar of Nowrunga in the year 1858, it can be ascertained that, in addition to the area measured, there were 2,800 beeghas of land to the south of the said area under dispute at that time. Upon examination of the maps prepared by the Ameen, it appears that at that time the Ganges was current in the south adjacent to the place where it was current during the preparation of the survey-map towards the west within the area surveyed of Mouzah Nowrunga; and 2,800 beeghas of land in dispute were situated towards the south of the river in the form of a *chukee*. And as the river in that shape suddenly receded and came from below Mouzah Segowlee towards the north, the area of Nowrunga, prior to 1858, was found to be about 7,000 beeghas. In that year, in addition to the lands of the disputed *chukee*, the area of the undisputed portion of Mouzah Nowrunga, owing to the diluvion from the south, was even less than the surveyed area, *viz.*, 5,369 beeghas. "Just as" (in the words of the Deputy Collector), "owing to the course of the river from "north to south, the lands alluviated since "the time of the permanent settlement, up "to the year 1264, corresponding with the "year 1857, the zemindar of Nowrunga "kept including the lands which alluviated "within his own area; whereby, in the year "1264, the area of the mouzah aforesaid "increased four-fold beyond the area of that "of the permanent settlement, that is by "8,000 beeghas; in the same way when, from "the year 1265, the river receded from south "to north, the zemindars of Sooheea, &c., "Zillah Shahabad, likewise, by taking pos-"session of these lands which accreted on "the near southern bank of the river, com-"menced establishing their mouzahs which "had formerly been washed away; whereby, "within the period of three years from the "receding of the river, that is, up to the "year 1267, all the mouzahs washed away "by the river were again established in their "own respective places, and the river again "became current below its old northern "bank, and the area of Nowrunga only "retained what it had at the time of the "permanent settlement, namely, about 2,000 "beeghas." These facts are proved by the documentary and other evidence in these suits

In the suit in which the present appeal is, the claim in the plaint is as follows: It is said to be a suit for the determination of right and recovery of possession of 5,241 beeghas of land, known by the name of *chukee* Nowrunga, Pergunnah Beehea, formerly appertaining to the District Ghazeepore, and the plaint asks for an order to obliterate the traces of the mouzahs alleged by the defendants and inserted in the map drawn out by the thakbust Deputy Collector in 1864; for determination whether in consequence of diluvion, destruction, and obliteration of traces of the entire mouzahs alleged by the defendants, they, the defendants, have no right whatever to the lands in suit under the provisions of Regulation XI. of 1825 and precedents of the High Court; and for annulment of the order of the Deputy Collecter of Ghazeepore, dated the 20th June 1864, as far as it is injurious to the right, title, and interest of the plaintiff, and of the orders embodied in the proceedings of the Deputy Collector of Shahabad of the 29th June and 30th of May 1864.

The grounds of suit are stated to be that after diluvion of the lands of the District of Shahabad and accretion of the same to Nowrunga, the property of the plaintiff, the river Ganges flowed below Mouzahs Soogonny, &c., lying in the District of Shahabad, until the year 1264 Fuslee, through the place marked as *bhagar* or channel, on the south in the survey-map sought to be set aside. At the close of 1264 and beginning of 1265 Fuslee, the river Ganges, leaving its old bed, at once flowed through Mouzah Nowrunga. Owing to this change in the course of the river, a large *chukee* or island with old traces and marks was formed on the south of the new stream and on the north of the old one. Also the lands in the old bed of the river being dried up became fit for cultivation in connection and contiguity with the lands of the said *chukee*. The plaint then states that in consequence of improper opposition and unfair interference on the part of the defendants, complaints were lodged before the Revenue authorities of the District of Ghazeepore. And that "in the year 1268, the current stream left the bed it had occupied in 1265, and at once turned to the north, and flowed through the lands of Mouzah Nowrunga, the estate of the plaintiff, leaving with it its old marks and traces, and these lands also being a second *chukee*, opposite to and in contiguity with the old *chukee*, became the right of plaintiff." It then sets out the proceedings of the Deputy Collectors which are sought to be set aside.

It is to be observed that it is not disputed that the lands claimed are lands which were re-formed in the mouzahs that had been washed away. The plaintiff says that in consequence of diluvion, destruction, and obliteration of traces of the entire mouzahs alleged by defendants, they have no right to the lands in suit under the Regulation. The proceedings of the Deputy Collector and the map prepared by him show that the authorities had been able to identify the sites of the different properties that had been washed away, and to mark them upon the map. The plaintiff founds his claim upon what probably at that time was thought to be the right construction of Regulation XI. of 1825 that there has been an accretion to his Mouzah of Nowrunga by the gradual alteration of the course of the river; and that then there was a sudden change of the river by which, as he says, first one *chukee* was formed in 1265, and then another in 1268, which he claims to be his property also by virtue of the Regulation. I shall refer to other parts of the proceedings afterwards which show still further that this is the nature of the plaintiff's claim.

The suit was, in the first instance, heard by the First Subordinate Judge of Shahabad, who, on the 31st of July 1868, dismissed it, on the ground that it could not be entertained after the expiration of three years from the order of the Commissioner made upon the proceedings of the Deputy Collector, which order was said to be dated the 29th of October 1864. From that decision there was an appeal to this Court, when it was held that the Subordinate Judge was wrong in his application of the law of limitation, and the suit was remanded for trial.*

It then came on to be heard by another Subordinate Judge of Shahabad, who, on the 30th of July 1870, without taking any oral evidence, and only upon the documentary evidence in the suit, decided that the ground taken by the defendants of the ownership of the original site of the land which had been re-formed was futile; because, as he says, there was no right of property in the mere original site of alluvial land. For this he cited decisions of this Court of the 25th of June 1860 and the 10th of July 1867. He then proceeded to apply what he considered to be the law to the different parts of the property in dispute, and made a

* 11 W. R. 527.

"modified decree" allowing part of the plaintiff's claim. It is not necessary to go into the particulars of this decree.

There was an appeal from this decree by the principal defendants to this Court, and it was held by the learned Judges by whom it was heard that the decisions upon which the Subordinate Judge based his judgment had been since very materially modified, in fact, overruled by the judgment of the Privy Council in Lopez *vs.* Muddun Mohun Thakoor,* and his decision was not sustainable upon that point. It was also thought that the case ought to be sent back in order that the parties might adduce any evidence that they might desire.

The case was accordingly again remanded,† and the learned Judges framed issues for the guidance of the lower Court. These were: (1.) How long has the land now in dispute or its several parts been in existence, and how was it formed? (2.) When and how did the river recede to the north of the land, the subject of this suit? when and how did the river cease to flow between these lands and the lands in Shahabad, which admittedly belong to the defendant's estate? (3.) Was the plaintiff in possession of the land claimed, or any and what portion of it, in 1265; and was he then, or at any other and what time, and how, dispossessed by the defendants? (4.) If the plaintiff had possession till 1265, or till dispossessed by the defendants, what was the nature of that possession, and when and how was it acquired; and had it existed for more than twelve years?

I shall observe presently upon the fourth issue, which may possibly be considered as introducing into the plaintiff's case a ground of suit which is not in the plaint. The plaintiff did not allege in the plaint that he had, by possession for twelve years, acquired a right to the re-formed land. The learned Judges seem to have thought that it might be desirable to have this matter inquired into.

The suit having been thus remanded, it was heard a third time, and on this occasion by Mr. Elliot, the Judge of Shahabad. I do not think it is necessary to examine his judgment at any length. The grounds upon which he decided the case appear to be that, with respect to the lands that are south of the piece of land occupied by the river in 1844, which is shown on the Ameen's map prepared under the order of the Court, the plaintiff had not shown any ground for reversing the order of the Deputy Collector by virtue of which the defendants had obtained possession of that part of the lands. And he seems, in deciding this, to have been governed by the decision of the Privy Council,* and also by a decision of Sir Barnes Peacock and other Judges of this Court† which he refers to.

Having decided as to the lands which were south of the river of 1844, he seems to have applied the Law of Accretion to the lands which were to the north of it, for he says that the plaintiff, by accretion to his original and accreted estate, became possessor legally under section 4 to the land down to the southern bank of the river of 1844, and on the land beyond that southwards he was a trespasser, and had not shown possession of any portion of that land for twelve years preceding dispossession.

"With reference," he says, "to the land "north of the south bank of the river of 1844 "then, it has to be considered whether plaint-"iff or defendants have a right as accretions "by alluvion to their several estates as "alleged," apparently, not applying to this part of the property in dispute the law as to re-formation upon the original site. And he ordered that the claim to the lands of Khootaha, Burhawa, and Pandeypore should be dismissed *in toto;* that of the lands of Pursondah and Sooheea, the plaintiff should be decreed so much as is on the north of the south bank of the river of 1844 as shown in the Ameen's map, with the provision that the river be taken as being four chains to the south of the position shown in the said map, the lands to the north of the south bank being alluvial accretions to the alluvial lands of the plaintiff's estate of Nowrunga, and to that extent he annulled the survey-map of 1864 and the Survey Deputy Collector's proceedings.

The first matter to be considered is the construction of Regulation XI. of 1825, which the plaintiff has made the foundation of his claim.

The case which has been treated as the earliest one on this subject is Roma Nath Tagore and others *vs.* Chunder Narain Chowdhry in Marshall's Reports, page 136. There Sir Barnes Peacock, speaking of the regulation, said: "The principle is that, "where the accretion can be clearly recognized "as having been re-formed on that which "formerly belonged to a known proprietor, it "shall remain the property of the original "owner. This is founded on general prin-

* 14 W. R. (P. C.) 11. † 16 W. R. 109.

* 14 W. R. (P. C.) 13. † Spl. F. B. No. of W. R. 45.

"ciples of equity and justice, which are the "principles recognized by the 5th clause. "We think clause 1, section 4, applies only "to cases of land gained, that is to say, formed "upon a site which cannot be recognized as "that of any former proprietor."

In Mussamut Imam Bandi *vs.* Hur Gobind Ghose,* in 4 Moore's Indian Appeals 403, their Lordships, at page 406, say: "Some "points seem to be agreed upon between "the parties. The whole of the district "adjoining the land in dispute, as well as "that land itself, is flat, and is very liable "to be covered, or washed away, by the "waters of the Ganges, which river fre-"quently changes its channel" (the state of things in the present case). "The land in "dispute was inundated about the year 1787; "it remained covered with water till about "1801; it then became partially dry till, "in the year 1814, it was again inundated. "After this period it once again re-appeared "above the surface of the water, and, by the "year 1820, had become very valuable land.

"The question then is, to whom did this "land belong before the inundation? Who-"ever was the owner then remained the "owner while it was covered with water "and after it became dry."

Next is the case, Lopez *vs.* Muddun Mohun Thakoor, reported in 13 Moore's Indian Appeals 467,† which may be considered the leading one on the subject. There their Lordships say of clause 1 of section 4 of the Regulation: "It is to be "observed, however, that that clause refers "simply to cases of gain, of acquisition, by "means of gradual accession. There are "no words which imply the confiscation or "destruction of any private person's pro-"perty whatever. If a regulation is to be "construed as taking away anybody's pro-"perty, that intention to take away ought "to be expressed in very plain words, or be "made out by very plain and necessary "implication."* * *

"In truth, when the whole words are "looked at, not merely of that clause, but of "the whole regulation, it is quite obvious "that what the then legislative authority "was dealing with was the gain which an "individual proprietor might make in this way "from that which was part of the public terri-"tory, the public domain not usable in the "ordinary sense, that is to say, the sea belong-"ing to the State—a public river belonging to "the State: this was a gift to an individual "whose estate lay upon the river or lay "upon the sea—a gift to him of that which, "by accretion, became valuable and usable "out of that which was in a state of nature "neither valuable nor usable." At page 478 they say: "Their Lordships, however, "desire it to be understood that they do not "hold that property absorbed by a sea or a "river is, under all circumstances and after "any lapse of time, to be recovered by the "old owner. It may well be that it may "have been so completely abandoned as to "merge again, like any other derelict land, "into the public domain, as part of the sea "or river of the State, and so liable to the "written law as to accretion and annexation."

It is sufficient, with reference to this part of the judgment, to say that, in the present case, the plaintiff not only did not put forward any case of abandonment of site by the defendants, but there is no evidence of their having abandoned their right to the original site. In one case there was a remission of revenue, but it was only a temporary remission, and cannot be treated as any evidence of an intention to abandon the site.

There is a more recent decision of the Judicial Committee in 10 B. L. R. 406—Nogender Chunder Ghose *vs.* Mohamed Esoff.* In that case, at page 429, their Lordships, speaking of the Regulation, say: "Two "observations arise on this statute:

"*1st.*—There is nothing to show that the "first rule contemplates other than that which "commonly falls within the definition of "'alluvion,' *viz.*, land gained by gradual and "imperceptible accretion, the *incrementum* "*latens* of the Civil Law.

"*2nd.*—No express provision is made for "the case of land which has been lost "to the original proprietor by the encroach-"ment of the sea or a river. But, on the "other hand, there is nothing to take away or "destroy the right of the original proprietor "in such a case, which must, therefore, "be determined by 'the general principles "'of equity or justice' under the 5th rule."

And at page 432 their Lordships accede to what is said in the case of Lopez *vs.* Muddun Mohun Thakoor† to the effect that a proprietor may, in certain cases, "be taken to have abandoned his rights in "the diluviated soil. It is unnecessary to "consider whether this might not be the "result of a successful application for remis-"sion of revenue under Act IX. of 1847,

* 7 W. R. (P. C.) 67. † 14 W. R. (P. C.) 11.

* 18 W. R. (P. C.) 113. † 14 W. R. (P. C.) 18.

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"section 5. For, in the present case, there is "nothing from which such abandonment can "be inferred. If an application for remission "of revenue was made, that application was "refused."

It is fully established by these decisions that, if the re-formation can be identified with the original site, and the owner of it is known, the Regulation does not deprive him of his property in the re-formed land which will belong to him. In those cases, I think in all of them, the re-formation did not take place as it did in the present case. It would seem that in those cases the re-formation began in the middle of the stream, or not adjoining to either bank of it, and gradually became annexed to the bank. But this makes no difference in the principle of the law that, if the site can be identified, the land shall belong to the owner of it. Whether the re-formation is by accretion to other land or not, the right of the owner of the site ought equally to prevail.

In the present case, therefore, the plaintiff cannot rely upon a title by accretion; because I take it to be satisfactorily proved by the proceedings before the different Revenue authorities at which the plaintiff was represented that the sites of the different lands that had been washed away were identified after the re-formation, and the Revenue authorities were able to lay down on the maps the position of the different lands that had been washed away and had re-formed.

But the plaintiff relies upon clause 2 of section 4 of the Regulation. He says in his plaint that the river suddenly changed on two occasions, and formed *chukees*, and that he was entitled, by clause 2 of section 4 of the Regulation, to that land. The words of the clause are: "The above rule shall not "be considered applicable to cases in which "a river, by a sudden change of its course, "may break through and intersect an estate "without any gradual encroachment, or may, "by the violence of stream, separate a con-"siderable piece of land from one estate, and "join it to another estate, without destroying "the identity, and preventing the recognition "of the land so removed. In such cases the "land, on being clearly recognized, shall "remain the property of its original owner."

Now, this clause does not apply in a case like the present so as to give to the plaintiff the ownership of the land, if he has not acquired it by the operation of the first clause. It is in fact a qualification of the first clause, and says that it shall not be applicable where there is a sudden change in the course of the river. The plaintiff is so far right in his construction that, if he could show that the land which he claims had become his property by the operation of the first clause, the second would not take it away from him. But that is very different from the second clause giving to him the property when he has not acquired it by accretion. And, according to the law as laid down by the Judicial Committee, he has not a title by accretion.

Then it also says that, in such cases, that is, of a sudden change in the course of a river, the land, on being clearly recognized, which was the case here, shall remain the property of its original owner. "Original owner" does not mean the person who may for a time have had possession of the accreted land without having acquired a right to the site of it. The original ownership must include the ownership of the site, and, if the plaintiff has not acquired that, this clause cannot operate to give him a right to the land.

Consequently, according to the construction of this Regulation which has been established, the case in the plaint is not supported by the law. Upon the facts of the case, the law does not give to the plaintiff a right to the land. It was probably in the belief that the law was as it had been laid down by this Court, that the plaintiff expected to succeed in these different suits, and to appropriate to himself an extent of land amounting, I think, as it appears upon the proceedings, to nearly 14,000 beeghas, his original estate of Nowrunga being a little under 2,000.

I have noticed that the fourth issue framed by this Court referred to a possession of the estate for twelve years. But the examination of the plaintiff's pleader on the 9th of July 1868 shows what at that time was considered to be the plaintiff's case. The pleader was asked to state the quantities of land covered by the several numbers given in the survey-map, and his answer was "as my client has "claimed the disputed lands as forming a "mouzah consisting of a chur, that is *chukee* "of Nowrunga, there is, therefore, no neces-"sity for my clients to state the quantity of "land of each of the several mouzahs alleged "by defendant;" thus resting his case upon a claim to the *chukee* as it is called, and the supposition that he acquired a title by force of the Regulation.

Then, in statements which were furnished by the parties when before Mr. Elliot, after the issues had been framed by the learned Judges of this Court, it again appears what

the case of the plaintiff was. On the 20th of June 1872, a statement was made to Mr. Elliot of the facts the parties intended to prove on the issues of the High Court. On the first and second issues the plaintiff said he intended to prove that the portions of Sooheea and Pursondah, shown in the map of the Ameen to be north of the Ganges in 1839, are the Nowrunga estate, and have existed from time immemorial. The rest of the land in dispute has been in existence since between 1839 and 1851-52 as far south as the south of the southern most *bhagar*, and this latter was formed by gradual accretion to the south of the Nowrunga estate as the river receded south. In 1857-58, the Ganges suddenly changed its course to the northern or middle *bhagar*, and again in 1861-62 to about its present position, making for itself a new course on both occasions without alluviating or diluviating, and thus forming two *chukees*—putting forward an acquisition of land, first, by gradual accretion to his estate of Nowrunga, and then, a confirmation of that title by the sudden change of the river and formation of the *chukees*. Then it was said that on the third issue the plaintiff would prove that in 1265 the plaintiff was not in possession, having been dispossessed that year by the defendants who were his dewans, and who took advantage of that position, and the sudden change of the river from the southern *bhagar* to the northern *bhagar*, to dispossess the plaintiff: and on the fourth issue, that the old proprietary right up to the river-boundary of 1839 from time immemorial and south of that by gradual accretion to his estate under clause 1, section 4 of Regulation XI. of 1825, from 1839 to 1857-58 to the southern *bhagar*, and retained to his estate under clause 2 of section 4 of that Regulation. Here the case is put forward in the most distinct terms.

This being the case in the plaint, it is a question whether, supposing the plaintiff had shown a possession for twelve years of such a description as to extinguish the title to the original site, he could be allowed to set it up now. In Mussamut Imam Bandi *vs.* Hur Gobind Ghose* before quoted, the Judicial Committee held that the question of limitation not having been put in issue in the pleadings could not be allowed to operate in the case. And in Ekcowree Singh *vs.* Heera Lall Seal† (12 Moore's I. A. 136), which was also a case of alluvion, Lord Chelmsford, who delivered the judgment, said: "This suit is brought to recover about 1,000 "beeghas of land claimed as alluvial, and "contained within the boundaries given in a "map annexed to the plaint. The plaintiffs "must succeed or fail on their title to the "land as alluvial. It is not competent for "them now, the cause having been decided "on this title, to raise at the hearing of "their appeal a different case, *viz.*, one "simply of original ownership of the site of "the lands re-formed. Had that been the "case alleged, some defence might have been "made founded on the nature of a boundary-"river, the ownership of its soil, the char-"acter, sudden or gradual, of the original "loss of land, and the effect of change from "such causes in the land itself on the owner-"ship in the soil," &c. There the plaintiffs having rested their case upon a title by alluvion, and having failed, were not allowed to fall back upon, and to raise at the hearing of the appeal, a title by ownership of the site.

What is said there will apply to the present case. The plaintiff does not seek to prove a title by original ownership of the site, but he seeks to prove a title by ownership for twelve years. He ought not to be allowed to do this. If he had rested his claim upon such a title when he brought the suit, some other matters might have had to be inquired into than have now been inquired into.

But, supposing, taking into consideration the issues framed by the High Court, he is to be considered as at liberty to raise this question, the evidence certainly does not show a possession for twelve years of such a nature as to extinguish the title to the original site. What is said by Lord Chelmsford in the judgment I have just referred to is applicable. Speaking of chur lands, he says: "The mere cultivation of them, like that of waste or jungle land, carries with it no *primâ-facie* character of usurpation or wrong." Land of this description may be made use of in some way for a time before it becomes really fit for cultivation; but the circumstances may be such that it would not be just to say that there was against the owner of the site an adverse possession which was a cause of action, so that the twelve years would commence running, and the title become extinguished. We must look at the nature of this land and the circumstances in which the defendants were placed, when we are considering at what time the possession which would operate

* 7 W. R. (P. C.) 67.
† 11 W. R. (P. C.) 2.

against them under the Law of Limitation can be said to have begun. As to the lands in the suit which I am now giving judgment in, there is not evidence of any such possession for twelve years. The evidence does not show what would be necessary in such a case, and is, as I have already said, subject to the remark that, if such a case had been put forward in the plaint, it is possible that the defendants would have produced rebutting evidence, and would have been able to meet any claim of that description.

It was also, upon this part of the case, argued that the words of Regulation III. of 1793, section 14, would apply, and that the circumstances were such that it might be said that there was good and sufficient cause for the defendants not prosecuting their claim.

I have some doubt whether that Regulation can apply to a case like the present, whether it is only applicable where a person is bringing a suit, and not where we are considering whether there had been, before the time when the defendants got possession, such a possession by the plaintiff as would give him a title to the land. But apart from this, I think that in this case the claim of the plaintiff has failed entirely, and that the decree of the Judge, by which the plaintiff was allowed to recover the land awarded to him in this suit, ought to be reversed, and the suit dismissed as to the whole of the plaintiff's claim.

[The Chief Justice then proceeded to deliver judgment in a number of cases connected with this case.]

Jackson, J.—I most fully concur.

The 23rd June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit for Partition (Butwarra)—Government Revenue.

Case No. 1146 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 11th March 1873, affirming a decision of the Subordinate Judge of that District, dated the 24th June 1872.

Bama Soonduree Dabee Chowdhrain (Defendant), *Appellant,*

versus

Kashee Kishore Roy Chowdhry (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Appellant.

The Advocate-General and *Baboos Sreenath Doss* and *Chunder Madhub Ghose* for Respondent.

In a suit by a shareholder of a joint estate to establish a right to (butwarra) partition, the Collector need not be made a party, unless the public revenue is jeopardized by the contemplated partition.

Kemp, J.—The defendant, Bama Soonduree Dabee Chowdhrain, is the special appellant in this case. The suit was brought by the plaintiff against three parties, *viz.*, Bama Soonduree, the special appellant before us, Hurish Chunder Chowdhry, and Ram Chunder Chowdhry, the sons of Huro Chunder Chowdhry. The plaintiff alleges that the father of the defendant No. 3, on the 3rd of Falgoon 1250, by an ewuznama of that date, made over to the plaintiff's father his four-annas share in the khanabaree lands, subject of the suit, in exchange for other lands; and that Hurish Chunder Chowdhry, the defendant No. 2, on the 32nd of Assar 1273, made over to him his eight-annas share of the said khanabaree also under an ewuznama; and that the plaintiff, being thus in joint possession of the khanabaree lands in proportion to the twelve annas so acquired by him, held the same jointly with the defendant No. 1, Bama Soonduree, who enjoyed the other four-annas share. An application was made to the Collector of Mymensingh for a partition under Regulation XIX. of 1814. The defendant No. 1 objected on the ground that the plaintiff was not entitled to a twelve-annas share, and the Collector, as a matter of course, under the aforesaid regulation, refused to entertain the application for a butwarra. His order is dated the 18th of November 1870. The present suit is therefore brought for a chinnit butwarra of a twelve-annas rukum of the khanabaree lands of Mouzah Bulwah. Now, *primâ facie*, the right to a butwarra is accessory to ownership, and the accessory right must follow the nature of its principal, which is that in a butwarra the assets shall be so apportioned that each of the allottees in a revenue-paying estate may be in equal funds and means to meet the public revenue apportioned on his share.

In this case if, by acceding to the plaintiff's prayer for a partition of the twelve-annas rukum which he has obtained by an exchange with other maliks, *i. e.*, the defendants Nos. 2 and 3, the Government revenue was likely to be jeopardized, this Court might pause before making any order for a partition without the Collector being made a party in the suit; but it has not been contended in the Court below, nor has it been shown before us in this case, that there were any other lands left joint at the time of the partition with the exception of these khanabaree lands in Mouzah Bulwah; and therefore it cannot be said that, in dividing off this twelve-annas share which the plaintiff has obtained under ewuznamas or by exchange with the defendants Nos. 2 and 3, and which he held jointly with the defendant No. 1, that the means to meet the Government revenue apportioned upon their respective shares are in any way affected, or the payment of the public revenue in any way jeopardized. Therefore, in my opinion, I see no legal obstacle to the plaintiff obtaining a butwarra as prayed for. I uphold the decisions of both Courts below, and dismiss the special appeal with costs.

Birch, J.—The plaintiff has become the owner of a twelve-annas share of a plot of khanabaree land which, by the butwarra-proceedings, was left joint and undivided between the applicants for butwarra.

The Collector having, as in duty bound, rejected the plaintiff's petition praying him to make a butwarra of this land, that petition being opposed by the four-annas share-holder, the plaintiff was compelled to resort to the Civil Court to obtain a division of this khanabaree land. He has succeeded in establishing his right to a twelve-annas share of it, and the Civil Court can, under such circumstances, direct the Collector to divide this plot between the plaintiff as representing twelve annas and the defendant as representing four annas. The Government revenue can be in no way affected by such partition.

It has been said here that this is only one of several plots left joint and undivided at the time of the butwarra. This plea was not raised in the Courts below. They have treated this case as referring to one plot of land, the boundaries of which are given in the schedule in the plaint, which was left undivided by the butwarra-proceedings, and have ordered that it be divided by the Collector. There is nothing contrary to law in this order, and in my judgment the special appeal must be dismissed with costs.

The 23rd June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Encroachments by Tenants—Presumption of English Law—Ejectment:—Re-adjustment of Rent.

Case No. 2466 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 4th August 1873, affirming a decision of the Moonsiff of Nurail, dated the 30th November 1872.

Gooroo Doss Roy (Plaintiff), *Appellant,*

versus

Issur Chunder Bose (Defendant), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboos Doorga Mohun Doss and *Bhoobun Mohun Doss* for Respondent.

The presumption of English Law as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant, so long as the original holding continues, and afterwards for the benefit of the landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit.

Where lands encroached upon have been added to the tenure, the tenant, if his tenancy is permanent, or he has a right of occupancy, cannot be ejected from them while the tenure lasts; but, when the rent is re-adjusted, these lands may be brought into the calculation.

Markby, J.—In this case the defendant had originally a holding of 16 khadas 18 pakhees of land at an annual rent of Sicca Rs. 430. He now holds 22 khadas in excess of that.

In the year 1277 the plaintiff delivered a notice to the defendant, calling upon him to pay, from the beginning of the ensuing year, Rs. 460-12-16 for the lands covered by the former lease, and Rs. 730-7-12 for the excess lands; total Rs. 1,191-3-18.

The plaintiff now claims the sum of Rs. 730, being the amount of rent due for the year 1278 in respect of the quantity of land held in excess.

The Subordinate Judge says: "It is stated "on the part of the plaintiff that the afore-"said excess lands, which are quite distinct "from the above-mentioned 16 khadas and "18 pakhees of land covered by the origin-"al jumma, were amongst the khas lands of

"the zemindar, but that the defendant's "predecessors gradually took possession of "them. If this allegation be true, then it "is clear that the 22 khadas and odd "pakhees of lands in question are not only "quite distinct from the tenure which the "defendant holds under the plaintiff, but "that possession thereof has been taken by "encroachments, and that the defendant or "his predecessor did never pay any rent "on account of the same. Under such a "circumstance, the possession of the defend-"ant in respect of those lands must be "considered adverse to the plaintiff, who, "therefore, cannot bring a suit against the "defendant for enhancement of rent since "the relationship of landlord and tenant "does not exist between the parties with "regard to the so-called excess lands." The first Court had taken a similar view of the case, and upon this view the plaintiff's suit was dismissed.

These judgments seem to proceed upon the ground that any encroachment by a tenant against his landlord is presumably a trespass. But, under ordinary circumstances, we think the presumption is the other way. We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English Law, and it is a rule which is supported by reason and principle. In India, where there is a great deal of waste land, and where quantities and boundaries are very often ill defined, there are very strong reasons for the application of such a rule. And the principle upon which the rule is founded is one of general application, namely, that, if an act is capable of being treated as either rightful or wrongful, it shall be treated as rightful. Now, in the case put, the act of the tenant in taking possession of more land than was let to him, though it may possibly have been a trespass and wrongful, may in most cases equally well have been done with the assent, express or implied, of the landlord, and so have been rightful, and, in the absence of any proof to the contrary, it is treated as the latter.

We know of no case in which the principle has been expressly recognized by judicial decision in India, but it is in accordance with the principle laid down by section 4 of Regulation XI. of 1825 as to the increase of land by alluvion. In practice also, encroachments made by the tenant are not considered as held by him absolutely for his own benefit against his landlord. If it were so, the tenant would, in twelve years, necessarily gain an absolute title under the Statute of Limitations; but we do not know of any case in which a title has been thus established.

The Moonsiff has referred to a case in the 6th Weekly Reporter, Act X., page 57. That decision does not appear to us to be at variance with the view which we take. The tenant there held a mokurruree tenure. The landlord, whilst this tenure was in existence, sued for a kubooleut of excess lands. It was held that he could not do this. It was said that either the tenant was trespasser, or else the land formed part of the existing tenure. Under the rule above mentioned this would be so.

It frequently happens that the landlord, though he cannot eject the tenant either because his tenancy is a permanent one, or because he has a right of occupancy, may yet have the rent re-assessed on the ground that the tenant pays less than his neighbours, or that the productive power of the land has increased, or that the quantity of land held by the tenant is greater than that for which rent has been previously paid by him. This last ground of enhancement seems to us to be expressly intended to meet such a case as this. As the lands encroached upon have been added to the tenure, the tenant cannot be ejected from them whilst the tenure lasts, but, when the rent is re-adjusted, these lands are brought into the calculation.

In the case above mentioned, Sir Barnes Peacock expresses his opinion that no rent could be assessed in such a case under section 17 of Act X. of 1859 (section 18 of Act VIII., B.C., of 1869). But that question was not then before the Court; and we do not know the facts of that case. Possibly it was a tenure which, as having been held at a fixed rent from the date of the permanent settlement, or for some other reason, could not be enhanced. From a case reported in 7 Weekly Reporter, page 122, we gather that Mr. Justice Shumbhoonath Pundit, at any rate (who was a party to both decisions), did not consider that the operation of the rule of enhancement for lands held in excess was excluded in such cases. Nor are we aware of any case in which it has been so determined.

The case in 17 Weekly Reporter, page 33, is distinguishable. That was a special appeal, and the Lower Appellate Court had finally found that the land there did not form any part of the tenure of which enhancement was sought.

It seems to us, therefore, in the present case—

(1) That, if these lands, as the plaintiff alleges, have been encroached upon by the defendant, and nothing appears to rebut the presumption, it ought to be presumed that the lands encroached upon are added to the original tenure; and,

(2) That, unless the tenure is protected from enhancement, the rent ought now to be assessed upon the lands held in excess, and that the plaintiff ought to have a decree for the rent so assessed.

We do not consider that there is any thing in the objections which have been raised as to the form of the suit. There is nothing to prevent these two questions being fully tried and determined between the parties in the present suit, and the suit is remanded to the Moonsiff for that purpose.

The 25th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Intending Purchasers—Notice of Interest—Joint Hindoo Family—Presumption.

On Appeal from the judgment of the Hon'ble C. Pontifex, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Gobind Chunder Mookerjee (Plaintiff), *Appellant*,

versus

Doorgapersaud Baboo and others (Defendants), *Respondents*.

Mr. Montriou and *Mr. Bonnerjee* for Appellant.

Mr. Lowe and *Mr. Evans* for Respondent Doorgapersaud Baboo.

If a person has notice that another has or claims an interest in property for which he is dealing, he is bound to inquire what that interest is; and, if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars or the extent of such interest.

Every Hindoo family is to be presumed joint in food, worship, and estate; but the evidence may rebut the presumption, and throw upon the person, who asserts that the family is joint, the necessity of giving some proof of his assertion.

THE judgment of Pontifex, J., which was appealed against, sets out the facts very fully, and was as follows:—

In this case one Gobind Chunder Mookerjee sues to set aside a sale to the principal defendant of a certain decree which stood in the sole name of Hurrish Chunder Mookerjee, the brother of the plaintiff. I may say at once that I think that there is not the slightest evidence that the purchase of the decree by the principal defendant was in any way dishonest. There has not been any attempt to show that Rs. 9,000, which he states that he gave for the decree, was not paid, nor that the Rs. 9,000 was not the fair value of the decree at the time when it was sold. Except, therefore, for any legal doctrine of notice, if the plaintiff's case be proved, this would be a contest between two innocent parties. The plaintiff in his plaint claims that he is entitled to an absolute interest in the decree which has been sold, and asserts that his brother Hurrish Chunder held it for him, and for him alone, benamee. The decree was granted in the following circumstances: Plaintiff alleges that in 1842 he lent certain Chowdhries Rs. 14,000; that in 1843 they confessed judgment in the late Supreme Court; that such judgment was confessed in the name of Hurrish Chunder and a certain jurisdiction-trustee who has since died; that various proceedings in execution of decree were taken out, some of which only were fruitful, and those only to a slight extent; that subsequently the decree was transferred from this Court to the Court of the 24-Pergunnahs; that execution was taken out in the 24-Pergunnahs, and that Rs. 1,000 or 1,500 were realized since such transfer. The plaintiff in his evidence attempted to prove that he is solely and absolutely entitled to the decree, but admissions were drawn from him in cross-examination, which, in my opinion, show clearly that the decree did not belong to the plaintiffs alone, but that, if it was not the separate property of Hurrish Chunder, it was part of the joint family-property. The plaintiff has admitted that, when he was in Assam many years ago, the whole of the interest on the judgment-debt was drawn by his father, and was applied for the expenses of the joint family-house. Moreover, in th

plaint he admits that, some time before the sale of the decree, the other members of the family insisted on having a share in it; that the matter went to arbitrators, and that the arbitrators allowed each of his brothers a certain share in the decree. I think also that the statement of the plaintiff that he was absolutely interested in the decree is disproved by the letter of his solicitor of the 13th June 1872. I cannot conceive that, if the plaintiff had instructed his solicitor that he was solely entitled to the decree, his solicitor would, in the letter which he wrote to Mr. Paliologus, the defendant's solicitor, have only stated that "Hurrish Chunder is not the absolute owner of the said judgment, and cannot claim the whole money realizable under it."

The plaintiff in his plaint has stated that, before the sale of the decree, *viz.*, on the 10th June 1872, he went to the defendant's kotee, and there saw the defendant and his gomastah Ramnauth. Although, in his written statement, the defendant apparently admits that he was present on that occasion, I am disposed to think that the defendant himself was not present, and that Ramnauth alone was present. It appears to me, however, to be immaterial whether the defendant was present or not, because the whole transaction relating to the sale of the decree was conducted by Ramnauth alone on behalf of the defendant. The plaintiff in his plaint states that, on going to the defendant's kotee, he gave notice of his claim as stated in the plaint, namely, that he was the absolute owner of the decree. I do not believe his claim was so stated to Ramnauth. The defendant, in the 8th paragraph of his written statement, has made a very fair admission of what took place on that occasion. He states that the plaintiff informed his gomastah that he, the plaintiff, was the brother of the said Hurrish Chunder Mookerjee, and, as such, was entitled to a share in the consideration-money, and that he must have some of the money which was to be paid to the said Hurrish Chunder Mookerjee, and threatened that, if he did not give some of the money, he would raise objections to the sale of the judgment. I believe that that statement is a correct statement of what took place. It corresponds exactly with the subsequent letter of the plaintiff's solicitor to Mr. Paliologus. I take it therefore to be the fact that plaintiff on that occasion only claimed a share in the purchase-money, and that he did not object to the sale itself or to the price which was to be given. If so, he would not be entitled to set aside the sale, except that as to any interest which he might have he would, to that extent, be entitled to a share of the purchase-money given on the sale.

Now the defendant's admission in paragraph 8th of his written statement is, I think, sufficient of itself to affect him with notice. It is immaterial whether the plaintiff claimed on that occasion to be absolutely entitled to the decree or only to a share in the money, for the notice would be sufficient if it was enough to excite attention, and call for inquiry on the part of the defendant. In one case it was held that notice of a claimant having a judgment or warrant of attorney affecting the estate was sufficient, although the claimant could only substantiate his claim as a mortgagor. I think therefore that the statement in paragraph 8th of the defendant's written statement is sufficient to affect him with notice of the plaintiff's claim. Therefore the question arises, did the defendant properly pursue the reasonable inquiry which he was bound to make after notice; and, if he did not, whether such reasonable inquiry, if he had properly pursued it, would have led him to discover that Hurrish Chunder was not the absolute owner of the decree? It appears from the 8th paragraph of the defendant's written statement and from Mr. Paliologus's letter that both the defendant and Mr. Paliologus were of opinion that, where a claimant gave notice of his claim, the purchaser was not bound to make any inquiry at all; but it was the duty of the claimant to establish his claim. That appears to me to be a misconception of the law. An intending purchaser is bound, when he has had notice given him, to make reasonable inquiry, and, if he does not do so, he must submit to the same consequences as if he had properly made the inquiry. But, on the other hand, I think that, if such reasonable inquiry would not disclose the fact of the claimant having any interest, the purchaser would not be affected by a mere statement of a person giving notice that he claimed an interest in the estate. The whole of the proceedings against the Chowdhrys have been put in this suit, and Mr. Bonnerjee, for the plaintiff, has argued that, after notice had been given, it was the duty of the defendant to go through the whole of these proceedings, and that, if the whole of the proceedings had been inspected, it would have appeared from the affidavits which were filed in the execution-proceedings that the plaintiff was at least jointly interested with Hurrish Chunder in the decree. But it further

appears that, after the decree had been transferred from this Court to the 24-Pergunnahs, the judgment-debtors came to an agreement with the decree-holder that the debt should be taken at Rs. 13,000, and should be paid by instalments. It has not been shown to me that, in any of the proceedings subsequent to that agreement (or in the agreement itself), there is any statement or reference which would have led a purchaser to suppose that Hurrish Chunder was not the absolute owner of the decree. The very fact that Hurrish Chunder alone made this agreement with the mortgage-debtors would go a long way to persuade the defendant that Hurrish Chunder was alone interested in the decree. When I say there is no document subsequent to the agreement which could lead a purchaser to suppose that Hurrish Chunder was not the absolute owner of the decree, I am not sure I am correct. Execution-proceedings were taken out by Hurrish Chunder against the Chowdhrys, who put in a petition alleging, among other grounds, why Hurrish Chunder alone should not be allowed to proceed with the execution; that Hurrish Chunder was not the absolute owner of the decree, but that he was a member of a joint family, and therefore he ought not to be allowed to execute the decree solely. The application went before Mr. Beaufort, the Judge of the 24-Pergunnahs, and that part of the application was dismissed as having no apparent show of reason. The allegation apparently was not supported by any evidence. Against that order, a petition of appeal was presented to this Court, and that also was dismissed. If those proceedings took place after the agreement with the Chowdhrys reducing the debt to Rs. 13,000, I think the defendant might fairly have supposed that the judgment-debtors had been put in motion by the brothers of the decree-holder; but, as these allegations were in no way substantiated, he might have naturally considered that Hurrish Chunder was the absolute owner of the decree. I do not think that the plaintiff's mere statement that he was entitled to part of the purchase-money rendered it necessary for the defendant to go back further in the proceedings than the agreement, which was, in fact, a sufficient starting point of title. If, therefore, the defendant had made the inquiry which, after the notice he received, he ought to have made, there is nothing in that portion of the record which he was reasonably bound to search which would have led him to suppose that Hurrish Chunder was not the absolute owner of the decree. But the defendant did not confine himself to the proceedings in Court. Ramnauth has said that he made inquiry of Hurrish Chunder as to the claim of Gobind Chunder, and Hurrish Chunder assured him that he and Gobind Chunder were then and had been long separate, and that this decree was the absolute property of Hurrish Chunder. He further says that he inquired of Kalee Baboo, the vakeel who acted for Hurrish Chunder in the proceedings in the Court of the 24-Pergunnahs, and that Kalee Baboo told him that Hurrish Chunder was the absolute owner of the decree. I think these were all the inquiries which the defendant was reasonably bound to make. It would be impossible to carry on the affairs of the world if transactions of this kind were not allowed to be completed after such enquiries as these. I think, therefore, that the defendant must be treated in the same manner as if he had searched the proceedings, and being so treated that he must be considered as a purchaser for valuable consideration without notice.

There is one part of the plaintiff's case which I cannot pass over. The plaintiff's own case is that he and Hurrish Chunder and his brothers were all members of a joint family living together in the same house. He admits that Hurrish Chunder remained an inhabitant of the house for a period of six months after the decree was sold. It became necessary, in order to prove the service of the summons on Hurrish Chunder, to show that the family-house was the dwelling-house of Hurrish Chunder at the time when the plaint was filed. No question whatever was put to the plaintiff throughout this case whether he asked Hurrish Chunder for his share of the Rs. 9,000. The only question put to him was whether or not he had been paid any share by Hurrish Chunder. If it was the fact that, after receiving Rs. 9,000, Hurrish Chunder proceeded to his native village, and came and resided in the house in which the plaintiff lived, and the plaintiff knew, as he must have known, that the sale had been completed, I think that the plaintiff was bound to show that he had taken some steps to inquire of Hurrish Chunder how the purchase-money was applied. The fact that no evidence was given to show that he made any inquiry of Hurrish Chunder is sufficient to taint the plaintiff's case with suspicion under these circumstances. I think the suit should be dismissed altogether. The plaintiff will pay the costs of Doorgapersaud on scale No. 2.

There is one other circumstance in the

case which I must notice. Both in his plaint and in his evidence the plaintiff has alleged that the reason why he took no proceedings to stay the sale of the decree was because Ramnauth had promised he would not proceed with the sale. The evidence of his brothers is directly contradictory of that. They say that, on the occasion of their visit to Ramnauth, Ramnauth said, "I will proceed with the sale, even if I throw the money into the river," and I consider it proved therefore that Ramnauth made no promise by which the plaintiff was misled or deceived.

The plaintiff appealed against this judgment on the following grounds:—

1st.—For that the learned Judge held that the defendant, Doorgapersaud Baboo, made all the enquiries he was bound to make before completing the assignment of the decree in the pleadings referred to, whereas he ought not so to have held.

2nd.—For that the learned Judge held that the said defendant was not bound to search the whole of the record in the suit in which the said decree was made before completing the assignment, whereas he ought not so to have held.

3rd.—For that the learned Judge held that there was nothing in the said record if the defendant Doorgapersaud Baboo had searched it to lead to the discovery that the defendant Hurrish Chunder Mookerjee had only a limited interest in the decree, whereas he ought not so to have done.

4th.—For that the learned Judge held that the defendant, Doorgapersaud Baboo, was not affected by negligence, and that he was in the position of a *bonâ-fide* purchaser for the value of the said decree without notice, whereas he ought not so to have done.

5th.—For that the judgment of the learned Judge was against the weight of the evidence adduced before him in this suit.

6th.—For that the learned Judge dismissed the plaintiff's suit, whereas he ought not so to have done.

Couch, C.J., delivered the judgment of the Appeal Bench as follows:—

The plaintiff in this suit and the second and following defendants, except the last, are the sons of Goluck Chunder Mookerjee, who died about the year 1858, leaving the plaintiff and those defendants and another son, Okhoy Coomar Mookerjee, surviving him. And the last defendant is the widow of Okhoy Coomar Mookerjee, who died about the year 1864. It appears that, in December 1842, three persons, named Roy Bykantonauth Chowdhry, Roy Mothoornauth Chowdhry, and Roy Preonauth Chowdhry, executed a bond and warrant of attorney to confess judgment in the Supreme Court at Calcutta, the bond and warrant of attorney being in the names of the defendant Hurrish Chunder Mookerjee and a person named Edward Hilder, who was called a jurisdiction trustee and who has since died. They were given to secure the payment of Rs. 14,000, with interest at 12 per cent., and a judgment was entered up upon the warrant of attorney in the Supreme Court on the 21st of November 1843 for Rs. 28,001. The judgment-debtors having died, the last in November 1868, proceedings were taken to revive the judgment against their representatives. This having been done, and there apparently being no property within the jurisdiction of the Supreme Court upon which execution could be had of the judgment, the usual certificate was transmitted to the Judge of the Court of the 24-Pergunnahs in order that execution might be had by that Court. An agreement appears to have been entered into, by whom authorized it is not, I think, clear, but at least it has been recognized as a binding agreement between the judgment-creditor and the representatives that part of the money due on the judgment should be remitted, and the remainder paid by instalments. This being the state of things, the defendant Hurrish Chunder Mookerjee entered into negotiations with the manager of the business of the first defendant, Doorgapersaud Baboo, for the sale to the first defendant of the money secured by the judgment. And the case of the plaintiff is that, pending the negotiation, and before the transfer of the judgment or order for execution had been effected in the Court at Alipore, the first defendant received notice from the plaintiff that he was interested in it, and that Hurrish Chunder was not the sole owner of the money secured by it, but was a trustee for the plaintiff, and apparently also for other members of the family. It is uncertain upon the evidence what is the precise notice which was given by the plaintiff. I do not refer to the attorney's letter, because it is possible that it was not communicated in time to have the effect of a notice. But, on the other evidence, I think it is clear that the plaintiff did give to Ramnauth, the defendant's agent or manager, notice that he was interested in the money. His own statement as to what notice he gave differs from that of his witnesses. Whatever he did tell Ramnauth, I think it is clear that it was sufficient to

oblige Ramnauth, who must be taken as representing the defendant, to inquire as to what interest the plaintiff had. The general rule is that, if a person knows that another has or claims an interest in property for which he is dealing, he is bound to inquire what that interest is; and, if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest. This is stated by Mr. Dart in his work on Vendors and Purchasers 794, quoting as his authority—Gibson *vs.* Ingo, 6 Hare 124.

The evidence in this case, although not altogether consistent, shows that enough was done to bring the first defendant within the operation of this rule. The effect of the notice is that the purchaser is bound to the same extent and in the same manner as the person was of whom he purchased. So that the first defendant would be bound to the same extent and in the same manner as Hurrish Chunder was, if he omitted to make the inquiry. Did he then make such an inquiry as he was bound to make and as would prevent the operation of the rule? There are, no doubt, some cases in which an inquiry might be sufficient. The Lord Chancellor in Jones *vs.* Smith, 1 Phillips 253, says there might be a case where the information coming from the vendor, and being of such a nature that the intending purchaser was *bonâ fide* misled by it, he would not be bound by the rule. But here we have not a case of that description. The notice of the plaintiff's interest came, not from the vendor, Hurrish Chunder, but from the plaintiff himself. What, then, was the inquiry which Ramnauth, representing the first defendant, thought proper to make? We must assume that at least he was informed that the plaintiff and Hurrish Chunder, the person in whose name the judgment was, were members of a Hindoo family, and were brothers. He must also be taken to have known the presumption of Hindoo Law which I will refer to presently. With this knowledge, he inquires, according to the evidence, of two persons. One was the vakeel who was employed in the execution-proceedings in the Alipore Court, but who could not be expected to know anything of the original transaction of the bond and warrant of attorney. That took place many years before. There is nothing to show that the vakeel would know anything more than what he could gather from the proceedings that were put into his hands for obtaining execution upon the judgment in the suit in which Hurrish Chunder was the plaintiff and apparently the person entitled to the money. The vakeel might have told him that the plaintiff and Hurrish Chunder were brothers and members of a Hindoo family. The other person of whom Ramnauth inquired is the vendor himself, Hurrish Chunder. Of course an inquiry of Hurrish Chunder, whether the plaintiff's claim was founded in truth or not, would be useless; because, being about to sell the judgment as his own property, he was not likely to tell the intending purchaser that it was not his, or that other persons were interested in it. It cannot be said that there was such an inquiry as was sufficient, supposing any inquiry would, in such a case as this, be sufficient, to prevent the defendant from being bound. I am not aware of any authority, and I have not been able to find any, that where a notice comes, as this notice did, from the person who claims an interest in the property, the purchaser can discharge himself from liability, supposing it is afterwards proved that the person really had an interest in the property.

I have said that the defendant must be taken to have known what is the presumption of Hindoo Law. That is stated by the Judicial Committee of the Privy Council for the first time, as far as I am aware, in Luximon Row Sadasaw *vs.* Mullar Row Rajee, 2 Knapp's Privy Council Cases 60.* Their Lordships then decided that, in a suit for the division of the property of an undivided Hindoo family, the whole of the property of each individual is presumed to belong to the common stock, and it lies upon the party, who wishes to except any of it from the division, to prove that it comes within one of the exceptions recognized by the Hindoo Law. The suit was by a person claiming to be entitled to a share of the property as family-property. And it was an appeal from a decision of Mr. Mountsteuart Elphinstone, when he was Governor of Bombay, to whom an appeal was then allowed. It is stated that the grounds upon which the claim was founded were that, by the Hindoo Law, until a division of a joint property or inheritance from the father is effected between the members of a family, the acquired fortune of each member falls into and belongs to the common stock, and is divisible accordingly.

Sir James Colvile in Srimuttee Jadumonee Dossee *vs.* Gungadhur Seal, which

* 5 W. R. (P. C.) 67.

is quoted in Baboo Shama Churn Sircar's Vyavastha Darpana 521, and is reported in 1st Boulnois, page 600, at near the end of his judgment, says: "The question is always one of fact, though a fact determinable in the absence of evidence strong enough to rebut presumption, *by the legal presumption that the property is joint.*" There is also a decision of the Sudder Court in 4 Bengal Select Cases 162 to the same effect. It was there held that in the case of an undivided Hindoo family, their acquisitions will be presumed to have been joint till proved otherwise—the *onus probandi* resting with the party claiming exclusive right. These cases were not quoted by me in Taruck Chunder Poddar *vs.* Jodeshur Chunder Koondoo, 11 B. L. R. 193.* I did not consider it necessary then to refer to all the decisions on this question, there being the judgments in the Privy Council which I quoted. The cases which I have now quoted may be added to them, and it is unnecessary in this case to quote again the decisions of the Privy Council which were quoted in the former case. But there is one case which it is necessary to notice. Mr. Justice Pontifex, in a recent judgment in Denonath Shaw *vs.* Hurrynarain Shaw, 12 B. L. R. 349, refers to the case of Umritonath Chowdhry *vs.* Gouree-nauth Chowdhry before the Privy Council, which is reported in 13 Moore's Indian Appeals 542,† and says that "it was an appeal from the unreported decision of Kemp and Pundit, JJ., who had held that in that case the mere fact of commensality was not sufficient evidence of their being joint in estate, and that it was necessary to ascertain whether the nucleus of the estate was originally joint or separate; and although the Judicial Committee did not go strictly into the question, they say at p. 550: "Both these cases of family and local custom, the burden of which was entirely on the defendant, have failed; and that brings it back to the case which the plaintiffs below had to prove, that is, the simple fact that this was ancestral property of their common grandfather. That being so, and it being substantially admitted that there was no other source from which the acquisition could be made, the decree of the Court below seems to their Lordships to be right." The learned Judge then says: "If the true doctrine is that an estate conveyed to an individual member of a family will, in the absence of proof to the contrary, be presumed to be joint without any evidence of a nucleus of joint property, then it is difficult to understand why the Judicial Committee should have relied on a substantial admission."

I agree that, if we had no other judgment on this subject than the passage which is quoted by Mr. Justice Pontifex, it might be supposed that their Lordships thought it was necessary that there should be some evidence of a nucleus of joint property. But we must look at the other judgments of the Judicial Committee, and I cannot, from this passage, infer that their Lordships intended to lay down a rule opposed to what had been laid down and acted upon by them in various cases. All that it amounts to is that there being this admission, their Lordships thought it strongly supported the presumption. In many cases, probably in most, there are facts in evidence which support the presumption, but it does not follow from this that the presumption is not to have effect in the absence of any such evidence.

In these decisions I do not find it anywhere laid down that the plaintiff need give any other evidence than that there is an undivided Hindoo family. The presumption then applies. Nor need he, in fact, give evidence that the family is undivided, although it is advisable to give it when it is possible to do so, and so it is to give evidence that there was family-property from which the acquisition could be made in anticipation of evidence that may be given to rebut the presumption. It is laid down by the Judicial Committee in Neelkisto Deb Burmono *vs.* Beer Chunder Thakoor, 12 Moore's Indian Appeals 540,* and the same doctrine is stated in Strange's Hindoo Law, that presumably every Hindoo family is joint in food, worship, and estate. This is the presumption, but of course the evidence may rebut it, and may throw, upon the person who asserts that the family is joint, the necessity of giving some proof of it.

Therefore it appears to me that the first defendant was fixed with such a knowledge as showed that at least the plaintiff was entitled to a share of this property; that it was property which Hurrish Chunder was not entitled to deal with as solely his own, because no facts appeared, or were proved, which show that Hurrish Chunder was so entitled.

Then the question is what decree ought to be made in this case? The plaintiff put

* 19 W. R. 178.
† 15 W. R. (P. C.) 10.

* 12 W. R. (P. C.) 21.

forward a case which is not proved. His case was that the money was his own, and that Hurrish Chunder was not representing the joint family, but was representing the plaintiff only. He has failed to prove this, and he is not entitled to the decree which he asks for in the prayer of the plaint, that he should be declared entitled to the whole of the property. But he has, I think, established a case in which, upon this plaint and the general prayer for relief, he is entitled to a decree. The plaintiff substantially claims to be interested in the property, and that appears upon the evidence to be true. He made defendants the other members of the family, besides Hurrish Chunder, who would be entitled to shares. Two of them appeared and put in a written statement, and were examined as witnesses, and they did not dispute the right of plaintiff to receive the money. They admitted that some arrangement was made with the various members of the family by which the plaintiff was to receive the money, and it was to be divided in a certain way. The other defendants have not appeared, and do not dispute the right of the plaintiff to receive their shares. I therefore think that the decree which we should make, after reversing the decree of Mr. Justice Pontifex, is a decree declaring that the first defendant is a trustee for the plaintiff and for the other defendants, except Hurrish Chunder, of their shares of what may be recovered upon the judgment, and that the shares of all of them, except Hurrish Chunder, be paid to the plaintiff. If any application should be made to us for the appointment of a Receiver, we can entertain it, and we need not appoint a Receiver now. We shall make a decree in the terms I have stated. The appellant will have the costs of this appeal on scale No. 2. The parties will pay their own costs of the suit on the same scale.

Macpherson, J.—I also think that this decree ought to be reversed. The purchaser unquestionably had noticed that the plaintiff claimed a beneficial interest in this fund, and that he objected to the sale; and there was the presumption of Hindoo Law in favour of his having a beneficial interest in it. Having that notice, the purchaser chose to go on and to complete the transaction without really making any substantial inquiry in the matter. Under such circumstances it appears to me clear that the purchaser took no more than the interest of Hurrish Chunder, his vendor, and therefore that the plaintiff is entitled to the decree proposed to be made.

The 25th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Breach of Contract—Damages.

Case No. 201 of 1873.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 3rd June 1873.

Poorno Chunder Chatterjee (Plaintiff), *Appellant*,

versus

The Chairman of the Municipal Commissioners of Hooghly (Defendant), *Respondent*.

Baboo Bykuntnath Paul for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

A contractor for work, who, by failing to fulfil the conditions of his contract, forfeits the money deposited by him as security, cannot also be held liable for damages for breach of contract, unless the damages exceed the money which was deposited.

Couch, C.J.—The 9th clause of the contract provides that, if the plaintiff fails to perform the work within the aforesaid time, that is, the time which had been named in the 2nd clause, and on the aforesaid conditions, or if he fails altogether to do the work contracted for, or if he does a part of the work, and fails to do the rest, or if he becomes in any way liable to the Commissioners on account of the contract, or if it appears to them that there was negligence on his part, the Chairman will be competent to seize and take the entire amount deposited by him, whether the Commissioners sustained any damage or not. It says: "I (the plaintiff) shall not in any way "have refund of the said money, &c., which "shall become the property of the Municipal "Commissioners." The evidence shows clearly that the plaintiff did not perform his contract, did not do the work within the time specified, and was in fact altogether dilatory and negligent in doing the work which he had agreed to do. The Commissioners appear to have borne with him for some time,

endeavouring to get him to do the work by threatening to impose a fine upon him; and yet the work was not done, and it is not shown that he was prevented from doing it by the want of orders on the part of the Commissioners. The case arose in which, according to the contract, the Commissioners were entitled to declare the deposit forfeited, and the plaintiff is not entitled to recover it from them. But we do not consider that the Commissioners should be able to forfeit the deposit, and also to have damages for the breach of the contract, unless the damages exceed the money which was deposited. This seems to be the intention of the 10th clause. It is not an unusual provision, and is a just one, that, if damages are demanded, the deposit shall be applied in the payment of the damages, if they do not exceed it; and if they do, so far as it will go. But it does not follow that, if the damages are less than the deposit, there is not power to forfeit the deposit, if the contract contains a clause to that effect.

The appeal fails except as to the sum of Rs. 384, which must be added to what has been awarded to the plaintiff by the lower Court, the decree of that Court being modified to that extent. Each party must bear his own costs in this Court.

The 25th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Wassilat—Suit by Co-sharer—Limitation.

Case No. 1671 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 3rd May 1873, reversing a decision of the Moonsiff of Shahzadpore, dated the 29th December 1871.

Juggut Chunder Bhadoory (one of the Defendants), *Appellant,*

versus

Shib Chunder Bhadoory (Plaintiff), *Respondent.*

Baboo Gopal Chunder Sircar for Appellant.

Baboo Nullit Chunder Sen for Respondent.

A suit to recover plaintiff's share of wassilat from a co-sharer, who has received it from a judgment-debtor with plaintiff's permission, but withholds payment to plaintiff, is not governed by the three years', but by the six years' limitation.

Kemp, J.—The points taken in special appeal are that the three years' limitation applies to the claim of the plaintiff; that the plaintiff has no cause of action against the defendant, special appellant; that there is no evidence that the money was received on the part of the plaintiff by the defendant; and that the suit ought to have been properly brought against the debtors, Messrs. Watson and Co., and not against the special appellant. On the first point, we find that the suit is not governed by three years' but by the six years' limitation, and having been brought within six years from the 26th of Srabun 1271 it is clearly not barred. The plaintiff and defendant are admittedly co-sharers, and the plaintiff does not dispute that the defendant's share was two annas. They were co-sharers in a putnee talook from which Watson and Co. ousted them. They then brought a suit against Watson and Co., and obtained a decree for possession, the question of wassilat being reserved for the execution-stage. It appears that Watson and Co. paid the wassilat under an amicable arrangement to Juggut Chunder Bhadoory, who acted for himself and under permission from the plaintiff. Juggut was, therefore, under an obligation to pay the plaintiff in proportion to his anna share, and he did not do so. The Court below has found as a fact that permission was given to Juggut by the plaintiff to receive his share of the money, and the second ground of special appeal must be rejected. Juggut Chunder having received this money from Watson and Co. on the 26th Srabun 1271, he was under an obligation to pay the plaintiff's share or two annas, and the suit having been brought within six years from that date, namely, from the 24th of Srabun 1277, it is not barred by limitation.

The special appeal is dismissed with costs.

The 25th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Arrears of Rent—Jummabundee Papers—Putwarree's Evidence—Admission of Tenancy.

Case No. 2177 of 1873.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 23rd August 1873, reversing a decision of the Moonsiff of Begoosurai, dated the 29th May 1873.

Pundit Bhugwan Dutt Jha and another (Plaintiffs), *Appellants,*

versus

Sheo Mungul Singh (Defendant), *Respondent.*

Baboo Nil Madhub Sen for Appellants.

Baboo Boodh Sen Singh for Respondent.

In a suit to recover arrears of rent at a specified rate, the jummabundee papers of a former putwarree, which were filed as evidence of the rate claimed, were held to be valueless without the personal testimony of the putwarree.

As defendant admitted tenancy and his liability for a certain rate of rent, the plaintiff was held to be entitled to recover arrears to the extent admitted unless defendant established his plea of payment.

Phear, J.—We see no reason for disturbing the findings of fact at which the Lower Appellate Court has arrived.

The suit is brought by the plaintiff for the purpose of recovering from the defendant certain arrears of rent at a specified rate for certain specified years.

And according to the statement of the Judge, which the learned pleader for the appellant is unable to controvert, the plaintiff adduces no evidence in support of the allegation of the rent being payable by the defendant at the rate he claims, excepting certain jumma-wassil-bakee papers, which, it is said, are proved by the putwarree. Proof of these papers is nothing more than a statement by the putwarree that he has made out the account exhibited in the papers, and probably also that he believes it is right and correct. But the question to be tried was a question of fact—what was the rent actually paid by the defendant in the previous years?

The plaintiff put forward no other ground for his right than the ground afforded by previous payments. The jumma-wassil-bakee papers of course prove nothing upon this point. The putwarree, it is true, also filed certain jummabundee papers of previous years. But he says that he got these from the former putwarree. Therefore, they are no evidence of any worth whatever in the case. Had the former putwarree come forward as a witness, and had sworn that he had collected rent from the defendant at the rate shown in the jummabundee, and that the jummabundee was his own record of the fact, then this would have afforded very material evidence in support of the plaintiff's claim. But this man is not called, and his jummabundee papers without him are valueless.

The Judge adds further that, although witnesses were called by the plaintiff, they were entirely silent as to the rates.

The result of this state of the evidence is that the plaintiff has failed to prove his case by the evidence which he himself brought forward for the purpose.

These findings of fact, however, thus arrived at by the Judge do not, under the circumstances of the case, entirely dispose of the plaintiff's suit, because the defendant in his written statement admitted that he was a tenant of the plaintiff and liable to pay rent to the plaintiff for the specified years. And he further stated the rate of the rent which was due from him. This being so, to the extent of this admission of the defendant, the plaintiff had the best possible evidence in support of his right to recover some arrears of rent. And the defendant could not avoid his liability in this suit to pay arrears to that extent, except by showing that he had in fact paid them. For the purpose of doing this, he appears to have adduced certain dakhilas and farkhutties purporting to bear the signature of Anunt Lall, plaintiff's putwarree. But the first Court was of opinion that these dakhilas were worthless, and that the defendant's allegation that he had paid rent for the years in question was certainly false. The Lower Appellate Court makes no express reference to this part of the case. The Judge says: "The defence set up is doubtless a bad one, and supported by evidence open to the gravest suspicion, but the onus lay on plaintiff, and he has, in my opinion, failed to establish that the former rate paid by defendants was that for which he now claims."

And on that ground alone he dismissed the plaintiff's suit.

But it was necessary for the Judge to come to an express finding as to whether or not the defendant had made out his plea of payment, because, if that defence was not established, then, as has already been said, the

plaintiff was, by reason of the defendant's admission, entitled to recover the arrears of rent to the extent to which the defendant admitted he was bound to pay rent.

The decision of the Lower Appellate Court must, therefore, be reversed, and the case remanded for re-trial only upon the issue whether or not the defendant's plea of payment is proved.

We think that the costs of this appeal should abide the event.

The 26th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson and C. Pontifex, *Judges*.

Act VIII. of 1859, s. 273 et seq.—Act XXIII. of 1861, s. 8—Imprisonment of Insolvent Debtor.

W. Coombe (Plaintiff), *Decree-holder*,

versus

A. Caw (Defendant), *Judgment-debtor*.

Mr. Lowe for Plaintiff.

Mr. Kennedy and *Mr. Branson* for Defendant.

The general design of the provisions in s. 273 and the following sections of Act VIII. of 1859 is that a man is not to be needlessly and uselessly detained in prison. There must be some object in the imprisonment, *viz.*, to oblige the debtor to make a full disclosure of his property, and to prevent him from fraudulently concealing property which might be taken in execution. The scope of these provisions does not require that he should be committed to prison for what would not be a legitimate advantage to the creditor, *e.g.*, in order to oblige him to borrow from others to pay his judgment-creditor.

THE plaintiff in this suit, which was brought to recover the sum of Rs. 2,000 on a bill of exchange which had been drawn by the defendant in plaintiff's favour, and accepted by Hazlewood and Co., and which was not paid by the acceptors, obtained a decree against the defendant; and, in execution of such decree, after realizing a portion (Rs. 736-9-9) from the property of the defendant in the 24-Pergunnahs, he attached the person of the defendant. The defendant on being brought before the Court applied for his discharge under section 273, Act VIII. of 1859, and presented the following petition:—

That your petitioner has been arrested under a writ of execution issued by the Hon'ble Court on a decree made against him in the above cause.

That your petitioner has no present means of paying the debt, for which the said decree has been made, and for which he has been arrested, either wholly or in part.

That the plaintiff attached a certain Soondurbund grant belonging to your petitioner through the Court of the 24-Pergunnahs, and has realized part of his claim.

That the schedule hereunto annexed and marked A contains a full account of all property of whatever nature belonging to your petitioner, whether in expectancy or in possession, or whether held exclusively by himself or jointly with others, or by others in trust for him, except the necessary wearing apparel of himself, and of the places respectively where such property is to be found, and your petitioner is willing to place the same property at the disposal of this Hon'ble Court.

That, with the exception of the said property mentioned in the said schedule A, your petitioner is not possessed of any other property except his salary of Rs. 600 per month, out of which, under order of this Court, he is to pay Rs. 100 per month to his creditor Dwarkanath Mitter.

The petitioner prayed accordingly that the plaintiff may be called upon to show cause why he should not be discharged under section 273 of Act VIII. of 1859, and why the plaintiff should not proceed against the property of the petitioner, and that, pending any inquiry that the Court may direct into the matter of the petition, the petitioner may be released on his furnishing good and sufficient security for his appearance at any time when called upon while such inquiry is being made.

The schedule referred to in the defendant's petition was as follows:—

1st.—A policy for Rs. 3,000 on my own life in the Standard Life Assurance Office, pledged with Mr. W. Sutherland for Rs. 400 or thereabouts, being amount advanced by him to pay the Delhi Bank, to whom the said policy was pledged.

2nd.—Household property at my residence at Teelkhul Ghât, Howrah, within the jurisdiction of the Hooghly Court—which property was then specified in detail.

The application came on for argument first before Macpherson, J., who referred it to a Bench consisting of himself and Pontifex, J., and these learned Judges, with the consent of Counsel on both sides, had the matter re-argued, on account of its importance, before a Bench consisting of the said Judges and the Chief Justice.

The judgment of the Bench was delivered as follows by—

Couch, C.J.—Mr. Lowe, who opposes the application, said that there can be very little doubt that section 273 of Act VIII. of 1859 and the following sections, as well as section 8 of Act XXIII. of 1861, are the law on the original side of the Court, and regulate its practice. He said "very little doubt;" but there is no doubt that it is the law, and it has been constantly acted upon.

The question we have to decide is what is the meaning of section 273. Of course, in considering that, we must look also at the sections in Act VIII. which follow it. It appears to me that the general design of these provisions is that a man is not to be needlessly and uselessly detained in prison.

Imprisonment is not to be arbitrary and capricious. There must be some object in it; to oblige the debtor to make a full disclosure of his property, and to prevent him from fraudulently concealing property which might be taken in execution of the decree. Section 273 says that the person, who is arrested, when brought up, may apply for his discharge "on the ground that he has no present means of paying the debt, either wholly or in part; or, if possessed of any property, that he is willing to place whatever property he possesses at the disposal of the Court." And he is to give "a full account of all his property of whatever nature, whether in expectancy or in possession." And section 8 of Act XXIII. of 1861, which is substituted for section 273 of Act VIII. of 1859, provides that "the Court shall examine the applicant as to his then circumstances and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed, and why the defendant should not be discharged; and, should the plaintiff fail to show such cause, the Court may direct the discharge of the defendant from custody."

Allowing that the word "may" is imperative upon the Court, and has, in fact, the same meaning as "shall," the discharge of the defendant from custody is only to be granted when, in the opinion of the Court, the plaintiff shall have failed to show such cause.

The question is whether the plaintiff here can be said to have failed to show cause. The only cause shown is that the defendant is holding an office for his services in which he is entitled to receive a monthly salary. If he is not discharged and remains in prison, he cannot perform those services, and we may certainly assume that he would not continue to receive the salary; so that, if the cause shown is allowed to be sufficient, the salary will entirely cease. The fact of his being entitled to receive a salary which he can only get by being discharged is given as a reason that he should not be discharged: I cannot see that it is.

When we consider what might follow on his not being discharged and being committed to prison, it would seem that the Court ought not to refuse his discharge.

He might, upon being committed to prison, apply under section 280 for his discharge, and then he must give a full account of all property of whatever nature belonging to him, whether in expectancy or in possession, and of the places where such property is to be found.

By section 281 the Court, on such application being made, is to cause the plaintiff to be furnished with a copy of the account of the defendant's property, and to fix a reasonable period within which the plaintiff may cause the whole or any part of such property to be attached and sold. If the plaintiff does not, within the time specified, prove that the defendant has been guilty of any of the acts there mentioned, he will be discharged.

The section shows that the property intended by the former section is property which may be made available for the satisfaction of the debt which may be realized and sold. This being the state of things, and the defendant being able, if we were now to send him to prison, to apply for his discharge under section 280, I think we ought not to refuse it under section 273. It is a case in which there is not sufficient cause shown for not discharging him.

It appears to me that the scope of these provisions does not require that the defendant should be committed to prison for what would not be a legitimate advantage to the plaintiff. The Court will not allow a person to be imprisoned in order to oblige him to obtain money from other persons to pay his debt, and incur a debt which he would be as little able to pay as the present. It will not aid in forcing other persons to take the risk of loss which is now the creditor's. As we have not the power of giving the plaintiff any lien or charge upon the salary, or to secure to him a part of it in preference to any one who may hereafter attach it, we see no alternative but to declare that the defend

ant is entitled to be discharged if the other circumstances necessary are proved.

Mr. Justice Macpherson will now take up the matter, and will also deal with the costs of this application.

Macpherson, J.—Having heard the matter fully discussed, I am of the same opinion as the Chief Justice.

Pontifex, J.—I am of the same opinion.

After the Bench rose, the petitioner was examined at great length by Macpherson, J., who held that there was nothing in the defendant's conduct which debarred him from the benefit of section 273 of the Act. The defendant was thereupon ordered to be discharged. The Court made no order as to costs.

The 26th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit for possession—Limitation—Act XIV. of 1859, s. 15.

Case No. 1627 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 23rd May 1873, reversing a decision of the Moonsiff of Rowjan, dated the 12th March 1873.

Prem Chand Kybutta (Plaintiff), *Appellant,*

versus

Huree Doss Kybutta (one of the Defendants), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Aukhil Chunder Sen for Respondent.

In a suit for possession of land where it appeared that plaintiff had forcibly turned out the opposite party and compelled him to seek his remedy under Act XIV. of 1859, s. 15, HELD that plaintiff was not entitled to get a fresh starting point from the date of his decision in that case.

Kemp, J.—THE plaintiff is the special appellant in this case, and the contention before us is that the Lower Appellate Court is wrong in finding that the plaintiff's suit is barred by the statute of limitation. The Subordinate Judge differed from the Court of first instance, and held that the plaintiff's claim was barred. He says: "I am of opinion, with reference to the oral and documentary evidence adduced by the plaintiff, that the claim in respect of the land in suit is entirely barred by limitation," and he gives his reasons in detail for differing from the first Court.

It is said in special appeal that the plaintiff was entitled to date his cause of action from the date of the decision under section 15, Act XIV. of 1859; or, in other words, that although there has been a clear finding that neither the plaintiff nor his grantor were in possession within twelve years before suit, the plaintiff is entitled to a fresh starting point, because he forcibly dispossessed the opposite party, and compelled him to bring a suit under section 15, Act XIV. of 1859. On this point we refer to a decision to be found in Volume XII., Weekly Reporter, page 9, in which case this question was raised and fully discussed, and we entirely concur with the principle there laid down, *viz.*, that "to hold that any fresh "cause of action accrues to a party from the "day on which a section 15 proceeding is "commenced would be tantamount to hold-"ing that a wrongful and forcible possession "is equivalent to an honest and legal pos-"session, which would be to defeat the "object and policy of the law." There is a clear finding that neither the plaintiff nor his grantor was in possession within twelve years prior to the institution of the present suit, and we cannot say that because he forcibly turned out the opposite party, and because that party was obliged to seek his remedy under section 15, the plaintiff is entitled to get a fresh starting point from the date of the decision in that case. The special appeal is dismissed with costs.

The 26th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit to recover in kind—Act XXIII. of 1861, s. 27.

Case No. 1537 of 1873.

Special Appeal from a decision passed by the Deputy Commissioner and Subordinate Judge of Kamroop, dated the 27th May 1873, affirming a decision of the Moonsiff of Gowhatty, dated the 28th June 1872.

Dom Kumar and others (some of the Defendants), *Appellants,*

versus

Soorjo Dutt Surmah (Plaintiff), *Respondent.*

Baboo Bykuntnath Doss for Appellants.

Baboo Obhoy Churn Bose for Respondent.

A suit to recover a quantity of rice (or its value, Rs. 300) in return for some paddy which had been taken by defendant under contract was held to be cognizable by the Small Cause Court within the meaning of Act XXIII. of 1861, s. 27.

Kemp, J.—A PRELIMINARY objection has been taken in this case that no special appeal lies under the provisions of section 27, Act XXIII. of 1861. On referring to the plaint we find that it is alleged that the defendants on the 25th of Srabun jointly took from the khets of the endowment 600 poorahs of paddy, for which they were bound to return 300 poorahs of rice, and that not having done so, the suit was brought for the recovery of 300 poorahs of rice or the value thereof, namely, Rs. 300. This is clearly a suit under a contract cognizable by the Small Cause Court and under Rs. 500 in value. No special appeal will therefore lie.

The appeal will be dismissed with costs.

The 26th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Contract of lease—Obligation to give possession—Damages.

Case No. 248 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 18th April 1873.

Ashrufoonissa Begum (Defendant), *Appellant,*

versus

Sheikh Tosudduck Hossein and others (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboos Sreenath Doss, Chunder Madhub Ghose, and *Boodh Sen Singh* for Respondents.

Defendant granted to plaintiff a zur-i-peshgee lease for a period commencing with 1276. It was recited in the lease that the property was in the possession of the previous zur-i-peshgeedars, from whom it was redeemable at the end of the year 1275, and it was agreed that a part of the consideration-money should be applied to payment of those ticcadars to enable plaintiff to obtain possession. The previous ticcadars not accepting the tendered payment, plaintiffs took legal measures against them, but without success. Subsequently they accepted payment and gave up the land. Plaintiff now sues defendant for damages for not having been put in possession at the beginning of 1276:

HELD that in the lease there was an implied contract on the part of defendant to put plaintiff into possession at the beginning of 1276, and that as plaintiffs were unable, in spite of their best endeavours, to obtain possession, the contract was broken:

HELD that even if the facts necessarily led to the assumption that the defendants could not give the possession stipulated for, still that was no reason why the defendants should not be compelled to make good the contract, so far as might be, if plaintiff thought proper to enter into the contract.

Phear, J.—THE principal facts of this case are admitted by both parties. The first-named defendant, in the year 1275, granted to the plaintiffs a zur-i-peshgee lease of certain properties for a period commencing with the beginning of 1276 and extending to 1284 in consideration of an advance of the sum of Rs. 20,000. It was recited in this lease that the property, which was the subject of it, was already in the possession of previous ticcadars under the terms of a zur-i-peshgee lease securing the repayment of a certain sum of money advanced by them. And it was said that, according to the terms of that lease, the property was redeemable from these ticcadars at the end of the year 1275.

And it was further on the footing of these recited facts made part of the agreement of lease that Rs. 5,600 out of the Rs. 20,000 should be applied to the purpose of paying off the previous ticcadars or mortgagees, and so enabling the present plaintiffs to obtain possession under their lease.

It was also further stipulated between the parties that in the event of the plaintiffs finding it necessary to take legal proceedings for the purpose of compelling the previous ticcadars to accept payment of their mortgage-money, and to give up possession of the property, the defendant, grantor of the lease, should pay a certain specified portion of the costs of such proceedings.

The Rs. 14,400 which was, according to this contract of lease, payable by the plaint-

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iff to the defendant, was paid to her, the defendant; the remaining Rs. 5,600, which ought to have gone to pay off the previous ticcadars, was, when it was first offered to them, not accepted by them. The consequence of this was that the plaintiffs, as seems to have been anticipated at the time of making the lease, were obliged to take legal measures for the purpose of compelling the ticcadars to accept the payment of their money, and to give up possession of the land. The proceedings which were taken for this purpose were not successful, but ultimately, in the year 1280, the ticcadars did accept the payment of the Rs. 4,600, and gave up the land to the plaintiffs.

It is on this state of facts that the present suit is placed. The plaintiffs now seek to recover damages from the defendant for the loss which they have sustained in consequence of not having been put into possession of the property leased to them on the 1st Assin 1276, as the defendant agreed should be done.

They measure their damages by the loss of interest at the rate of 12 per cent. per annum upon the sums of money which they advanced to the defendant. Some of these advances were made before the commencement of the period of the lease, namely, on some dates in 1275, and the total amount in the whole is 7,220 rupees 5 annas 3 pie.

The Lower Court has given the plaintiffs a decree for this sum.

It is now urged before us on appeal from this decree that the defendant is not liable, on the terms of the lease, to compensate the plaintiffs for not having obtained possession of the lands during the period running from 1276 to 1280. It is argued, in effect, that the plaintiffs on the facts which occurred must be taken to have accepted the chance of getting into possession of this land, and that they did not obtain an express lease of the land to commence from the specified date of 1276.

This argument is mainly based upon the assumption that the plaintiffs must have perceived from the recitals which were made in their lease that the previous ticcadars could not be compelled to give up possession of the land so early as the end of the year 1275.

Apart from any assumption of this kind, it seems to us quite plain that the words of the lease in the granting part are explicit enough. The defendant, in consideration of the sum of Rs. 20,000 advanced by the plaintiffs, leased to the plaintiffs the land and property mentioned in the lease for a period of eight years, to commence from the beginning of 1276. And if this stood alone, there can be no doubt that there arises therefrom by implication a contract on the part of the defendant to put the plaintiffs into possession of the land so leased at the commencement of the year 1276. And inasmuch as it is admitted that the defendant did not put the plaintiffs in possession of that land, that in fact the plaintiffs were unable, in spite of their best endeavours, to obtain possession of the land till the year 1280, that implied contract has been broken by the defendant. And it seems to us that there is nothing in the lease to prevent this implied contract from arising, unless it be the assumption of fact which was just now referred to. Now if we look to the recitals a little more closely, the recitals which are supposed to justify the assumption that the plaintiffs must have known that the defendant could not give the possession which was stipulated for, we find that they do not necessarily lead to this assumption. But even if they did, then information of this kind coming to the knowledge of the plaintiffs, though it might very reasonably be supposed to operate by way of inducing the plaintiffs not to enter into the contract which the defendant offered them, still afford no reason why the defendant should not be compelled, so far as may be, to make good the contract if the plaintiffs thought proper, notwithstanding this information, to enter into the contract with the defendant. It was not suggested in the Court below, and no facts were put in issue which could bear upon the question, whether the plaintiffs by their conduct in regard to the way in which they pursued the legal measures which they adopted for the purpose of obtaining possession of this property from the hands of the previous ticcadars, had blundered or made such default as ought to excuse the defendant from being called upon specifically to fulfil or to make good his contract. And this being so, we need not enter into and give consideration to the argument which was addressed to us upon that point.

Now, even supposing that the defendant had entered into an express contract to deliver over this property at the given date to the plaintiffs, yet the plaintiffs undertook with the defendant that they would carry on the requisite measures for the purpose of obtaining that possession, and had done this so faultily that the defendant ought not to be held responsible for their failure, a good

answer might be raised in this suit upon that ground. But obviously such a defence requires facts to be proved which have not been established or in any way put in issue in this suit.

On the whole, then, we are of opinion that the judgment of the lower Court in favour of the plaintiff is a correct judgment.

It has been pressed upon us that the mode in which the Subordinate Judge has arrived at an assessment of damages is erroneous. He has given damages in the shape of interest calculated at the rate of one per cent. per annum upon every item of payment which the plaintiffs made. And those payments were four in number, the first three having been made on the 19th Falgoon 1275, 19th Cheyt 1275, and 6th Jeyt 1275—that is, before the date upon which the lease commenced, and therefore before the date on which the breach complained of was committed by the defendant. And therefore it is said that the plaintiffs are not entitled to have their interest on their money for that period. But it seems to us that this argument is founded upon a slightly erroneous view of the nature of the damages which the plaintiffs seek. There is no doubt that if the contract had been faithfully kept by the defendant, and the plaintiffs had been put into quiet possession of this property, as they ought to have been, on the 1st Assin 1276, they would, from that time forward, have received in the shape of profits under their lease considerably more than 12 per cent. upon the money advanced by them, because they were by the terms of the lease to pay themselves 12 per cent. upon that money in the shape of a portion of the rent which was reserved to the defendant, and which they were allowed to keep in their own hands, reckoning it as payment. But over and above this they would necessarily have all the profits arising from the property in excess of the amount of rent. And these, it is only reasonable to presume, would have been in themselves very substantial. So that in awarding damages by the mode which he has adopted, the Subordinate Judge has in all probability given the plaintiffs a less sum than they would have been strictly entitled to if they had asked that damages should be measured upon the footing of the profits obtainable under the terms of the lease. And this being so, we think that there is no occasion to disturb the finding of the Subordinate Judge on this account.

The appeal is dismissed with costs.

The 26th June 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mortgage—Redemption.

Case No. 2234 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 19th August 1873, reversing a decision of the Additional Sudder Moonsiff of that District, dated the 27th July 1872.

Shaikh Imam Ali and others (Defendants), *Appellants,*

versus

Oograh Singh (Plaintiff), *Respondent.*

Moonshees Mahomed Yusuf and *Abdool Baree* for Appellants.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

Where a certain quantity of land was the subject of one zur-i-peshgee mortgage, redeemable on payment of Rs. 225 to K and Rs. 275 to M, the mortgagees taking possession in moieties, it was held that the mortgagor could not recover any portion of the land until he had paid up all the money due upon the mortgage, *e.g.*, as long as he had not paid up the amount due to M, he could not claim even the land allotted to K, whose portion had been liquidated.

Phear, J.—We do not see reason on special appeal for disturbing the findings of fact at which the Subordinate Judge has arrived. But we are of opinion that upon those facts the plaintiff is not entitled to recover possession of the 5 beeghas odd, which were formerly occupied by Kureem Bux, until he pays to the representatives of Mahomed Shafi the amount of money which he was decreed to pay in the redemption-suit which he brought against those persons.

It seems plain, upon the facts found by the Subordinate Judge, that the 11 beeghas were the subject of one zur-i-peshgee mortgage, which was redeemable on payment of Rs. 225 to Kureem Bux and Rs. 275 to Mahomed Shafi. After this mortgage was effected, the mortgagees took possession in moieties, that is, Kureem Bux and Mahomed Shafi each took and occupied 5 beeghas odd of the 11 beeghas which was the subject of the mortgage. These are the facts which are found by the Subordinate Judge. But this arrangement between Mahomed Shafi and Kureem Bux, mortgagees, in regard to taking possession of the land mortgaged to them, did not alter the character of the

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mortgage itself. And therefore the plaintiff, who seeks to redeem the whole of the land under a title derived from the original mortgagor, cannot claim to recover from the representatives of the original mortgagees any portion of it until he has paid up all the money that is due upon the mortgage. He has paid Rs. 225, the share of the representatives of Kureem Bux, but he has not paid the Rs. 275 which is payable under the mortgage to Mahomed Shafi. And while this latter sum remains unpaid, he cannot claim as of right to recover, even from the representatives of Mahomed Shafi, the share of the land which had formerly been allotted to, and occupied by, Kureem Bux. It appears that the representatives of Kureem Bux put no opposition to his getting possession of their predecessor's share, but the representatives of Mahomed Shafi obstruct him in doing so. And on the facts which have been found by the Subordinate Judge, it seems to us that the principal defendants, as they are called, that is to say, the representatives of Mahomed Shafi, have the right to keep the plaintiff from the possession, even of the 5 beeghas of Kureem Bux, until they have been paid the amount of money which is due to them under the mortgage. What this amount is has been already the subject of a decree, because by some irregularity the plaintiff has already brought a suit against the representatives of Mahomed Shafi to redeem and recover possession of the 5 beeghas of land belonging to Mahomed Shafi, and in that suit he got a conditional decree for possession on payment of a specified sum due to the defendants.

We think, under all these circumstances, that the decree of the Lower Appellate Court in this case ought to be varied, and the decree for possession should be made, subject to the condition that the plaintiff do pay to the principal defendants the amount which he was decreed to pay in the redemption-suit which he brought against them.

This view which we have taken of course disposes of the question of wassilat, because, if the principal defendants had a right to keep the plaintiff from the possession of Kureem Bux's share of the land, they cannot be made liable to pay damages for having done so.

As the modification we have made in the decree of the Lower Appellate Court is made upon a ground which was not taken in either of the Courts below, we think that each party ought to bear his own costs in this Court.

The 26th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Limitation—Issues—Objection.

Case No. 2214 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 17th July 1873, modifying a decision of the First Subordinate Judge of that District, dated the 20th August 1872.

Chumun Lall (Plaintiff), *Appellant,*

versus

Soorujmun Jha and another (Defendants), *Respondents.*

Baboo Rajendro Nath Bose for Appellant.

Mr. R. T. Allan and *Baboos Kalee Mohun Doss* and *Taruck Nath Sen* for Respondents.

In a suit for the balance of an account, the Lower Appellate Court applied the law of limitation upon the facts which were established, and held part of the suit to be barred, notwithstanding that no issue had been raised upon the point in the Court of first instance.

In special appeal the High Court, finding that plaintiff-appellant's pleader was not prepared to say that there were any facts such as would take the case out of the law of limitation which had been applied to it, refused to disturb the decision.

Phear, J.—In this suit the plaintiff seeks to recover the balance of an account between him and the defendants' predecessor.

The Lower Appellate Court has held that the plaintiff's claim as regards a large portion of it is barred by the operation of clause 9, section 1, Act XIV. of 1859.

And the only question which has been raised before us on special appeal is whether or not that Court is right in this holding.

It appears that the plaintiff carries on the business of a banker, and in that capacity receives payments from the defendant in the shape of rents and profits of his zemindary

estate. On the other hand, he advances money to meet the Government revenue and other charges, if there are any, upon the property. And the accounts which constitute the foundation of this suit are simply accounts between the plaintiff as banker and the defendant, his customer, the zemindar.

On the facts as they are disclosed in the plaint, and as they have been found by the lower Court, it seems to be very clear that these accounts are not accounts of mutual dealings between traders and merchants. And that being so, the law of limitation prescribed by clause 9, section 1, Act XIV. of 1859, is applicable.

But it has somewhat unfortunately happened in this suit that the plea of limitation was not raised by the defendant in the first Court. Consequently, no issue of limitation was framed and tried. The Lower Appellate Court, however, applied the law of limitation upon the facts which were established in the case, notwithstanding that no issue upon the point had been raised in the Court below. And it has been a principal point in the argument before us that the lower Court ought not to have applied the law of limitation without having given the plaintiff an opportunity of establishing facts which might bring his cause of action within time.

We should have been very willing, even on special appeal, to have given effect to this argument on behalf of the plaintiff, if we had been furnished with a statement of facts capable of being proved by the plaintiff such as would have the effect of bringing the plaintiff's suit within the period of limitation.

It has been said that possibly, if the plaintiff had the opportunity of so doing, he might succeed in showing that the accounts upon which he sues are accounts between him and the defendant's predecessors of mutual dealings in the way of traders or merchants; and that if he did so, the case would be brought within the operation of section 8 of the Limitation Act, and would not be governed by clause 9, section 1 of that Act. But, upon questioning the learned pleader who has appeared on behalf of the appellant, we find that he is not prepared to say that there are any facts in his client's case which could be proved such as to bring that case within section 8 of the Limitation Act.

Under these circumstances, we are of opinion that we ought not to disturb the decision of the Lower Appellate Court, and that consequently the appeal should be dismissed with costs.

The 26th June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Hindoo law—Heirship—Sister's son.

Case No. 17 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 24th July 1873, affirming a decision of the Moonsiff of Gurbetta, dated the 28th April 1873.

Gunesh Chunder Roy (Defendant), *Appellant,*

versus

Nil Komul Roy and another (Plaintiffs), *Respondents.*

Baboos Mohinee Mohun Roy and *Bhowanee Churn Dutt* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Jogesh Chunder Dutt* for Respondents.

According to the general principles of Hindoo law, a sister's son is a preferential heir to a mother' sister's son as being capable of conferring greater spiritual benefits upon the soul of the deceased.

Mitter, J.—THE question in this case is whether the plaintiff, who is the sister's son of one Mudhoo Soodun, is a preferential heir to Kashee Nath, who is the mother's sister's son of Mudhoo Soodun. The Lower Appellate Court has decided this question in favour of the plaintiff. In special appeal it is contended that that decision is against the provisions of the Mitakshara law. We do think that this contention is correct. It has been decided by a Full Bench of this Court that the sister's son is a Bundhoo, to which class Kashee Nath, who is the mother's sister's son, also belongs. It is clear that the sister's son confers greater spiritual benefits upon the soul of the deceased than his mother's sister's son. Therefore, according to the general principle of the Hindoo law, the plaintiff is a preferential heir to Kashee Nath. There being no decided cases upon this point and in the Mitakshara itself, the respective positions of these parties not being definitely settled, the general principle of the Hindoo law should be our guide in determining this question.

We therefore affirm the judgment of the Lower Appellate Court, and dismiss the special appeal with costs.

The 26th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Bond—Evidence—Act I. of 1872, s. 114.

Case No. 1676 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 28th April 1873, reversing a decision of the Moonsiff of Maldah, dated the 10th January 1873.

Gunesh Chunder Shaha (Plaintiff), *Appellant*

versus

Khetoo Meah (Defendant), *Respondent.*

Babaos Mohinee Mohun Roy and *Motee Lall Mookerjee* for Appellant.

Baboo Sreenath Doss for Respondent.

In a suit on a bond where defendant pleaded satisfaction, HELD, under the Evidence Act (I. of 1872), s. 114, that, as the bond was in the hands of the obligor who was not shown to have stolen it, it was rightly presumed that the obligation had been discharged.

Kemp, J.—THIS is a very clear case. The suit was on a bond. The defendant pleaded satisfaction, and stated that the bond was in his possession. Under section 114 of the Evidence Act, Illustration (*i*), the Court may presume that, when a document creating an obligation is in the hands of the obligor, the obligation has been discharged. Then, under the explanation of Illustration (*i*), the above maxim may not apply, although the bond is in the possession of the obligor "if the circumstances of the case are such that he may have stolen it." Now, in this case, the Judge has found that the allegation of the plaintiff that the defendant had stolen this bond is not proved, and further that, at the time that he made a charge against the defendant in the Criminal Court, no mention was made of this bond.

The special appeal is dismissed with costs.

The 29th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Possession—Attachment under Regulation V. of 1812, s. 26, and Regulation V. of 1827—Cause of action.

Cases Nos. 203 and 213 of 1873.

Regular Appeals from a decision passed by the Subordinate Judge of Mymensingh, dated the 14th June 1873.

Jeebunessuree Dabee and another (Plaintiffs), *Appellants,*

versus

Kristo Monee Dabee and others (Defendants), *Respondents.*

The Advocate-General and *Baboos Sreenath Doss* and *Nullit Chunder Sen* for Appellants.

Baboos Chunder Madhub Ghose, Hem Chunder Banerjee, and *Issur Chunder Chuckerbutty* for Respondents.

Plaintiff's father-in-law B and B's nephew R, members of a Hindoo family, purchased a share of a talook with joint funds, but in the name of R, after which they separated in food only. B dying, R, in collusion with his brother N, obtained possession. A suit was brought which ended in a decree, dated 11th November 1843, under which plaintiff got possession, but not khas possession, inasmuch as the talook was under attachment by the Collector by order of the Court under the provisions of Regulation V. of 1812, s. 26, as modified by Regulation V. of 1827. On the withdrawal of the attachment in 1866, plaintiff sought to obtain direct possession of the disputed share; but, being opposed by the defendants (R and N) in possession, brought a suit for a declaration of right in the share specified in the decree:

HELD that the possession of the Collector was on account of all the parties interested in the talook, and the cause of action arose after the attachment was withdrawn.

Kemp, J.—IT is admitted that one judgment will govern these two appeals in as far as the question of limitation, which is the only point at present before us, is concerned. We take the case No. 203 first, the pleaders having also argued that appeal first. Jeebunessuree Dabee is the plaintiff in that case. Kristo Monee Dabee, the defendant No. 1, is the widow of the late Ram Coomar Chuckerbutty; and Dwarkanath Chuckerbutty, the adopted son of Kalee Coomar

Chuckerbutty, the son of Nubo Coomar Chuckerbutty, brother of Ram Coomar, who is represented by his guardian, Raj Mohun Roy, is the other defendant. The suit is for possession on a declaration of right in an 8-annas share specified in the decree of the 11th of November 1843 in certain mouzahs and kismuts appertaining to talook No. 115 Nowajanee, Tuppeh Rambhowal, in Zillah Mymensingh. The facts as stated in the plaint are that the father-in-law of the plaintiff Brojo Kishore Chuckerbutty and his brother's son Ram Coomar Chuckerbutty, the husband of the defendant No. 1, were living joint in food and in estate, and purchased, with their joint funds, but in the name of Ram Coomar, the rights and interests of one Abdool Sumud in the above talook. This purchase, although the fact is not set out in the plaint, was made in September 1835. Then the plaint goes on to allege that, subsequent to the purchase of Brojo Kishore and Ram Coomar, they separated in food only; that Brojo Kishore died subsequently to that separation—and here again we are not supplied with the year which is 1836; that, after his death, Ram Coomar, in collusion with his brother Nubo Coomar Chuckerbutty, obtained possession of the aforesaid share in right of an auction-purchase, and a suit was then brought, which ended in the decree of the 11th of November 1843; and that the plaintiff, on the death of her husband Ishan Chunder Chuckerbutty, who is the adopted son of Brojo Kishore Chuckerbutty, obtained possession through the Court in execution of that decree in June 1850, but that, inasmuch as the talook was under attachment by order of the Court under the provisions of Regulation V. of 1812, section 26, as modified by Regulation V. of 1827, the plaintiff did not obtain khas possession; that subsequently the aforesaid decree of the 11th of November 1843 was sold in execution of a money-decree against the father-in-law of the plaintiff, and was purchased by Tara Kant Bhuttacharjee, guardian of the minor Gobind Coomar, the son of Ram Coomar Chuckerbutty; that afterwards in Bysack 1273, corresponding with the year 1866, the attachment by the Collector was withdrawn, and the plaintiff upon this adopted measures to obtain direct possession of the disputed share, but that the defendants opposed her, and are themselves holding wrongful possession of the same. The cause of action is said to have accrued to the plaintiff on the withdrawal of the attachment in the month of Bysack 1273.

It is only necessary to allude to that portion of the written statement of the defendants which refers to the question of limitation. That will be found in para. 4 of the written statement, and runs as follows: "Plaintiff was not in possession of the "disputed property as having been left by "the late Brojo Kishore Chuckerbutty at "any time within 12 years of suit, or at "any time whatever; nor did she receive "any portion of the profits accruing during "attachment. We, in succession to our pre-"decessors, have held the property in ques-"tion for upwards of 12 years by receiving "the profits accruing during the continuance "of the attachment, partly in ready money, "and partly in promissory notes with interest, "and subsequently by enjoying direct posses-"sion and the profits. Plaintiff's claim, "therefore, is liable to dismissal on the "ground of limitation."

The Subordinate Judge has found that the suit is barred. Now, with reference to the claim in respect of Bajergaon containing 206 poorahs of land, the learned Advocate-General, who appears for the appellant, admitted, to use his own words, that "he could not struggle against that portion of the Subordinate Judge's decision." That portion of the case, therefore, was given up. With reference to the other portion of the claim, the Subordinate Judge has held that it was equally barred; that there was no satisfactory proof that plaintiff ever obtained possession of the property in dispute; that it appeared that, from 1837 to 1866, the property was under attachment by the Collector of the district; and the decree being dated 1843, it had been said that formal possession was taken in 1850, but admittedly, says the Subordinate Judge, no actual possession was taken of any of the villages; and further that, from certain papers which are numbered in the decision of the Subordinate Judge, it appears that the defendants have taken the profits of the mehals in dispute from the Collector during the attachment, and that there is nothing to show that the plaintiff has received any of these profits within 12 years prior to the institution of the present suit.

The contention of the appellant before us is that the possession of the Collector under the attachment was a possession, not for Ram Coomar alone, but for all parties entitled to a share in the disputed talook. Now it is clear that there was a dispute with reference to the shares of the proprietors of that

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talook, for had not such been the case, section 26, Regulation V. of 1812, would have been wholly inapplicable, and no attachment would have taken place. It is also clear that the Collector was holding the talook in dispute under attachment by order of the Civil Court, inasmuch as there were disputes between the sharers entitled to that talook, and the possession of the Collector was therefore not a possession on account of Ram Coomar alone but of all parties interested in that talook. But it has been said, on the other side, by the respondents, that it has not been shown that the plaintiff at any time enjoyed any portion of the profits of the estate which remained after paying the sudder jumma of the attached talooks. A proceeding was referred to of the Judge, dated the 26th of April 1860, by which it is contended that the respondents were held to be entitled to take away the profits from the Collectorate on account of a moiety as appertaining to Ram Coomar, and of the other moiety as having been purchased by the defendants in execution of a decree against the petitioners. It is also shown to us that there was an order of the Collector, dated the 12th of October 1860, authorizing the payment to the defendants of the sums in deposit. Taking the time from that date, we think that the suit having been brought on the 1st of October 1872 would be barred; but this is not a case in which we have to consider whether the plaintiff's right to the profits is barred. What we have to consider is whether the plaintiff's right to recover the land is barred, and on that question we must hold that the Collector held the talook in dispute under attachment, not for Ram Coomar alone, but for all parties concerned as owners in the talook. The plaintiff obtained a decree in 1843 in which it was established that the talook in dispute was purchased with the joint funds of the family, and that the representatives of Brojo Kishore Chuckerbutty were entitled to a moiety of that talook. The attachment lasted from 1837 to 1866, and the cause of action to the plaintiff arose after the attachment was withdrawn, and the suit is brought within time from that date. We must, therefore, hold that the suit, except in so far as the claim for Bajergaon is concerned, is not barred. The decision of the lower Court with reference to Bajergaon will be upheld; and with reference to the remainder of the claim, both cases must go back to the Subordinate Judge to try the other issues. Costs to follow the result.

The 29th June 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Waiver—Acquiescence—Limitation.

Case No. 148 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 17th March 1873.

Taruck Chunder Bhuttacharjee and others (Defendants), *Appellants,*

versus

Huro Sunkur Sandyal and others (Plaintiffs), *Respondents.*

Baboos Nullit Chunder Sen and *Mohinee Mohun Roy* for Appellants.

Baboos Kalee Mohun Doss and *Bykunt Nath Doss* for Respondent.

The doctrine of acquiescence does not apply in this country to cases in which the period within which a suit can be brought is laid down by statute.

Kemp, J.—We do not think it necessary to call upon the pleader for the respondent in this case. The facts of the case are sufficiently detailed in the decision of the Subordinate Judge. The points taken in appeal are, 1st, whether section 11, Act XXIII. of 1861, does not apply to this case; 2nd, whether the long silence of the plaintiffs and their conduct does not amount to a waiver of their right. These are the words used by the pleader for the appellant; and, lastly, whether the whole sale having been set aside and the plaintiff's title being founded on purchase, the plaintiffs can recover at all.

On the first ground, we think it clear that there was a second ouster as alleged by the plaintiffs. There is evidence to that effect which has been believed by the Subordinate Judge, and we see no reason to differ from the conclusion at which he has arrived. Then, as regards the question with reference to the 2-anna 1-gunda 2-cowrie 2-krant share, this is not a question which arose between the parties in the former suit, or in execution of the decree in the former suit.

On the second point it has been held that the doctrine of acquiescence does not apply in this country to cases in which the period within which a suit can be brought is laid down by statute. In this case, although the plaintiffs did delay very long in bringing

their suit, they have brought it within the period allowed by law. A decision of the Privy Council, to be found in Volume XVII., Weekly Reporter, page 108, was referred to, in which their Lordships say that, "according to the Mahomedan law, there may be a renunciation of the right to inherit, and such a renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another;" but their Lordships come to no finding upon that point; they only casually make that remark. This case has nothing to do with the Mahomedan law, and the lands had not been for a long time in the possession of a third party.

On the last point taken, we find that the 2-anna 1-gunda 2-cowrie 2-krant share was expressly reserved from the claim in the former suit, and the decree in that suit was expressly for the reversal of the sale with reference to the 8-anna 13-gunda 7-cowrie 1-krant share.. That plea is also overruled.

The decree of the lower Court will be affirmed, and this appeal dismissed with costs.

The 29th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Review—Jurisdiction.

Case No. 2258 of 1873.

Special Appeal from a decision passed by the Judge of Gya, dated the 25th June 1873, reversing a decision of the Subordinate Judge of that District, dated the 7th August 1872.

Syud Fuzzul Hossein and others (Defendants), *Appellants,*

versus

Enayet Ali Khan (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellants.

Moonshee Mahomed Yusuf and *Baboo Boodh Sen Singh* for Respondent.

Where a review is admitted without sufficient legal reason, the judgment passed on review is passed without jurisdiction, and may be reversed in appeal.

Phear, J.—THE judgment of the Court of first instance out of which this appeal arises was a judgment passed on review of a previous judgment; and the interval between the two judgments was about one year and nine months.

The Lower Appellate Court, after discussing the case, says: "I must find that the application for review was inadmissible for two reasons, *1st*, that an appeal had already been preferred; and, *2nd*, that no reason for the delay in making the application was given; and I further find that there were no sufficient reasons for admitting the review."

It seems that the view thus taken by the Lower Appellate Court on the second point cannot be controverted in special appeal. It is to the effect that no reasons for the delay in making the application for review were given, either in the petition for review or so far as appears on the record at the hearing of the review. And we have no good cause shown to us why we should disturb the finding of the Judge that there were in fact no sufficient reasons for admitting the review. This being so, we cannot interfere with his decision, because if the review was admitted without sufficient legal reason, then the judgment which was passed on review was passed without jurisdiction. And the Lower Appellate Court was quite right in reversing it.

It becomes therefore unnecessary for us to express an opinion as to whether or not the Judge was right on the facts of this case in saying "that at the time when the application for review was made, an appeal had been already preferred against the previous judgment" within the meaning of section 376 of the Civil Procedure Code.

We dismiss the appeal with costs.

The 29th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Refusal to summon witnesses—Act VIII. of 1859, s. 355.

Case No. 2259 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 28th June 1873, affirming a decision of the Subordinate Judge of that District, dated the 28th February 1872.

Abelakh Roy and others (Plaintiffs), *Appellants,*

versus

Guggun Bhuggut and others (Defendants), *Respondents.*

d'

Mr. R. E. Twidale for Appellants.

Baboos Unnoda Pershad Banerjee and *Anund Chunder Ghossal* for Respondents.

Where the first Court refused plaintiff's application to summon five of his witnesses, notwithstanding that it postponed the case for ten days, although fifteen other of the witnesses were present, the High Court held that the first Court's omission to summon the witnesses was, under the circumstances, a sufficient reason within Act VIII. of 1859, s. 355, for the Lower Appellate Court to send for and take their evidence.

Phear, J.—We think that the plaintiff has a right to complain of the course which was taken by the first Court in this matter. When the plaintiff applied to the Subordinate Judge on the 20th February for a postponement of the case in order that five witnesses who had not been summoned should be summoned, it might have been entirely right on the part of the Subordinate Judge to refuse a postponement for that purpose, and to have insisted that the trial should go on at once with the evidence which was then ready to be taken. But the Subordinate Judge did not adopt this course: he thought it right, for reasons of his own, to postpone the trial of the case for ten days, notwithstanding that so many as fifteen of the plaintiff's witnesses were present and ready to be examined. Yet, although he made so long a postponement of the case, he refused to issue the summons which the plaintiff asked for. We think that he ought under those circumstances, if the plaintiff required it, to have issued the summonses for the five witnesses, returnable of course on the day to which the trial had been postponed.

In this view it seems to us that the decision of the Lower Appellate Court overruling the objection made on appeal by the plaintiff on this point is not correct, and must be reversed. And the better course will be that the case should go back to the Lower Appellate Court in order that the Lower Appellate Court may, under the provisions of section 355 of the Civil Procedure Code, send for and examine the five witnesses whom the Subordinate Judge omitted to summon. It seems to us that the omission of the Subordinate Judge to summon them is, under the circumstances of the case, a sufficient reason within section 355 for the Lower Appellate Court to send for and take their evidence.

The decree of the Lower Appellate Court which has been made on the decision of a preliminary issue of limitation is reversed, and the case remanded to that Court in order that this evidence may be taken and the case re-tried.

Costs will abide the event.

The 29th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mortgage—Redemption-suit—Procedure.

Case No. 1628 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 26th May 1873, affirming a decision of the Subordinate Judge of that District, dated the 27th May 1872.

Shah Lutafut Hossein (Plaintiff), *Appellant,*

versus

Chowdhry Mahomed Moonem and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

In a suit to recover possession of mortgaged property where the lower Courts had not (as they ought to have done) given the plaintiff a decree conditioned upon the payment, within a reasonable period, of what was found due, the High Court, in special appeal, considering that the state of the accounts might now be materially different from what they had been, confined its decree to a declaration that the sum found by the first Court to be due by the plaintiff was due on a given date.

Phear, J.—We think that on the facts which are found by the Lower Appellate Court, the decree of that Court is wrong and ought to be reversed.

The principle upon which suits of this kind ought to be dealt with was pointed out by this Court in a case decided on the 1st June of this year;* and several preceding cases have also occurred in recent years in which the same principle was illustrated, notably in a case in the First Bench, reported in 18 Weekly Reporter, page 65. It is unnecessary now for us to explain that principle again. We think it clear that the Lower Appellate Court, agreeing as it did substantially with the first Court as to the facts of the case, ought to have given a decree to the plaintiff for recovery of possession of the mortgaged property, conditioned upon the payment of the amount of money found due within a reasonable limited period. The amount which was found due by the

* *Ante*, p. 172.

first Court is 3,000 kuldar rupees. And if it had not been for the circumstance that a long period has elapsed since the decree of the first Court was passed, we should have thought it right, even now, to give a decree in favour of the plaintiff in the shape in which the Lower Appellate Court ought to have put it. But inasmuch as two years have gone by since the date when the first Court found that 3,000 kuldar rupees was due from the plaintiff in respect of this mortgage, it is plain that the state of the accounts between the parties may now be very materially different from what they were at that time. And accordingly it would not be right for us to give a decree for possession of the land upon the payment of that sum only.

Under these circumstances, we think that the interests of justice will be best served by our confining the decree to the declaration that the sum of 3,000 kuldar rupees, together with batta at one anna per rupee (as found by the first Court), was due on the adjustment of the mortgage account between the plaintiff and the defendant on the 27th May 1872. And in any future suit which the plaintiff may bring to redeem the property, the accounts which may then become necessary to be taken will start from this declaration.

We think that each party must bear his own costs in the Court of first instance, and the plaintiff will have his costs in the two Appellate Courts.

The 29th June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Sale-certificate—Act VIII. of 1859, s. 260—Privy Council ruling.

Case No. 92 of 1874.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 30th June 1873, modifying a decision of the Sudder Moonsiff of that District, dated the 8th August 1872.

Syud Wassel Ruhman *alias* Fundoo Meah and others (Defendants), *Appellants,*

versus

Sheikh Golam Russool (Plaintiff), *Respondent.*

Baboo Obhoy Churn Bose for Appellants.

Baboo Doorga Mohun Dass for Respondent.

Following the decision of the Privy Council that, notwithstanding Act VIII. of 1859, s. 260, it is open to a party other than the holder of the sale-certificate to show that at the sale itself the purchase was made on his behalf, the High Court set aside judgments of the lower Courts founded on the law as it stood prior to that decision.

Markby, J.—In this case it appears to us that the Moonsiff acted upon the law as it stood prior to the decision of the Privy Council in the 10th Moore's Indian Appeals, page 522. The Moonsiff appears to have considered that the plaintiff having obtained a certificate, he must be exclusively taken to have been the purchaser of the property, and that the only title the defendant could set up was a title subsequently derived from the plaintiff. That was, as we have said, in accordance with the view taken by this Court prior to the Privy Council decision. But the Privy Council has held that, notwithstanding the provision in section 260 of Act VIII. of 1859, it is open to the defendant to show that at the sale itself the purchase was made on his behalf. The judgments of both the lower Courts must therefore be set aside, and the case remanded to the Court of first instance for a fresh trial. Costs will abide the result.

The 29th June 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Act VIII. of 1859, ss. 127, 170 & 206—Order for attendance of a party to the suit.

Case No. 2190 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 12th July 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 9th April 1872.

Obhoy Churn Mookerjee (Plaintiff), *Appellant,*

versus

Mussamut Pearee Dossia (Defendant), *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Bungshee Dhur Sen for Respondent.

Act VIII. of 1859, s. 206, applies only to proceedings which are taken while the decree is in execution.

Before applying the provisions of either s. 127 or s. 170, Act VIII. of 1859, it is absolutely necessary that the Court should strictly conform to the law, in making the order for the attendance of a party to the suit. If made under the former section, it must follow upon the failure or refusal of the pleader to answer material questions; if made under the latter, a summons should be issued on the party.

THE first ground of special appeal which has been urged that section 206 of Act VIII. of 1859 applies to the case, and that the Judge ought not to have made any inquiry whether the decree had been satisfied out of Court before it was put into execution cannot be supported. That section applies only to proceedings which are taken while the decree is under execution. It has been held by a Full Bench of this Court* that a person who has been injured by the suing-out of execution after satisfaction of a decree may bring a separate suit, and obtain such remedy as the Court is able to give him under the circumstances of the case.

But, on the other point, it appears to me that the special appeal must succeed. The Judge has dealt with the case by applying to it the provisions of section 127 of the Code of Civil Procedure; but I think it is clear, on looking into the case, that the order for the attendance of the plaintiff would more properly have been made under section 166. But, whether the provisions of section 127 or those of section 170 be applied, it is absolutely necessary that the Court should, before applying them, strictly conform to the law in making the order for the attendance of a party to the suit. If this order be taken as made under section 127, as it purports to have been made, it is clear that there has been an error in procedure; for the direction made under that section for a party to attend is to follow upon the failure or refusal of his pleader to answer material questions which the Court is of opinion that the party whom he represents ought to answer. That is a condition precedent to the issue of such an order; and in this case there is nothing to show that the Court had attempted or intended to examine the pleader, or that such pleader was unable or refused to answer. The case, therefore cannot come under section 127. The Court no doubt might have directed the plaintiff under section 166 to appear and give evidence in this case; but, in such a case, a summons would have to be issued on him, and that has not been done. Therefore, it is impossible to deal with this case, as if the order made by the Judge were one made under section 170. The judgment of the Lower Appellate Court must be set aside, and the case must once more go to that Court for trial.

* 13 W. R. (F. B.) 69.

The 30th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Evidence of Opposite Party's Witnesses—Discrepancy.

Case No. 3 of 1874.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 18th September 1873, modifying a decision of the Moonsiff of Sulkia, dated the 30th November 1872.

Issur Chunder Santra (Plaintiff), *Appellant*,

versus

J. R. Bellilios and another (Defendants), *Respondents*.

Baboo Bykunt Nath Doss for Appellant.

Baboo Ashootosh Mookerjee for Respondents.

In deciding a suit for the plaintiff, it is neither unfair nor inequitable for a Judge to use evidence which the defendant may have given, but which appears to the Court to be favourable to the plaintiff.

In the case of a statement made by one of plaintiff's witnesses, the question is not whether it quite corresponds with the plaint, but whether it is worthy of credit, and substantially agrees with plaintiff's case.

Couch, C.J.—THE Moonsiff, in a judgment which has been fairly called by the respondent's pleader a well-considered judgment, decided in favour of the plaintiff. The Subordinate Judge has reversed that decision upon grounds which appear to us to be erroneous in law. It was submitted to us that this had not affected the decision on the merits, but it must have done so as it has led to the reversal of the Moonsiff's judgment.

The Subordinate Judge says that he thinks that the judgment of the Moonsiff has not been fair and equitable, and proceeds to give as a reason for thinking so that the Moonsiff had relied upon the oral testimony of one of the witnesses for the opposite party, namely, the vendor of the defendant.

Whether the Moonsiff had relied upon that evidence or not does not matter so far as regards the erroneous opinion thus expressed, that it is not fair and equitable for a Judge in deciding a suit for the plaintiff to use evidence which the defendant may have given, but which appears to the Judge to be favourable to the plaintiff's case. It would be a novel mode of deciding a case where both the parties give evidence, and it frequently happens that one of them succeeds in extracting from a witness of his opponent some matter favourable to his case. Frequently, the most important and valuable evidence for a party is that which he succeeds in extracting from the witnesses for the opposite party. To use this the Subordinate Judge says is contrary to the principles of justice.

Then he says, and this is very material as it shows the way in which he considered the evidence for the plaintiff, which evidence the Moonsiff had considered to be satisfactory, that the evidence of the plaintiff's vendor, the witness No. 1, ought to be accepted with great care in consequence of his having no further interest in the disputed land. So far from this being a reason for his not distrusting his evidence, it would be a reason for thinking that he might not be disposed to give evidence in the plaintiff's favour, and had become indifferent about the matter. He seems not to have deposed about matters which he had observed after he had parted with the land, but gave evidence of other matters. Here again is an expression of opinion on the part of the Subordinate Judge which, if acted upon, and we must assume that it was, would materially affect the way in which he was considering the evidence of the plaintiff's witnesses.

He says again, as a reason for not giving weight to the plaintiff's witnesses, that a statement made by one of them does not quite correspond with the plaint. The question was not whether it quite corresponded with the plaint, but whether the evidence was worthy of credit, and, if so, whether it substantially agreed with the plaintiff's case and proved it. It does seem to us that the Judge has given most unsatisfactory reasons for the decision which he came to.

Again he says, repeating what he had before said about the evidence of the defendant's witnesses not being used for the plaintiff: 'The lower Court awarding plaintiff possession of the land three feet removed from the row of cocoanut trees upon the evidence of the defendant's witnesses, that is, of his vendor, is contrary to law and equity."

It was upon this part of the evidence of the defendant's vendor that the Moonsiff acted. He appears to have taken the statement of this witness as being to that extent what he might consider to be true. The Subordinate Judge thought that ought not to have been done; that the Moonsiff had no business to take any part of the statement of the vendor; and that his doing so was contrary to law and equity.

There are so many errors in this judgment that it cannot be allowed to stand as reversing the decree of the Moonsiff. The Subordinate Judge appears to have approached the subject altogether in a wrong state of mind, and not having at that time a proper idea of law or justice, or the principles of justice. We think his decision must be reversed, and the appellant will have the costs of this appeal.

The 30th June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Comparison of Signatures—Special Appeal.

Case No. 479 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 8th December 1873, reversing a decision of the Additional Moonsiff of that District, dated the 16th July 1872.

Sreemutty Phoodee Bibee (one of the Defendants), *Appellant,*

versus

Gobind Chunder Roy (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Where the Lower Appellate Court relied on a comparison between the signature in a mortgage-deed and the signature in a vakalutnama, and it appeared, in special appeal, that there were very considerable discrepancies between the signatures, the High Court (departing from the ordinary assumption in such cases) concluded that the comparison had been conducted in some way which led the lower Court into error. They accordingly reversed its decision, and remanded the case for re-trial.

Markby, J.—The first ground taken in special appeal we think fails. The provision in the deed of mortgage which the appellant relies on is merely in order to protect the mortgagee in case he is evicted by a person

having a superior title; it in no way affects his right to hold possession of the property as against the present defendant. As regards the question of registration also, we think this special appeal fails, because, in fact, that question would only arise if the defendant's kobala were proved. Moreover, if an issue had been raised upon the defendant's title under his kobala, the plaintiff might have been able to show that, even if it was a genuine kobala, yet it did not give a title which could be relied on. Therefore, we think that the question of registration cannot now be raised.

But another objection has been taken that the Subordinate Judge has erred in relying upon a comparison of the signature in the mortgage-deed with the signature in the vakalutnama. It is objected as to that that the signature in the vakalutnama was neither proved nor admitted. Now, under ordinary circumstances, we ought, we think, to assume that this comparison took place in open Court; and that a comparison having been made without any objection by the party affected by it, the signature in the vakalutnama was in fact admitted. But it so happens that the signatures are before us, and although of course we have no power to deal with this matter of fact, it is impossible for us to shut our eyes to the circumstance that there are very considerable discrepancies between the two signatures; and as they are now before us, it is impossible for us to avoid coming to the conclusion that the comparison of these signatures must have been conducted in some way which led the Subordinate Judge into error. It seems impossible that, if the comparison of the signatures had been conducted in the presence of the pleaders of the parties, they would not have been able to point out the discrepancies between these two signatures. Therefore, we think we should not be justified in making the assumption in this case which we should make in all ordinary cases. We think it also right to add that, although it is not a matter on which the special appeal turns, yet we are disposed to take the view of the Moonsiff as to the value of the comparison of the signatures rather than that of the Subordinate Judge; and we consider, according to our experience, that a comparison of signatures is a mode of ascertaining the truth which ought to be used with very great care and caution.

The result is that the judgment of the Lower Appellate Court will be set aside, and the case remanded for the re-trial of the appeal. Costs will abide the ultimate result.

The 1st July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Registration Act of 1871, s. 48—Unregistered Deed—Transfer of Possession.

Case No. 101 of 1874.

Special Appeal from a decision passed by the Third Subordinate Judge of the 24-Pergunnahs, dated the 21st November 1873, reversing a decision of the Moonsiff of Diamond Harbour, dated the 31st January 1873.

Kirty Chunder Haldar (Defendant), *Appellant*,

versus

Raj Chunder Haldar (Plaintiff), *Respondent*.

Baboo Kumala Kant Sen for Appellant.

Baboo Doorga Doss Dutt for Respondent.

The new Registration Act of 1871, s. 48, which says that documents relating to any property duly registered shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession, does not apply to a case where there is no transfer or making over of possession.

Couch, C. J.—We think the doctrine that an unregistered deed accompanied by possession (or as Mr. Justice Jackson says in the case in 8 Weekly Reporter, page 300, where possession has been made over to the purchaser) ought not to be extended to such a case as the present; for here there is no transfer or making over of possession.

Nothing appears to have been done except the execution of the instrument which is unregistered, and there is no act which might, by altering the apparent state of things, show that there had been a transfer of the property. That the doctrine ought not to be extended to a case like this is shown, we think, by what has been done by the Legislature in the Registration Act which is now in force. There, with the intention, apparently, of giving to what had been decided by the Courts the effect of an Act of the Legislature, it is said in section 48 that documents relating to any property duly registered shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession. It is intended that there should be

some Act at the time of, or after the execution of, the unregistered document which would show that there was a transfer of alteration of the possession. We certainly would not extend the doctrine to a case like the present. It would, in our opinion, be giving a great facility to defeating the object of the registration law. Persons would only have to create a tenancy of some kind so that the intending purchaser might be put into possession under it, and then to execute an instrument of sale and not register it. We are not inclined to come to a decision which would encourage that practice. We think the appeal ought to be dismissed with costs.

The 1st July 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Certificate of Administration—Act XXVII. of 1860—Brothers of the Half Blood.

Case No. 112 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Sylhet, dated the 2nd February 1874.

Hurro Kristo Doss (Objector), *Appellant,*

versus

Rama Nundo Doss (Petitioner), *Respondent.*

Baboo Joy Gobindo Shome for Appellant.

Baboo Rajendro Nath Bose for Respondent.

Where a certificate under Act XXVII. of 1860 for a moiety of the estate of the deceased was granted to each of two heirs, one of the half blood and the other of the full blood, the High Court on the appeal of the latter, who possessed the title-deeds and had performed the shradh, ordered the certificate for the whole estate to be given to him.

Kemp, J.—THIS is an appeal on behalf of Hurro Kristo Doss, who was the objector in the Court below. Rama Nundo Doss, the petitioner in the Court below, applied for a certificate under the provisions of Act XXVII. of 1860 to administer to the estate of Chinta Monee Doss in respect of a moiety of the debts due to that estate. The debts were set forth by him to be Rs. 150, and he asked for a certificate to administer with reference to Rs. 75. He also said that if Hurro Kristo Doss would not take a certificate jointly with him, he was prepared to take out a certificate for the whole 16 annas.

Hurro Kristo Doss opposed him. He stated that he was the legal heir of Chinta Monee, inasmuch as Rama Nundo Doss was only of the half blood, and was not entitled to succeed in preference to him. He also stated that he had performed the shradh of the deceased Chinta Monee, and that he had expended Rs. 400 for that purpose. There is also evidence on the record to that effect.

The Judge has gone into the Hindoo Law point, and has held that the heirs of brothers of the half blood are on an equal footing as to succession with the heirs of brothers of the full blood. He therefore ordered a certificate for a moiety of the estate to be granted to each party, namely, to Rama Nundo Doss and Hurro Kristo Doss.

Now, as a certificate under this Act is only evidence of the representative title of the party obtaining it, and as it is clear that the object of Rama Nundo Doss was to obtain a decision on a question of Hindoo Law in a summary case, and as it is also clear that the title-deeds of the estate are with the objector Hurro Kristo Doss, and as he has performed the shradh of the deceased, we think that, as the certificate will only be evidence of his representative title as against the debtors to the estate, the certificate ought to be given to him.

We therefore reverse the decision of the Judge, and decree this appeal. Each party to pay his own costs.

The 2nd July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Under-Leases—Term of Tenancy—Construction.

Case No. 123 of 1874.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 18th November 1873, reversing a decision of the Moonsiff of Alipore, dated the 27th January 1873.

Hurish Chunder Roy Chowdhry (Defendant), *Appellant,*

versus

Sree Kalee Mookerjee (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Taruck Nath Sen for Respondent.

A lessee cannot make an under-lease for a longer time than his own lease, nor is he the agent of the landlor

so as to bind him by granting leases for any time he may think fit.

Where an under-lease specifies no term of tenancy, it cannot be construed to have effect beyond the interest of the grantor.

Couch, C.J.—THE plaintiff sued for possession of land on an allegation that he held it under a lease which had been executed to him by Anund Chunder Nag, who held the same as an ijaradar under the Government. And the case is that the interest of the ijaradar had ceased, and the plaintiff notwithstanding that claims to be entitled under a lease which had been given to him by the ijaradar.

The Moonsiff dismissed the suit. On appeal to the District Court, the learned Judge of that Court reversed the decree of the Moonsiff, and gave the plaintiff a decree declaring him to be entitled to hold the land. He says that it would be very detrimental to the interest of an estate if the ijaradar could not establish tenants on the land. The ryots would not ordinarily take lands of which they were liable to be dispossessed on the determination of the superior tenure, and that an ijaradar has the same power of entering into *bonâ-fide* engagements for land as an agent of the landlord has.

We think this judgment cannot be supported. We should have thought it was familiar law that a lessee (we use the English term) cannot make an under-lease for a longer time than his own lease. He may sub-let the land for as long a time as he has it himself, or he may assign his interest (we are speaking of cases where there is no restriction either by agreement or by law against sub-letting or assigning), but he cannot give a greater interest than he has himself in the land. And we have never heard it said that a lessee is in any way the agent of the landlord so as to be able to bind him by granting leases for any time that he may think fit to grant them for. He is not in any way the agent of the landlord; he is a tenant with certain rights, and he has power to deal with the interest which he has in the property. If he could be considered as in any way the agent of the landlord, it would only be to the extent of disposing of the property for the time to which his own interest is limited. The landlord by letting to him does not in any way give him authority to grant leases of the land beyond his own time.

In the present case, there is to my mind another reason for holding that this judgment cannot be supported. The lease under which the plaintiff claims does not specify any period during which the land was to be held. Where that is the case, and the person granting the lease has only a limited interest, it would be contrary to all rules of construction to give it an effect beyond the interest of the grantor. It must be taken that a man who makes a lease, not saying how long it is to last, intends to do that which he has authority to do, namely, to grant a lease for his own time; and it would not be right to consider it, as what it is sought to be made in this case, a perpetual lease.

As to a tank having been made upon the land, if a person having only a limited interest in land chooses to spend money upon it, he must take the consequences of not being able to get a renewal of the lease. He runs the risk of losing the benefit of the money he has so expended. Not long since we had a case of this description, in which we held that, although it was a hard case, it was the person's own fault. He ought to learn, before laying out his money, what interest he has in the land—whether it is secure for a sufficient length of time to repay him the money which he is about to spend.

The decree of the Judge must be reversed, and the decree of the Moonsiff restored, and the appellant will have the costs in this Court and in the Lower Appellate Court.

The 2nd July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Abatement of Rent—Contract as to Measurement—Cause of Action.

Case No. 143 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 4th September 1873, reversing a decision of the 2nd Moonsiff of Alipore, dated the 31st December 1872.

Prosunno Moyee Dossee (Defendant), *Appellant*,

versus

Doya Moyee Dossee (Plaintiff), *Respondent*.

Baboo Hem Chunder Banerjee for Appellant.

Baboo Nullit Chunder Sen for Respondent.

In a suit for abatement of rent founded on an agreement that, at a certain time, the land should be measured, and if found less than the quantity named in the agreement, the rent should be an abatement, it was found that plaintiff had never required abatement, but had continued to pay the rent six years:

HELD that the suit was barred by limitation, the cause of action having arisen when the zemindar continued to take rent according to the quantity of land named in the agreement.

Semble.—There might be ground for saying that the agreement was abandoned by the parties.

Couch, C.J.—THIS suit, which is called a suit by the plaintiff for abatement of his rent, is founded upon the agreement entered into between the zemindar and the person from whom the plaintiff bought, that at a certain time, namely, in 1269, the lands should be measured, and if the quantity was found to be less than that named in their agreement, there should be an abatement of the rent.

The lands were not measured at that time. The tenant seems never to have required that they should be measured. He continued to pay the rent according to the quantity named in the agreement for about six years without raising this question. He then sold to the plaintiff, who seems to have thought fit to raise it.

We think it is doubtful whether the plaintiff can raise this question. The state of things at the time he bought was that the person who sold to him was entitled to sue the zemindar for a breach of contract, but whether the right to sue passed to the plaintiff may be doubted.

But we think the suit is barred by the law of limitation. The cause of action arose when the contract that there should be a new measurement was broken. At what precise time in 1269 it may be said to have been broken we need not determine. It must be said to have been broken when the zemindar continued to take from his tenant the rent according to the quantity named in the agreement, because he then showed that he did not intend to make any fresh measurement. And the agreement does not say that the measurement is not to be made until demanded, but it was to be made at the time appointed.

There was then a breach of the agreement and a cause of action; and the time limited by the then law for bringing the suit was three years from the date of the cause of action, which had expired before the plaintiff made his purchase. There is not a fresh cause of action for every year. The contract is not to measure in 1269, or at any future time when it may be demanded by the tenant, but it is a contract to measure at that time, and the omission to do so created a cause of action.

But even without the law of limitation, the circumstance that the plaintiff's vendor had for six years paid the rent without insisting upon the right to measure might perhaps be a ground for saying that the agreement had really been abandoned by the parties; that the tenant had waived his right of insisting upon any measurement and was satisfied to continue paying the rent according to the agreement. If this were so, the plaintiff would not be in a better position, and would not be entitled to insist upon what his vendor could not insist upon. The decree of the Lower Appellate Court must be reversed, and the decree of the first Court will stand. The appellant will have the costs in this Court and in the Lower Appellate Court.

The 2nd July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Riparian Proprietorship—Rights of Passage.

Case No. 179 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 1st November 1873, reversing a decision of the Additional Sudder Moonsiff of that District, dated the 29th January 1873.

Roop Lall Doss and others (Plaintiffs), *Appellants,*

versus

The Chairman of the Municipal Committee of Dacca (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

The bank of a river is not regarded by the law as public property. It may be, and constantly is, private property, though there may be public rights of passage over it for the purposes of navigation.

Couch, C.J.—THE land in dispute is very distinctly found by the first Court to have been an accretion to the plaintiff's land which formerly joined the river, and up to which the river at one time flowed. And the Appellate Court, although not so distinctly as the first Court, also found that it had accreted to the plaintiff's land.

The doctrine upon which the Appellate Court has decided the case that the bank of a river is public property and that a private individual cannot have a right in it is not the law. The bank of a river may be, and constantly is, private property. There may be public rights of passage over the banks for the purposes of navigation; but these are rights to be exercised over the property of the persons who own the land of the banks. They are in the nature of easements which belong to the public, but the land may be private property.

It does not seem to be disputed that the land of the river bank was at one time the property of the plaintiff. There is no reason that the accretion to it should not be also the plaintiff's property.

The decree of the Lower Appellate Court must be reversed, and the decree of the first Court will stand.

The 2nd July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII. of 1859, s. 63—Release of Attached Property—High Court's Interference—Charter Act, s. 15.

In the Matter of
Bishno Chunder Bhuttacharjee, *Petitioner,*

versus

Shoshee Mohun Pal Chowdhry and others, *Opposite Party.*

Baboos Doorga Mohun Doss and *Mohinee Mohun Roy* for Petitioner.

Baboo Rash Behary Ghose for Opposite Party.

An order of a competent Court releasing property from attachment after investigation of a claim put forward ought not to be interfered with on any ground of mere irregularity, unless a failure of justice has occurred.

The High Court's interference under s. 15 of the Charter Act will not be exercised where another remedy is open to the party complaining.

Jackson, J.—THIS rule was obtained on the 8th April last for the purpose of setting aside an order made by the Moonsiff of Bagheerhat, whereby, on a claim being preferred by Shoshee Mohun Pal Chowdhry, the Moonsiff had released from attachment and sale a certain under-tenure contrary, as was alleged, to the provisions of section 63, Act VIII. of 1869. The grounds on which this rule has been supported to-day are chiefly these: In the first place, it is said that the Moonsiff was not competent to entertain the claim, because no deposit had been made as required by section 63; and, secondly, that the proprietorship and possession relied upon by the claimant ought not to have been recognized, because the transfer to the claimant had not been previously registered in the serishta of the zemindar, and no sufficient cause for non-registration had been shown to the satisfaction of the Court. Now, on the question of deposit, we find there has been a recent decision by a Division Bench of this Court in which judgment was given by the learned Chief Justice. In that case it was held that, although the Moonsiff might have acted erroneously in postponing the sale without requiring the necessary deposit or security, it was not an act done without jurisdiction, but only an irregular proceeding, inasmuch as the result showed that the sale ought not to have been made, and the decree-holder could not have been allowed to receive the money if the deposit had been made. In the case before us it does not appear that any postponement took place. All that we find is that the property having been attached, a claimant came forward; his claim was investigated and found to be well-founded, and the property was released. Technically, therefore, there was no violation of the terms of section 63, and so far the case corresponds with that decided by the Chief Justice which we have referred to, and which is printed in page 10, XX. Weekly Reporter. But this Court, whether it has power to do so or not, certainly ought not to interfere in such cases, unless it is satisfied that failure of justice has occurred by reason of the irregularity.

The second point is that no transfer should be recognized without registration. On that point no doubt it is clear that registration had not taken place, and no cause for non-registration had been shown in this case; but here again arises the question whether, upon a ground of this sort, this Court can, and ought to, set aside the order of the Moonsiff as being made contrary to the provisions of this section. It has been already observed that the Court has the power, but ought not to do so, unless it is shown to be necessary for the ends of justice. Several cases have been cited in which it has been laid down that a mere error or irregularity ought not to be a ground for interference under section 15, where the Court below, although acting erroneously, has acted with jurisdiction; but there is also another principle which has been fre-

quently laid down, and is now well settled, that this Court ought not to interfere where another remedy is open to the party complaining. Here it is open to the petitioner to bring his suit, and obtain, in that way, the relief which he seeks to obtain from us under this rule. On all the grounds, therefore, we think that the propriety of making the rule absolute is doubtful, and that the rule, therefore, must be discharged with costs—Rs. 50.

The 2nd July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Third Parties—Act VIII. of 1859, s. 73.

Case No. 211 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 29th October 1873, amending a decision of the Additional Subordinate Judge of that District, dated the 27th March 1873.

Brohmo Moyee Dossee (Plaintiff), *Appellant,*

versus

Mudhoo Soodun Ghose and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Gooroo Doss Banerjee* for Appellant.

Baboos Ashootosh Dhur, Nil Madhub Bose, and *Jadub Chunder Seal* for Respondents.

In a suit in which plaintiff claims property as duly acquired from others who would have been otherwise entitled thereto, and the Court is not satisfied of such acquisition, it ought to bring the third parties on the record under Act VIII. of 1859, s. 73, and try the entire question of liability between the plaintiff and defendants.

Jackson, J.—We consider that, whether the Subordinate Judge, Baboo Nubo Coomar Banerjee, had or had not the power to strike out the issue raised by his predecessor in office, he did not exercise a sound discretion in doing so. In the suit as brought by the plaintiff, in which no concealment or fraud upon the Court is apparent, it was intended to raise the entire question of liability between the plaintiff as representing the parties under whom he claimed and the defendants. If the Court was not satisfied that the plaintiff had duly acquired the interests of the several persons who would have been otherwise entitled to the property, it ought to have brought those persons on the record, and ought to have done so under section 73. We consider that the issue framed by Baboo Brojendro Coomar Seal ought to be restored, and a trial take place thereupon. If the defendants succeed in showing that the interest claimed by the plaintiff had been previously transferred to them, that would be a ground for dismissing the plaintiff's suit. But there is no ground for refusing a trial of that question; otherwise the plaintiff, or those who may claim after him, would be justly entitled to bring a suit later on, but would be met with the plea of limitation.

The 2nd July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Special Appeal—Grounds of Remand.

Case No. 2078 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 12th August 1873, affirming a decision of the Moonsiff of Monghyr, dated the 30th June 1873.

Kooldeep Narain Singh and others (Plaintiffs), *Appellants,*

versus

Rummon Singh (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Boodh Sen Singh* for Appellants.

Baboo Huree Hur Nath for Respondent.

The High Court in special appeal remanded this case for re-trial on the ground that there had been such misapprehension of the state of the evidence, and such omission to consider the testimony of witnesses, as to render the trial imperfect and incomplete.

Phear, J.—We think that there has not been a satisfactory trial of this case in the Court below. The Subordinate Judge has commenced his judgment by a reference to the appearance of the jummabundee papers. He says that "a mere glance of the jummabundee papers brought by the plaintiffs shows that they have been recently prepared at one and the same time, and written with one and the same ink." And this is the only direct reference which he makes to any of the evidence on the record.

On the other hand, he speaks of the effect of certain papers which other co-sharers had

filed in the Road Cess Office, stating therein that Rs. 2-4 was the rate of rent of the land held by tenants. And unquestionably these papers are not evidence between the parties in this suit.

We are told that the plaintiff brought several witnesses, amongst others the put-waree, to support the facts exhibited in the jummabundee papers, and also to establish the plaintiff's allegation that the defendant had entered into a settlement with him for the payment of rent at Rs. 2-7 per beegha instead of at the rate of Rs. 2-4 per beegha, which he formerly paid.

The first Court has dealt with this evidence in some degree. But the Subordinate Judge has omitted entirely to express his opinion upon it.

The learned pleader who has appeared on behalf of the appellant also states that the defendants have not filed any receipts or any documentary evidence which might be supposed to be in their power tending to show that the rate of rent payable by them was Re. 1-6, as they contend it was, and as the lower Court appears to have assumed that it was. This absence of evidence on the part of the defendants was a fact in the case which ought to have been considered together with the evidence of the plaintiff for as much as it was properly worth.

On the whole, it seems to us that there has been such misapprehension of the state of the evidence between the parties, and such omission to consider the testimony of witnesses on the record, as has rendered the trial in the Court below imperfect and incomplete. Accordingly we reverse the decision of the Lower Appellate Court, and remand the case for re-trial.

Costs will abide the event.

The 3rd July 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Robert P. Collier, and Sir Lawrence Peel.

Statutable Rights—Liability without Negligence.

On Appeal from the High Court of Judicature at Madras.

The Madras Railway Company

versus

The Zemindar of Carvetinagarum.

In a suit in which damages were claimed for injuries occasioned to plaintiffs' railway and works by the bursting of two tanks upon defendant's land, defendant pleaded that the injuries were the result of influences beyond his control. The first Court held that defendant was not liable in the absence of negligence, and that he had not been negligent. This judgment was upheld by the High Court on appeal. Before the Privy Council it was contended that, by storing up water on his land, defendant rendered himself liable in damages in the event of its escaping to the injury of others, even though he might not have been guilty of negligence.

As the principle that a man, in exercising a right, may be liable, without negligence, for injury done to another, is inapplicable to rights conferred by statute, the Privy Council held that it was inapplicable to the case of defendant, which was analogous to that of persons on whom statutory rights had been conferred and statutory duties imposed, for the tanks were ancient and a part of a national system of irrigation recognized by law, and their maintenance was a duty in many instances devolving on zemindars (of whom defendant is one), who have no power to do away with the tanks in which large numbers of people are interested.

THE Madras Railway Company claimed in this suit damages against the defendant, the Zemindar of Carvetinagarum, for injuries occasioned to their railway and works by the bursting of two tanks upon his land.

The defendant denied that the injuries complained of resulted from the bursting of the tanks: he asserted that if they did so arise, the bursting was caused by no act or negligence of his, but by vis-major, or the act of God. He further pleaded in these terms:—

"4. The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated; and the practice of storing water in such tanks in India, and particularly in this district and in the zemindaree of Carvetinagarum and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said zemindaree is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

"7. The defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people, which also burst at the same time."

He also contended that the damage arose through want of proper care on the part of

the plaintiffs in the construction of their works, but this contention was abandoned. It was found by both Courts, and is not now disputed, that the works of the plaintiffs did suffer serious damage from the bursting of the tanks; these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal, agreed to by the parties, were—

1. Whether the injuries complained of were the result of vis-major, or the act of God, or other influences beyond the defendant's control.

2. Whether defendant is liable for any, and if so what, damages sustained by the plaintiffs.

The evidence given in the cause may be summarized as follows: It was shown that the tanks of the defendant, which were ancient tanks, the date of their origin not appearing, were constructed in the usual manner; that the banks were properly attended to and kept in repair; that sluices and outlets for the water were provided of the kind usually employed, both in private and Government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years, but that an improved description of sluice, of recent introduction, would be still more efficacious; that at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the Deputy-Inspector of the Railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the defendant as exceeding any fall of rain for twenty years; that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of, the contents of other tanks at higher levels, proved more than the sluices could carry off, that the banks of the tanks were overflowed and finally carried away.

Upon these facts the Acting Civil Judge of the Civil Court of Chittoor found for the defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent.

This judgment was affirmed by the High Court on appeal.

The appellant now contends that the judgment of the High Court should be reversed on two grounds;

1st.—That the defendant, by storing up water on his land, rendered himself liable in damages, should it escape and do injury to other persons, even though he might not have been guilty of negligence.

2nd.—That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence.

The case mainly relied upon in support of the first contention is Fletcher *vs.* Rylands, Law Reports, 3 House of Lords 330, which it becomes necessary to examine. In that case the plaintiffs, the owners of a mine, sued for damages, the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works into the plaintiffs' mine and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the plaintiffs were entitled to damages against the defendants.

The grounds of this judgment are stated very clearly and shortly by the then Lord Chancellor (Lord Cairns) and Lord Cranworth.

The Lord Chancellor says:—

"The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners and occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of the land, be used; and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature . . . . On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground in quantities, and in a manner not the result of any work or operation on or under the land; and if, in consequence of their

doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their own peril; and if, in the course of their doing it, the evil arose . . . of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then, for the consequence of that, in my opinion, the defendants would be liable."

Lord Cranworth thus states the principle of the decision:—

"If a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . . and the doctrine is founded in good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.*"

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by Statute.

This distinction was acted upon in Vaughan *vs.* The Taff Vale Railway Company, 5 Hurlston and Norman 679, where it was held by the Exchequer Chamber that a Railway Company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by Statute. Cockburn, C.J., observes: "Where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." This view is fortified by the consideration that the Legislature may be presumed not to have conferred special powers on persons or companies without being satisfied that the exercise of them would be for the benefit of the public as well as of the grantees. On the same principle it was decided that a waterworks company, laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity. (Blyth *vs.* The Birmingham Waterworks Company, 25 Law J. 212.)

On the other hand, in Jones *vs.* The Festiniog Railway Company (3 Law Rep., Q. B., 733), it was held that a railway company which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived.

It has been argued on the part of the respondent that the case of Rylands *vs.* Fletcher, decided on the relations subsisting between adjoining landowners in this country, has no application whatever to India. Though that case would not be binding as an authority upon a Court in India not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim *Sic utere tuo ut alienum non lædas,* expressing a principle recognized by the laws of all civilized countries, it does not afford a rule applicable to circumstances of the same character in India; they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindoo and Mahomedan Law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian Law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the defendant in this case is in a very different position from the defendants in Rylands *vs.* Fletcher.

In that case the defendants, for their own purposes, brought upon their land and there

accumulated a large quantity of water by what is termed by Lord Cairns "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances. (See Withers *vs.* The North Kent Railway Company, 27 Law Journal, Exch., 417.)

The second ground on which the appellant relied was not so clearly stated; their Lordships understood it to be, in substance, that the Court below and the High Court estimated by a wrong standard the amount of care which the law requires of the defendant.

It should be observed that the question of negligence was little, if at all, argued in the High Court.

The Judge of the Court below quotes and applies to the case the following definition of negligence by Baron Alderson: "Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party;" and the High Court confirm this view of the law. Without adopting every expression of the Judge of the inferior Court, their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

The 3rd July 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Act VIII. of 1859, s. 2—Res Adjudicata—Putnee Jumma.

Case No. 2783 of 1873.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 29th August 1873, affirming a decision of the Moonsiff of that district, dated the 28th June 1873.

Rakhal Doss Singh and others (Plaintiffs), *Appellants,*

versus

Sreemutty Heera Motee Dossee and others (Defendants), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Radhika Churn Mitter for Respondents.

HELD, with reference to Act VIII. of 1859, s. 2, that where the cause of action is the same in substance in both suits, and where the former suit was so constituted that the parties to the present suit were in direct contest with each other and had full opportunity of asserting their rights, the decision in the former suit is *res adjudicata, e.g.*, decrees passed in suits for putnee-rent, in which the jumma payable is put in issue, are decisive as to the amount of such jumma.

Kemp, J.—THE plaintiffs are the special appellants in this case. They allege that they purchased a share in a durputnee talook, and that they have been repeatedly sued by the proprietors of the 2-anna share in the said putnee, and that they, the proprietors of the 2-anna share, have obtained decrees against them at a yearly jumma of Rs. 564-4. The plaintiffs then allege that they were not aware at the time of their purchase what was the real jumma of the share purchased by them; that they have recently come to know from a putnee bynamah granted by defendants' predecessors that the true jumma is sicca Rs. 464-3-7-2, equivalent to Co.'s Rs. 495-2-6. The plaintiffs, therefore, bring this suit to have it declared that the defendants are entitled to a yearly rent of Rs. 495-2-6 from them and no more.

The defendants, amongst other objections, raised the plea that the suit was barred under section 2 of Act VIII. of 1859.

The first Court was of opinion that the plea of *res adjudicata* was a bar to the suit. The Moonsiff found that the principal defendants repeatedly sued the plaintiffs for arrears

of rent, alleging that the jumma payable by the plaintiffs was Rs. 564-4, and succeeded, in spite of repeated and adverse objections on the part of the plaintiffs, defendants in the rent-suits, in obtaining decrees against them. The Moonsiff goes on to say that in all these suits the jumma payable by the plaintiffs in the present suit was distinctly put in issue, and that in the present case precisely the same issue arises; that a rent-suit establishes the rate of rent payable by the tenant, and as the jumma payable by plaintiffs has been determined by the previous decisions of a Court of competent jurisdiction, and as it is sought in the present suit to disturb the finality of these decisions, the suit must be dismissed with costs.

The Judge has confirmed that decision. We do not think it necessary to enter more particularly into his judgment as he affirms, and for very much the same reasons, the decision of the first Court.

The grounds taken in special appeal are :—

1st.—That the causes of action in the present suit and in the former suits for arrears of rent not being identical, the Courts below have erred in law in holding that the suit is barred under section 2, Act VIII. of 1859.

2nd.—That the decisions in the previous suits are conclusive only in so far as the rents recovered in those suits are concerned, and that the Courts below are in error in holding that such decisions are conclusive between the parties for all other purposes.

3rd.—That the issue as to the annual putnee rent payable by the special appellants, though a necessary issue, arose incidentally in the former suits, and hence any decision of that issue in those suits cannot debar them from instituting the present action.

Under section 34, Act VIII. of 1869, proceedings in suits instituted under that Act are regulated by the Code of Civil Procedure, namely, Act VIII. of 1859. Now, although the provisions of section 2, Act VIII. of 1859, ought not to be too widely construed, and a judgment is final only for its own purpose and object, still there can be no doubt that, where the cause of action is the same in substance in both suits, and where it is clear, as in this case, that the former suit was so constituted that the parties to the present suit were in direct contest with each other, and had full opportunity of asserting their rights, the decision in the former suit, which has disposed of the same matter and substance as now in dispute in the present suit, is *res adjudicata*. There can be no doubt that in the former suit the jumma payable by the plaintiffs in this suit was put in issue, and it was found that the jumma payable by them was the jumma alleged by the defendants in the present suit. Decrees were passed on that footing; those decrees were executed, and satisfaction of those decrees obtained.

It is now said that the plaintiffs have since discovered some fresh evidence in the shape of a putnee bynama granted by the predecessors of the defendants showing the jumma really payable by the plaintiffs. All we can say with reference to that part of the case is that the plaintiffs ought to have applied for a review to the Moonsiff who decided the question of the amount of jumma payable by the plaintiffs, if such application was not barred under the provisions of Act VIII. of 1859.

Holding, therefore, with the Courts below that the question of the jumma payable by the plaintiffs has been decided by a competent Court, and that that question cannot be re-opened, we dismiss the special appeal with costs.

The 3rd July 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Act VIII. of 1859, s. 223—Execution of a Decree—Giving Possession of a House with Locked Doors.

In the Matter of
Gunesh Chunder Shah, *Petitioner,*

versus

Ram Dhunee Dossee, *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Kalee Mohun Doss for Opposite Party.

In a case in which the officers of a Moonsiff's Court were unable to give a decree-holder possession of a house, because the judgment-debtor had bolted and locked the doors, and the Moonsiff struck the case off the file, the High Court holding that the Moonsiff was bound, under the Code of Civil Procedure, s. 223, to remove the locks, and to place the decree-holder in possession, and, in the exercise of its powers of supervision, directed the Moonsiff to adopt this course.

Kemp, J.—On the 15th of May the petitioner obtained a rule, calling upon the opposite party to show cause why the order of

the Moonsiff of the 11th of February 1874 should not be set aside, and the said Moonsiff be directed to carry out the execution of the petitioner's decree. It appears that the petitioner obtained a decree under section 15, Act XIV. of 1859, awarding to him possession of an undivided moiety of a certain house and premises against the opposite party, Ram Dhunee Dossee. The petitioner is the brother of the husband of the said Ram Dhunee Dossee.

On the petitioner applying for execution of his decree, the Nazir of the Moonsiff's Court was deputed to put the petitioner in possession. He reported that the judgment-debtor, Ram Dhunee Dossee, had bolted and locked the doors, and that he was unable to give the decree-holder possession. Then the serishtadar of the Moonsiff's Court was deputed, and he also was unable to give the decree-holder possession. The objections taken by the judgment-debtor below were that she had brought a regular suit to set aside the decision under section 15, and that there was buried treasure in the house. She therefore objected to the decree-holder obtaining possession. The Moonsiff was of opinion that, under section 223 of the Code of Civil Procedure, he was justified in putting the decree-holder in possession, and for that purpose, if necessary, in breaking open the doors of the house; but that, as the former Moonsiff had made a reference to the Judge of the district, he stayed his hand, and directed that the judgment-debtor should be prosecuted under the provisions of sections 183 and 186 of the Penal Code. The Judge, in reply to the reference made by the former Moonsiff, in a letter dated the 7th of November 1873, informed the Moonsiff that he would not be justified in breaking open any door or lock for the purpose of giving possession to the decree-holder. On receipt of this letter, the Moonsiff struck the case off the file, and it is that proceeding of the Moonsiff which has led to the present petition. The pleader, who appears for the opposite party to show cause, says that this is not a case in which this Court ought to interfere under the provisions of section 15 of the Charter, inasmuch as the petitioner has his remedy by regular suit, and that he ought not to be allowed to succeed by way of motion in obtaining that which he can obtain by a regular suit. No doubt, that argument is a very sound one in cases in which the Courts below have not exceeded their jurisdiction, or refused to exercise the jurisdiction which they possess; but this is a case in which the Court below, while admitting it had jurisdiction to execute the decree, has shirked the responsibility and consulted the Judge by letter; and in which the Judge himself appears to have declined the responsibility of directing the Moonsiff to carry out the law. We do not think that this is a case in which the petitioner should be referred to a separate suit, and, were he to bring a separate suit, he would most probably be met by an objection under section 11, Act XXIII. of 1861. Clearly, therefore, this is a case in which this Court ought to exercise its powers of supervision. Having disposed of this question, we cannot look behind the decree; our duty is to see that it is executed, if execution is practicable. Under section 199 of the Civil Procedure Code: "If a decree be for "land or other immoveable property, the "same shall be delivered over to the party to "whom it shall have been adjudged." Then under section 223: "If the decree be for "a house, land, or other immoveable property "in the occupancy of a defendant or some "person on his behalf, or of some person "claiming under a title created by the defendant subsequently to the institution of the "suit, the Court shall order delivery thereof "to be made by putting the party to whom "the house, land, or other immoveable property may have been adjudged, or any "person whom he may appoint to receive "delivery on his behalf, in possession thereof, "and if need be, by removing any person "who may refuse to vacate the same."

Now, it is clear that the judgment-debtor in this case opposed the execution of the decree, although several opportunities were given to her, for the Moonsiff went so far as to give her an opportunity of removing the alleged buried wealth, and putting it into a separate room of which the decree-holder was not to have possession, although entitled to it under the decree. She refused that offer, and, although the Nazir and the serishtadar were deputed on two different occasions, she persistently resisted the process of the Court. Under section 223 of the Code, the Court, in executing the decree which the plaintiff has obtained in this case for an undivided moiety of the house, is bound, if the judgment-debtor refuses to vacate the house, or to permit the decree-holder to obtain the possession to which he is entitled, to remove the locks, and to place the decree-holder in possession. We therefore direct the Moonsiff to carry out this order. The rule will be made absolute with costs. Pleaders' fees—2 gold mohurs.

d.

The 3rd July 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Rent-suit—Joint Kubooleut—Co-Lessees.

Case No. 1709 of 1873.

Special Appeal from a decision passed by the Judge of Patna, dated the 24th April 1873, affirming a decision of the Moonsiff of Behar, dated the 17th June 1872.

Jhoomuck Lall (one of the Defendants), *Appellant,*

versus

Mussamut Shurfoon *alias* Khoodirun (Plaintiff) and another (Defendant), *Respondents.*

Moonshee Abdool Baree for Appellant.

Moonshee Seraiul Islam for Respondents.

In a suit for rent against one of two co-lessees under a joint kubooleut, defendant pleaded that plaintiff had been content to receive from him as his share half only of the rent, and that this conduct amounted to an agreement or an interpretation of the original agreement to the effect that defendant was not liable for more than half the rent:

HELD that the evidence did not avail the defendant to that extent.

Phear, J.—THE case for the appellant has been very clearly and very fairly put before us by the learned pleader, but we think that he has failed to make out any substantial error in the judgment of the Lower Appellate Court.

The defendant Jhoomuck Lall admits the kubooleut, and, by the terms of that deed, he is jointly liable with his co-lessee for the whole of the rent. But it has been argued that the receipts put in and other evidence show that, as between him and the plaintiff, the plaintiff has been content to receive from him as his share half only of the rent, and that this conduct on the part of the plaintiff amounts to an agreement, or, if not itself an agreement, as an interpretation of the original agreement, to the effect that the defendant was only liable to pay half of the rent.

It seems to us that the evidence which has been referred to does not avail the defendant to this extent, and that the Judge has been right in holding the defendant liable to pay the whole of the rent jointly with his co-sharer.

But, on the other hand, it appears to us that the defendant ought to have credit for the Rs. 177-3 paid into the Collectorate. The Collectorate challan shows that this money was paid in by the defendant to the credit of the plaintiff under the provisions of the Rent Law. It is true, as the Judge says, the defendant has failed to show that he had previously tendered the amount to the plaintiff, or that any notice was sent to him. But we think it must be taken on the evidence afforded by the challan, in the absence of any thing to the contrary, that the money was duly paid into the Collectorate, and that the plaintiff can obtain the money from the Collectorate whenever she thinks proper.

We are therefore of opinion that the decree of the Lower Appellate Court should be varied, and that credit should be given in it to the defendant for the sum of Rs. 177.

It has been also pressed upon us that credit ought to be given to the defendant for the sum which, he says in his written statement, he paid into Court in this suit. But no evidence has been furnished to us other than the passage in the written statement itself to show that the money actually is in Court. We therefore cannot say that the Lower Appellate Court is wrong in not giving credit for this sum of money in the decree.

We may, at the same time, remark that, even if it be in Court, the defendant will get the advantage of it when the decree comes to be put into execution. That is to say, if it is in Court at all, it is there to the credit of the plaintiff, and must be taken into account as so much going towards the satisfaction of the decree.

Each party must bear his own costs in this Court.

The 3rd July 1874.

Present :

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Questions of Law—Construction of Pottah—Possession.

Case No. 1718 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 5th May 1873, reversing a decision of the Moonsiff of Pubnah, dated the 29th December 1871.

Janokee Nath Dutt (Plaintiff), *Appellant,*

versus

Moulvie Mahomed Israil (Defendant), *Respondent.*

Baboos Mohinee Mohun Roy, Issur Chunder Chuckerbutty, and *Grija Sunkur Mojoomdar* for Appellant.

Baboos Grish Chunder Ghose and *Gopal Lall Mitter* for Respondent.

In construing a pottah in this case, such construction being, according to the practice of the Court, treated as a question of law, the Court held that it must look to the surrounding circumstances, one of which was the possession given by the grantor, and accepted by the grantee.

Markby, J.—In this case we think that it is quite clear that the judgment of the Lower Appellate Court is defective, inasmuch as the Subordinate Judge has not considered one of the grounds upon which the decree was given to the plaintiff by the Moonsiff. The Moonsiff, acting under section 170 of Act VIII. of 1859, decreed the suit against the defendant upon the ground that the defendant having been ordered to attend and to give evidence, and also to produce certain documents, had, without lawful excuse, failed to comply with the order. That alone is a ground upon which the suit might be rightly decreed, and the Court of Appeal was bound to consider the propriety of that course. It has, however, been contended before us that, as a matter of law, upon the construction of the instrument itself, the plaintiff is entitled to succeed, and that, therefore, we might set aside the judgment of the Subordinate Judge at once, and give the plaintiff a decree upon the construction of the document, treating that purely as a question of law. Now, although, no doubt, the construction of the pottah is, according to the practice of this Court, treated as a question of law, nevertheless, in putting a construction upon it, we must look to the surrounding circumstances; and one of the surrounding circumstances which is certainly a matter of importance in this case is what possession was given by the grantor of the pottah, and accepted by the grantee under the pottah. Although there are some expressions in the pottah which no doubt support the contention of the grantee that the whole interest of the grantor in this mehal was granted to him, still we are not prepared to go to the full length of saying that, if the possession was clearly exclusive of the particular portion which is now in dispute, that might not alter our opinion on the construction of the document. We do not express any opinion upon that, but we merely say that this is not a matter which is so clear upon the terms of the document as to render it unnecessary to consider what possession was given by the grantor to the grantee under the pottah.

We think, therefore, that there must be a remand of this case, and we also think it right under the circumstances that the case should not go back to the Subordinate Judge who has already formed an opinion upon it, and that it should go entirely to a fresh Court. Accordingly, the case will go to the Judge of the district. He will deal with the case in this way: He will first consider whether or no he agrees with the Moonsiff in thinking that this is a case in which he ought to apply the provisions of section 170. If he agrees with the Moonsiff in that, of course the appeal from the Moonsiff's decision will stand dismissed; if he does not, it will then be for him to consider what other order in relation to the suit he might deem proper to pass under the circumstances of the case as directed by that section. If he thinks that it is proper now to summon the defendant to appear and produce the documents required, we leave it to his discretion to do so. But what he will do will be, when he has the whole case before him, if he decide to go into the case, to determine what construction he will put upon this lease with reference to all the evidence in the case and the findings of fact which he might come to upon it.

The case will be remanded accordingly, and the costs will abide the result.

The 3rd July 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Co-Sharers—Appropriation of Joint Property—Liability.

Case No. 235 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 10th November 1873, reversing a decision of the Additional Moonsiff of Madareepore, dated the 17th March 1873.

Bissambur Shaha (Defendant), *Appellant,*

versus

Shib Chunder Shaha and others (Plaintiffs), *Respondents.*

f

Baboo Kalee Mohun Doss for Appellant.

Baboos Doorga Mohun Doss and *Sreenath Doss* for Respondents.

The new Limitation Law, s. 27, does not apply to a suit to restrain one co-sharer in a joint property from appropriating to his own particular use a portion of such property without the consent of other co-sharers.

If one sharer chooses to build against the wishes of others, he must take the consequences, and cannot ask for compensation in case his building is ordered to be pulled down.

Ainslie, J.—We are of opinion that this special appeal must be dismissed with costs, and that the Judge was right in holding that section 27 of the new Limitation Act did not apply to the present claim, which is a claim to restrain one co-sharer in a joint property from appropriating to his own particular use a portion of that joint property, not only without the consent, but against the expressed will, of other co-sharers. The judgment of the late learned Chief Justice, Sir Barnes Peacock, which is to be found in a foot-note in page 140, XVI. Weekly Reporter, does not appear to us to apply to a case like this. There is nothing to show that in that case there had been warning to the defendant at the time he began to erect his wall that the other party would not suffer him to complete or maintain it. If the doctrine contended for by the special appellant were allowed, any co-sharer in a joint property might appropriate to his own use any portion of the joint land, subject of course to the payment of compensation to the other co-sharers, and thus effect a compulsory sale of it to himself. If one sharer chooses to build against the wishes of his co-sharers, he must take the consequences of his own act, and cannot ask for compensation in case his building is ordered to be pulled down.

As to the extent to which the Judge has decreed the case, it is quite clear that what he intended to do was to restore the paths claimed by the plaintiffs to the extent set out in the plaint, *viz.*, five and six cubits wide respectively. The special appeal will be dismissed with costs.

The 6th July 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Agreement to grant a Lease—Limitation—Act XIV. of 1859, s. 1, cl. 16.

Case No. 2012 of 1873.

Special Appeal from a decision passed by the Judge of Patna, dated the 9th of June 1873, affirming a decision of the Subordinate Judge of that District, dated the 27th July 1872.

Lalla Ram Sahoy Lall (Plaintiff), *Appellant*,

versus

Bibee Chowbain and others (Defendants), *Respondents*.

Baboo Mohesh Chunder Chowdhry for Appellant.

Moonshee Mahomed Yusuf for Respondents.

An agreement to grant a lease cannot be said to create an interest in immoveable property, nor can a suit upon it be said to be one for the recovery of such property or of an interest in it. Such a suit is governed, not by the 12th, but by the 16th cl. of s. 1, Act XIV. of 1859.

Couch, C.J.—We need not determine whether this instrument operated as a charge upon the property before any lease was granted, or before the time arrived for the lease to be granted by force of the words against alienating it, because the present suit is not brought to enforce a charge. It is not brought to recover an interest in the property created by a charge, but to enforce the agreement to grant the mokurruree lease, and to have possession given to the plaintiff under that. He asks for possession as the consequence of the lease being granted. There may be no objection to this being done. The suit is really brought to enforce the agreement to grant a lease. It does not appear to us that such an agreement can be said to create an interest in immoveable property, or that a suit upon it is a suit for the recovery of immoveable property or of an interest in it. We think, therefore, that the suit does not come within the 12th clause, but is governed by the 16th clause of section 1 of Act XIV. of 1859, and must be brought within six years.

The appeal will be dismissed with costs.

The 6th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Non-joinder of Parties.

Appeal, under section 15 of the Letters Patent, against the decision of the Hon'ble W. Markby, one of the Judges of this Court, dated the 21st May 1874, in Special Appeal No. 2500 of 1873.

Heera Lall Chowdhry and others (Defendants), *Appellants*,

versus

Bistoo Lall Chowdhry and others (Plaintiffs), *Respondents*.

Baboo Hurree Mohun Chuckerbutty for Appellants.

No one for Respondents.

The objection of non-joinder of parties cannot be made a ground of special appeal, unless the want of parties has caused a wrong decision to be given.

The judgment of Markby, J., appealed against, was as follows:—

THE ground taken in special appeal is precisely that which was raised by the Moonsiff, namely, whether the former decree is a bar to the plaintiff's claim. The Moonsiff considered that, and came to the conclusion that it was not. The Judge does not consider it at length, but I may presume that he agreed with the Moonsiff. The ground raised in special appeal is that the decision of the Moonsiff is wrong on that point. I am not prepared to say that it was. No doubt the ground upon which the plaintiff claims this rent is at first sight somewhat inconsistent with the right declared in that decree. But I do not think I can say as a matter of law that the parties who are co-sharers in the whole mouzah may not, for their own convenience, have made some arrangement under which the land of a particular portion of that mouzah, what is called in this suit *chota toke*, is to be treated as belonging to the plaintiff. There is nothing to justify me in special appeal in saying that the Moonsiff was wrong on that point.

The special appeal will be dismissed with costs.

Judgment of the Appeal Bench.

Couch, C.J.—There is no ground for saying that the decree has been misconstrued. Both the lower Courts have found against the present appellant. It is true there may be an objection on account of the persons entitled to share in the whole of the 7 *tokes* not having been made defendants. Only they who are entitled to share in the *chota tokes* are defendants. But that objection might and ought to have been taken at an earlier period. If the appellant suffers from the other persons not being parties to the suit, it is from his own fault in not having, at the proper time, required them to be made defendants. The objection of non-joinder of parties cannot, in our opinion, be made a ground of special appeal, unless it can be shown that the want of parties has materially affected the decision, has caused a wrong decision to be given. It is not so here.

The appeal must be dismissed with costs.

The 6th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Review—Special Appeal—Evidence—Procedure.

Case No. 107 of 1874.

Special Appeal from a decision passed by the Judge of the Twenty-four Pergunnahs, dated the 1st November 1873, reversing a decision of the Second Subordinate Judge of that District, dated the 17th June 1872.

Sahebjan Bibee (one of the Defendants), *Appellant*,

versus

Syud Sufdur Ali (Plaintiff), *Respondent*.

Mr. Ameer Ali and *Baboo Anund Gopal Palit* for Appellant.

Mr. C. Gregory, *Baboo Mohesh Chunder Chowdhry*, and *Moonshee Abdool Baree* for Respondent.

When a lower Court, with materials before it, comes to the conclusion that a review which has been applied for is necessary to correct an evident error or omission, or for the ends of justice, and grants the application accordingly, the order admitting the review is not open to be questioned in special appeal.

Where new evidence is adduced in an application for review, it need not be *per se* sufficient to show that the previous decision is wrong or such as to cause an overmastering balance of evidence. If there is sufficient

ground for receiving the new evidence, the case is to be heard as if it were being originally heard with the materials then before the Court.

Couch, C.J.—We think the appeal must be dismissed. The first question is whether the act of Mr. Beaufort in granting the review is subject to a special appeal. The terms of the section in Act VIII. of 1859, which gives the power of granting a review, are very wide. It says that, if the Court shall be of opinion that the review desired is necessary to correct an evident error or omission, or requisite for the ends of justice, it shall grant the review. The Court to which the application for review is made is that which has to determine whether it comes within this description. If there was matter before Mr. Beaufort upon which he might come to that opinion, although we might not agree in the view which he took, there would not be ground for coming to this Court in special appeal. The party is not at liberty to ask us in special appeal to review the propriety of the conclusion to which Mr. Beaufort came, if there were materials before him upon which he might come to it. The fact, that the Judge to whom the application for review was made was not the Judge who gave the judgment, makes no difference. It may seem unfit for one Judge to say that it is necessary or requisite to review the decision of another to correct an error or omission, or for the ends of justice; but the question is, whether there were materials before Mr. Beaufort upon which he might come to that conclusion. We think there were. We think the reasons that Mr. Beaufort has given for granting the review are fair, and if he was of the opinion, which he appears to have been, not only might he grant the review, but that it was a case in which it was fit that it should be granted. But we have not to decide that question.

Then the review having been granted, the question is whether there is any error in the judgment which was passed after it had been granted. There is no ground in the judgment for a special appeal. It deals with the facts of the case and the evidence, and comments, we think fairly, on the absence of evidence on the part of the defendants, who set up a case of fraud, and whose case appears to us to be, what cases of defendants often are in this country, a seeking to throw suspicion on the case of the opposite party, and resting to suspicion more than to the evidence which is produced. Possibly, the reason that this line of defence is so commonly adopted in this country is that very little of the evidence that is produced can be trusted. Persons think there is little use producing it, and there is a disposition, instead of doing so, to ask the Court to decide questions of fraud and forgery upon mere suspicion. We think, therefore, that the appeal ought to be dismissed.

We have only to remark upon the case, which has been quoted from 2 Weekly Reporter 175, that the question which the Court had to decide there was whether, on the application for a review of judgment, the Court could dispense with the proof of new evidence having come to the knowledge or within the reach of the applicant since the first hearing. In giving his reasons for the decision on that point, Mr. Justice Steer says: "Except on some clear and palpable "error committed by the predecessor, no "Judge is competent to reverse the decision "of his predecessor on a matter of fact on "the self-same evidence." So far this is in accordance with the words of the Act, using, instead of the words "evident error or omission," "clear and palpable error." We would rather keep to the language of the Act in this matter. The learned Judge then proceeds to say: "If, then, when any new "evidence is adduced as affording a ground "for preferring an application for review, "the Judge finds that the new evidence "tendered is not sufficient *per se* to show "that the decision of the predecessor is "wrong on the matter of fact, or that the "new evidence, if thrown into the scale, "would not create an overpowering balance "of evidence on the side of the party on "whose behalf the application for review is "made, the Judge's proper course is to refuse "the application."

We are unable to concur in the opinion that the new evidence must be sufficient *per se* to show that the previous decision is wrong, or that it must be such as to cause an overpowering balance of evidence. When the new evidence is admitted, if there is ground for receiving it, because it had not come to the knowledge of the parties before, the Court is to consider the case with the new evidence in the same way as the case would have to be considered before. There is no more reason for an overpowering balance of evidence when the judgment in review comes to be given than there was on the first occasion. When the review is granted upon what is a sufficient ground, the case is to be heard as if it were being originally heard with the materials then before the Court. The learned Judge appears, in the

latter part of the judgment, to have taken a strong view, perhaps not an improper one, of the power of granting a review; and this may have led him to express himself in this way. We must say we are not prepared to go to that extent. It is not a decision upon the question, but an expression of his own opinion, and I claim the right to express mine without a reference to a Full Bench.

The respondent will have the costs of this appeal.

The 2nd July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII. of 1859, s. 2—Jurisdiction.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Sealdah, dated the 23rd April 1874.

Sreeram Mitter, *Plaintiff,*

versus

Nobin Kristo Mookerjee and another, *Defendants.*

The fact that one of two defendants who are jointly and severally liable is excluded from a decree for want of jurisdiction does not debar the plaintiff from his remedy in a Court possessing jurisdiction with respect to the balance of claim irrecoverable from the other defendant.

Case.—I HAVE the honor to refer, under the provisions of section 22, Act XI. of 1865, the following question of law for the decision of the Honorable Court:—

It has been found as a fact that a promissory note, payable on demand, for Rs. 400, was executed by Nobin Kristo Mookerjee for himself and his partner Mohessur Mookerjee, jointly carrying on business in the suburbs of Calcutta, and for their mutual benefit.

Both the partners were sued originally in the Calcutta Small Cause Court, and a decree was obtained by the plaintiff, Sreeram Mitter, against both. Subsequently, the 2nd defendant, Mohessur Mookerjee, applied for and obtained a new trial, and the following order was passed: "Suit abates for want of jurisdiction as regards the 2nd defendant."

The plaintiff then took out execution against the 1st defendant, and recovered the sum of Rs. 162-3. No further amount being realizable from this defendant, the plaintiff sued in this Court to recover the unsatisfied amount of the promissory note from the 2nd defendant, Mohessur Mookerjee, who is resident within this jurisdiction, where also the promissory note was executed.

It was pleaded in defence that a fresh action could not be brought upon the same promissory note on the principle enunciated in section 2, Act VIII. of 1859.

I overruled the objection, considering that the former suit having been heard and determined between the plaintiff and another party, and by a Court not of competent jurisdiction in regard to the 2nd defendant, was not a suit between the same parties, nor within the meaning of section 2. And that the fact of the 2nd defendant having been excluded from the former decree on the ground of jurisdiction alone did not debar the plaintiff from his remedy in a Court possessing jurisdiction with respect to the balance irrecoverable from the other defendant, to which the plaintiff was equitably entitled from both the defendants jointly and separately according to the note.

I accordingly passed a decree in favour of the plaintiff, contingent on the opinion of the High Court on the point above indicated, which was reserved with the consent of both parties.

The judgment of the High Court was delivered as follows by—

Jackson, J.—We consider the opinion of the Small Cause Court Judge in this case to be correct. It is not quite apparent why the reference was made, as the Judge himself does not appear to have entertained any doubt, and neither party was competent to insist upon the reference.

The 3rd July 1874.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Suit against Guardian—Compromise prejudicial to Minor—Insufficient Representation.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Unnoda Dabee

versus

Maria Louisa Stevenson.

F, having purchased an estate on behalf of his minor daughter M, paid a part of the price, and gave a mort-

* From the judgment of Peacock, C.J., and Markby, J., in Regular Appeal No. 308 of 1855, decided on the 8th June 1866—8 W. R. 29.

gage-bond for the rest. Upon this bond the vendor sued F personally, and as the guardian of his daughter, for the amount due, and obtained a decree declaring him alone liable. F then appealed to the Sudder Court, on the ground that his daughter ought to have been joined in the decree, and then proposed a compromise, which was acquiesced in, and on which judgment was given to the effect that the decree should be allowed to declare the liability of the half-share of the putnee which had been specially pledged as security, and the decree-holder be permitted to proceed against F only for such balance as might not be satisfied by the sale of the said property. Upon the daughter attaining her majority, she and her husband applied for a review of this decision. The High Court held that the appeal to the Sudder Court had been by F alone, who had obtained an alteration of the decree in his own favour to the prejudice of his daughter, and that they had not materials to determine what were the rights between F and his daughter. The High Court accordingly reversed the decree of the Sudder Court:

HELD that they were not wrong, and that the vice of the compromise on which the Sudder Court's judgment had been based was that it was made without the party who was principally affected by it (*viz.*, the daughter) being sufficiently represented.

THEIR Lordships think that they ought not to disturb the decree of the High Court, which was made upon a review of the judgment of the Sudder Adawlut. The suit was brought by the present appellant, who was the representative of a vendor of a putnee talook, which had been purchased by Mr. Henry Gloucester French, as he represented, on behalf of his minor daughter, Miss Maria Louisa French. The suit was brought against Mr. French personally and as the guardian of his daughter. It appears that, upon the purchase of the estate, which was sold for the sum of Rs. 26,625, a sum of Rs. 8,000, part of it, remained unpaid; and Mr. French gave a mortgage-bond, or what is called a tummasook, to secure this money, and the suit was brought upon that bond. The conclusion of the suit is this—after stating the circumstances of the purchase of the bond: "It therefore becomes necessary "to sue him in the above sum in his own "name and as guardian of his daughter. "This suit is instituted against Mr. French "himself and as guardian of Miss Maria "Louisa French, a minor; and I pray that "summons be directed to the defendants "aforesaid as usual; and that, on hearing "my evidence in proof of my claim, it may "be ordered that the defendants be directed "to pay me the amount of my claim, with "interest and Court costs." There is nothing in that prayer which seeks to affect the estate. It is a prayer that the defendants may be ordered to pay the amount of the claim. The case was heard before the Principal Sudder Ameen, who found these to be the facts: "It does not appear from "the tenor, or the part signed, of the ikrar, "on which the present suit has been brought "by the plaintiff, that Mr. French has given "and signed the ikrar as guardian or execu-"tor of the minor, Miss Maria Louisa "French. He has not signed the ikrar as "guardian and executor of the said Miss "Maria Louisa French; he has signed for "himself. It has been clearly mentioned in "the ikrar that the defendant, Mr. French, "had obtained the putnee tenure for the said "minor. The name of the said minor was "used in this affair only by the defendant, "Mr. French. In every respect the defend-"ant, Mr. French, appears to be responsi-"ble." He goes on: "Such being the "case, the said minor can by no means be "responsible." Then the order is "that "the case be decreed; that the defendant, "Mr. French, pay to the plaintiff the amount "claimed, *viz.*, Rs. 12,276,' together with "interest on the principal," and so on. There is, therefore, a finding, the question apparently having been raised, that Mr. French alone is liable upon that instrument, and an order upon him alone for the payment of the money. The plaintiff, whom the present appellant represents, seems to have been perfectly contented' with that decree. He did not appeal, but Mr. French appealed upon the ground that he ought not to have been made solely responsible for this amount, and that his daughter ought to have been joined in the decree. That ground of appeal was in the teeth of his own assertion in the pleadings in the Court below that he was alone liable for this debt; and an effort was made by him to get rid of that pleading, but the Court apparently did not grant his request, and at all events that pleading stood; and so the case came before the Sudder Court. On the pleadings as they stood, and which were not amended, it would have been impossible for that Court to have altered the decree as Mr. French desired; and they did not do it; but it seems that Mr. French proposed to the plaintiff a compromise of the appeal, which the appellant acquiesced in. That compromise is stated in the judgment, founded on the compromise, of the Sudder Court. They state: "Mr. French has appealed; "and his pleader, after submitting some pleas "and objections which were not found to be "included in his written grounds of appeal, "confined his appeal to the point that, as "the debt was obviously contracted by "Mr. French for the purchase of a putnee "exclusively intended for the use and benefit "of his minor daughter, and for the security

"of which debt the half-share of the putnee "was specially pledged, that the decree be "allowed to declare the liability of the pro-"perty so pledged in the first instance, and "the decree-holder be permitted to proceed "against Mr. French only for such balance "of the decree as may not be satisfied by "the sale of the property pledged. As the "pleader on the other side signifies to the "Court that he should be satisfied if the "lower Court's decree be to this extent "amended, it is therefore ordered that the "amount decreed by the Principal Sudder "Ameen be confirmed; but, with reference "to the above arrangement, the decree-holder "will first proceed to satisfy this decree by "sale of the property pledged, so far as that "property may be liable under the terms of "the bond executed by Mr. French as wolee "or woosee of his daughter, and any balance "still remaining with them be levied from "Mr. French unreservedly, until the whole "amount of the decree be realized." The compromise may have been proper, and if all the facts could be assumed as Mr. Kay supposes them to exist, there may have been no objection to such an arrangement; but the vice of the arrangement is that it was made without the party who is principally affected by it being sufficiently represented. The appeal to the Sudder Court was really an appeal by Mr. French against his co-defendant, his own daughter; and she not being in any way represented before the Court but by himself, he comes to this compromise, and gets the assent of the plaintiff to it. It is plain that the Court exercised no controlling power over it; that they did not consider that they were looking after the interests of the infant, but they base their decree simply upon this compromise. It does not appear what was done for 10 years after this decree; but, upon the daughter attaining her majority, and being married, she and her husband applied to the High Court for a review of this decision, which the High Court had power to rehear, as the Sudder Court, if it had existed, might itself have done. Upon the rehearing, the objections, to which allusion has just been made, were pointed out in the judgment of the High Court. The learned Chief Justice went very fully into the case, and came to the conclusion that the appeal to the Sudder Court was not made by the plaintiff, but by Mr. French himself, and that he had obtained an alteration of the decree in his own favour to the prejudice of his daughter. The High Court thought that, in a suit commenced as this had been, and with the pleadings of Mr. French standing as they did upon this record, they had not materials for going into the merits of the case to see what were really the rights between Mr. French and his daughter. Their Lordships cannot say they were wrong. By reversing the former order of the Sudder Court, they left the appellant exactly where he was after the judgment of the Principal Sudder Ameen—a judgment from which he did not appeal, and to which he must be again remitted. Whatever rights (if any) the plaintiff may have against the estate or against the daughter, he will not be precluded from asserting in a suit properly framed, because one of the grounds of this judgment is that this suit was framed merely on a money-claim for the amount of the mortgage-debt.

Their Lordships will therefore humbly advise Her Majesty that the order of the High Court be affirmed.

The 6th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Limitation—Title—Lower Appellate Court.

Case No. 1410 of 1873.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 31st March 1873, modifying a decision of the Subordinate Judge of that District, dated the 22nd July 1872.

Gobind Chunder Dass Purkaisto and others (Plaintiffs), *Appellants,*

versus

Ameenoozzumah Chowdhry and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Grish Chunder Ghose for Respondents.

Where a plea of limitation has been overruled, and the first Court has adjudicated upon the plaintiffs' title, the Lower Appellate Court is bound to adjudicate upon the title also.

Markby, J.—THE appeal of the special appellants relates only to plots Nos. 2 and 3. The plaintiffs obtained a decree from the Moonsiff for those two plots. One of the pleas raised by the defendants was that the

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suit was barred by limitation. That plea was overruled, and the plaintiffs' title found to be established. The defendants appealed, not upon the ground that the suit ought to have been held to be barred by limitation, but upon the ground that the plaintiffs had not proved that they were dispossessed in Cheyt 1269, as stated in the plaint, and they also appealed generally upon the question of title. The Lower Appellate Court has dealt with the suit, so far as it relates to plots 2 and 3, upon this ground only. It has dismissed the plaintiffs' claim upon the ground that they failed to prove that they were dispossessed from plots 2 and 3 in Cheyt 1269; and that, consequently, their suit as to these two plots must fall to the ground.

Now, it is undoubtedly of very great importance that the parties should correctly state in their plaint the date of their dispossession. If that date turns out to be wrongly stated, it may considerably affect the opinion of the Court as to the credibility of the witnesses. But, when the plea of limitation was overruled, and the first Court adjudicated upon the title, we think the Lower Appellate Court was bound to adjudicate upon the title also. The only other question for us to consider is, whether this suit ought to be remanded, or whether we can finally dispose of it in this Court. Now, it appears to us, now that we have the survey map and the Ameen's map before us, that there is really nothing upon which we can send the case back to the Lower Appellate Court. It is now finally decided that the Ameen's map is to be accepted as having been properly made. We have therefore referred to the Ameen's map also, and there is no doubt whatever as to the exact situation of the two plots in dispute. It also appears without any possibility of doubt, when we compare the map made by the Ameen with the survey-map, that the disputed land falls within Mouzah Bhobopore, which is the plaintiffs' mouzah. There is nothing, as far as we have been able to see, upon the record upon which the Lower Appellate Court could, by any possibility, find that the survey-map was incorrect. No doubt, the survey-map is not conclusive, but it is very good evidence, and, until something is brought to show that it is incorrect, the Courts below would inevitably act upon it.

Under these circumstances, we think that the decision of the Lower Appellate Court is wrong in law, and must be reversed, and the decision of the Subordinate Judge restored with costs. There has been a cross-appeal on the part of the respondent as to plot No. 1, but that is disposed of by the observations which we have made as to plots Nos. 2 and 3.

The 7th July 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Daughter-in-law—Maintenance—Hindoo Law—Full Bench Ruling.

Case No. 2745 of 1873.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 27th August 1873, affirming a decision of the Moonsiff of Burjorah, dated the 19th September 1872.

Nund Mohun Chuttoraj (Defendant), *Appellant,*

versus

Rohinee Debia (Plaintiff), *Respondent.*

Baboo Romesh Chunder Bose for Appellant.

Baboo Nil Madhub Bose for Respondent.

A decree declaring a Hindoo female entitled to maintenance from her father-in-law was held to bind the latter, notwithstanding a later Full Bench Ruling to the effect that a daughter-in-law was not entitled to such maintenance.

In this case the defendant, special appellant, was sued by the plaintiff, his daughter-in-law, for arrears of maintenance which had accrued due subsequent to 1870. It appears that the plaintiff, in the year 1859, obtained a decree against the defendant, declaring her entitled to maintenance at the rate per mensem claimed

in this suit. The defendant, amongst other pleas, mainly relied on a Full Bench Ruling of this Court, reported at page 15, Volume II., B. L. R.,* and pleaded that he was not bound, under the Hindoo law, to maintain his daughter-in-law. Both the Courts below have decreed the plaintiff's claim, overruling this objection on the ground that it is no longer open to the defendant to raise it, as he is bound by the decision passed between the parties in the year 1859. The defendant has preferred this special appeal, contending that the decisions of the lower Courts on this point are erroneous in law. I do not think that this contention is valid. It seems that the decree of the year 1859, upon which the Courts below have relied, is in the nature of a decree declaring the plaintiff's right to obtain maintenance from her father-in-law at the rate of one rupee and 8 annas per mensem. Therefore the Full Bench decision quoted above cannot now re-open the question which has been finally determined between the parties by that decree.

The special appeal is accordingly dismissed with costs.

The 8th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Family Dwelling-house—Partition—Right of Suit.

Case No. 2206 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 11th July 1873, reversing a decision of the Sudder Moonsiff of Chuprah, dated the 18th June 1872.

Jhubboo Lall Sahoo (Plaintiff), *Appellant,*

versus

Khoob Lall and others (some of the Defendants), *Respondents.*

Baboo Judoo Nath Sahoy for Appellant.

Moonshee Mahomed Yusuf for Respondents.

A suit for partition of a family dwelling-house may be brought either by one of the members of the family or by a purchaser from such member.

Couch, C.J.—In the previous proceedings, which terminated in an order of this Court, and in which the parties to this suit were parties, it was determined that Chuckun Sahoo had an interest in the family dwelling-house, which might be taken in execution and sold. Therefore we have not to consider whether the share of a member of a joint Hindoo family in the family dwelling-house can be taken in execution and sold. It would seem to be within the words of section 205 of Act VIII. of 1859, which make the property of a defendant liable to attachment and sale in execution of a decree.

There is evidence that the plaintiff became the purchaser of the interest of Chuckun Sahoo, and he has a right to sue in respect of it. The Judge seems to have misapprehended, as far as we can see, the plaintiff's case. He appears to have held that, as the plaintiff had not proved that he had been in possession, his suit must be dismissed. But the suit having been brought within twelve years from the time when Chuckun Sahoo has been found to be in possession, he need not show that he had ever taken possession. That part of the judgment cannot be supported, nor can the part which precedes it, where the Judge appears to find that Chuckun had no interest in this house, because he was living separately in another part of the property. He says that such a suit as the present for division and possession of such a dwelling-house, a family dwelling-house, cannot stand as being in its nature opposed to Hindoo law. We do not understand upon what ground the Judge holds this opinion. A suit for partition of a family dwelling-house may be brought, and has frequently been brought. And then the only question is, whether, if the right of one of the members of the family in the family dwelling-house has been sold, the purchaser may not bring a suit for a partition. The objection that a stranger would be introduced into the house applies equally where the members of the family have made a partition of the house, and then one of them has sold his share, which he may do. In this case, taking it as decided that the plaintiff had become the purchaser of the interest of Chuckun, we see no reason that a suit for partition should not be maintained.

The decree which the first Court made is for the recovery of the plaintiff's share by a partition of the property. That seems to be a right decree and must be restored, the decree of the Judge being reversed. The appellant will have the costs in this Court and in the Lower Appellate Court.

* 10 W. R. (F. B.) 89.

The 8th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Joint Tenancy—Liability of Joint Occupiers—Zemindar's Rights.

Case No. 79 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 30th June 1873, affirming a decision of the Additional Moonsiff of Bongram, dated the 20th May 1873.

Gour Mohun Roy (Plaintiff), *Appellant,*

versus

Anund Mundul and others (Defendants), *Respondents.*

Mr. H. E. Mendies for Appellant.

No one for Respondents.

The fact of some of the joint occupiers of a joint tenure paying portions of the rent due from all, corresponding with the shares for which the joint occupiers are liable, cannot prevent the zemindar from suing them *all*, or making them all answerable for the joint debt.

Jackson, J.—It appears to us that the ground on which the Courts below have concurred in dismissing the plaintiff's suit cannot be sustained. This was a suit against several persons who appear to be joint-holders of a tenure under the plaintiff, and they were sued together for arrears of rent, amounting to Rs. 199. In answer to the suit they alleged that they were accustomed to pay their shares of the entire rent separately to the plaintiff, and they ought not to be sued together, and that, consequently, there has been misjoinder. In support of that allegation, they brought forward a solehnama between themselves, on the one hand, and the plaintiff by his karpurdaz on the other, by which it was agreed that the rents should be paid in specified instalments according to those shares. This solehnama the Moonsiff and the Subordinate Judge on appeal have taken to be binding on the plaintiff. Now the solehnama in question was the compromise of a particular suit for rent brought against all these parties, and the plaintiff by his agent appears to have accepted their engagement to pay their rent as therein specified in the shares mentioned, and it was agreed that, if the payments were not so made, execution shall take place. It does not appear that the execution was limited to particular persons or particular shares, and in point of fact it seems that afterwards, on further non-payment of rent, a suit was again brought against all these parties jointly, and a joint decree obtained by the plaintiff. The Court below appears to have relied considerably upon the circumstance of the plaintiff having subsequently received rents from these parties according to the shares mentioned by them. Now there is nothing in ordinary circumstances to prevent some of the joint occupiers from paying portions of the rent due from all, and the portions so paid may correspond with the shares for which the joint occupiers are liable, but there is nothing to prevent the zemindar from suing them all, or making them all answerable for the joint debt.

The Subordinate Judge refers to a case in 10 Weekly Reporter, p. 392, which, it appears to us, ought rather to have put him on the right path, and prevented him from giving the present judgment. In that case it would appear that a suit had been brought against two defendants as being joint tenants. The defendants did not dispute the amount of rent due, nor did they dispute their tenancy. They only set up that they had, amongst themselves, made an allotment of the land in certain shares. The learned Judge observes: "Had they shown that this sub-division or allotment was recognized by the plaintiff, then the view taken by the Lower Appellate Court would have been correct." Now, what distinguishes that case from the present is that, although the parties here were allowed to settle amongst themselves the shares in which they were to pay the rent, yet there was no corresponding division of the land, and the holding remained undivided. Consequently, if there was failure in the payment of one of those shares, the whole tenure would be answerable. It appears to us that none of the circumstances indicate any consent of the landlord to divide the holding, or to recognize, otherwise than for the purpose of that particular suit, any right to make separate payments on account of particular shares. The landlord, therefore, was undoubtedly entitled to sue the parties as being joint occupiers of a joint tenure. The decree on which the plaintiff's suit is dismissed is set aside. The case must go back to the Moonsiff's Court for trial of the other questions raised in the suit. The costs of this appeal will abide the ultimate result.

The 8th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Witnesses.

Case No. 729 of 1874.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 24th December 1873, affirming a decision of the Moonsiff of Doobrajpore, dated the 29th July 1873.

Brojo Nath Mookhopadhya and another (Defendants), *Appellants,*

versus

Protap Chunder Thakoor and another (Plaintiffs), *Respondents.*

Baboo Ashootosh Mookerjee for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

If a defendant's case is not closed, he has a right to have his witnesses summoned, and to get an opportunity of producing them if he can do so in time. Where such right was refused to a defendant by the first Court, and his objection on that score was not noticed by the Lower Appellate Court, the High Court, in special appeal, remanded the case for a fresh hearing.

Markby, J.—We are generally very unwilling to interfere upon special appeal upon the ground that the witnesses whom the parties desired to have examined have not been examined. Generally speaking, that is a matter we are not in a condition to deal with. But it certainly does appear in this case that, whereas evidence was taken on the 28th July, summonses which the defendants applied for on the 27th were refused, apparently for no reason. Of course, although the time might be very short, yet, if the defendants' case was not then closed (as it is clear that it was not), they had a right to have their witnesses summoned and to get an opportunity of producing those witnesses, if they could do so in time. That refusal was made a ground of appeal to the Lower Appellate Court. The Lower Appellate Court has not noticed that ground. But there are circumstances in this case which lead us to suppose that there can be no doubt that the defendants were really *bonâ fide* desirous to produce those witnesses. They had produced a great many of them on several previous occasions, but, for reasons which appear to us to be quite insufficient, they were then not examined. Therefore, under the circumstances of this case, we think we should be justified in interfering in special appeal and saying that the defendants have a right to have their witnesses examined.

The judgments of both the lower Courts will, therefore, be set aside, and the case remanded to the Moonsiff for a fresh hearing. Costs will abide the result.

The 8th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Survey Map—Onus Probandi—Ferry Rights—Competition.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 5th December 1873, modifying a decision of the Additional Subordinate Judge of that District, dated the 28th May 1873.

Case No. 260 of 1874.

Narain Singh Roy (Defendant), *Appellant,*

versus

Nurendro Narain Roy (Plaintiff), *Respondent.*

Baboos Unnoda Pershad Banerjee and *Grija Sunkur Mojoomdar* for Appellant.

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Respondent.

Case No. 435 of 1874.

Nurendro Narain Roy (Plaintiff), *Appellant,*

versus

Narain Singh Roy (Defendant), *Respondent.*

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Appellant.

Baboos Unnoda Pershad Banerjee and *Grija Sunkur Mojoomdar* for Respondent.

A survey-map is a piece of evidence like other evidence in a case, and can be of no effect in determining the burden of proof.

A rival ferry cannot be set up so as to interfere with the proprietary rights in an existing ferry, that is to say, under circumstances involving direct competition with such ferry.

Jackson, J.—THE plaintiff in this case sued to recover possession of a piece of land in the possession of the defendant, which the defendant used for the purposes of a ferry, or means of crossing a narrow piece of water locally called a bheel, to the detriment, as the plaintiff urged, of an existing ferry of the same description worked by the plaintiff at the distance of a quarter of a mile. The Subordinate Judge found the land to belong to the plaintiff, and gave him a decree. On appeal, the Judge reversed the finding of the Subordinate Judge, so far as ownership of the land is concerned, and found that the plaintiff had not made out his right to it, but, inasmuch as the plaintiff had got a subsisting "ferry," or arrangement for crossing, and as the ferry which the defendant claimed had been opened in 1869, he lays down a principle which he expresses in these words: "There are proprietary rights in a private "ferry with which another party may not "interfere by exercising his own proprietary "rights over adjacent lands, unless he is en-"titled to do so." This, no doubt, is a very harmless principle, but it would not quite conclude the present controversy, because here the question was whether the defendant was entitled to do so or not. The principle of the question seems to have been consciously or unconsciously borrowed with certain modifications from an observation of Mr. Justice Bayley in 16 Weekly Reporter, page 282, where he says: "It is recognized "that there are proprietary rights in a "private ferry of such a nature that another "party may not so interfere with the profits "arising therefrom, as would be the result by "running a boat, if not exactly on the same "line, at least within such a distance as, for "all practical purposes, would be the same as "if it were on the same line." This is the only authority on which the plaintiff relies before us in special appeal. The Judge has given plaintiff a decree for removal of the defendant's ferry, and the defendant has appealed specially. The plaintiff also appeals against that part of the decision of the Judge which decides the question of ownership to the land against him. His appeal relates entirely to the mode in which the Judge has dealt with the evidence. He says that the Judge was bound, as the Subordinate Judge did, to treat the survey-map as a circumstance sufficient to throw the onus on the defendant to make out a better title to the land. It appears to us that there is no ground for any such contention. The survey-map was a piece of evidence like other evidence in the case. It could be of no effect in determining the burden of proof. The plaintiff gave this evidence; the Judge considered it, and held that it was not sufficient to establish the plaintiff's claim. The cross-appeal therefore, in our opinion, entirely fails.

In regard to the defendant's appeal, we confess we do not see on what principle the judgment of the Court below has been given against him. In the case referred to in 16 Weekly Reporter, the circumstances were very different. The ferry complained of there had been set up at a distance of half a russee (20 yards) from the plaintiff's ferry. The effect of that would be to set up, immediately side by side with the plaintiff's ferry, a direct competition in the means of crossing passengers over a narrow piece of water. Here the defendant's ferry was situated at a distance of a quarter of a mile from the plaintiff's. It has been found that the right to the land belongs to the defendant, and not only that, but it also appears that in former times the defendant's predecessors had exercised the right of crossing passengers by this ferry, which right was summarily put an end to by a somewhat arbitrary proceeding of the Collector. Under these circumstances we put it to the respondent's pleader to say where to draw the limit. If a quarter of a mile is an unlawful vicinity, a mile, and we might say five miles, may be similarly unlawful. The real answer therefore seems to be that which we have stated, *viz.*, that, if there is a prohibition to set up a rival ferry, it must be under circumstances such as are set out in 16 Weekly Reporter, that is to say, there must be a direct competition with the existing ferry. In the present instance that is not the case. It appears that, although the plaintiff has suffered, he has not suffered in any such way as would constitute a wrong on the part of the defendant, and therefore there is nothing which would justify the removal of his ferry.

Special Appeal No. 260 is therefore allowed with costs, and Special Appeal No. 435 dismissed with costs.

The 9th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Act XI. of 1865, s. 6—Action for Damages.

Case No. 2106 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 19th June 1873, modifying a decision of the Moonsiff of Nattore, dated the 22nd March 1872.

Bhugobutty Churn Rajpaye (Plaintiff), *Appellant,*

versus

Sharoda Pershad Sookul and others (Defendants), *Respondents.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Doorga Mohun Doss for Respondents.

An action to recover, from the hands of defendants, money collected from a landed estate, which had been charged with the payment thereof under an instrument to which defendants had not been parties, was held to be a personal action for damages within the meaning of Act XI. of 1865, s. 6.

Markby, J.—It seems to us that this case comes within the jurisdiction of the Small Cause Court. The only decree that was sought in this suit by the plaintiff was a personal remedy against the defendants. No decree was sought against the land upon which the monthly payment was charged. The defendants do not appear to have been in any way parties to the instrument by which the monthly payment was granted; and therefore the only way in which they could be personally liable would be that, having in their hands money collected from this estate which they were under an obligation to pay over to the plaintiff, they have not done so. In that view, this suit would be a suit for damages within the meaning of section 6 of the Mofussil Small Cause Courts Act. The claim, therefore, being below five hundred rupees, no special appeal will lie to this Court.

The appeal must be dismissed with costs.

The 5th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Act VIII. of 1859, s. 206—Contract between Decree-holder and Judgment-debtor.

Case No. 2610 of 1873.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of the 24-Pergunnahs, dated the 21st July 1873, affirming a decision of the Second Moonsiff of Alipore, dated the 26th September 1872.

Nujeem Mullick (Defendant), *Appellant,*

versus

Erfan Mollah and others (Plaintiffs), *Respondents.*

The Advocate-General for Appellant.

Moonshee Abdool Baree for Respondents.

A suit to enforce a contract by which a dispute was adjusted between a decree-holder and judgment-debtor is not barred by Act VIII. of 1859, s. 206.

Markby, J.—In this case the Courts below have, upon a contract to that effect established by the plaintiff, directed the defendant, upon payment of Rs. 100 to him by plaintiff, to execute a conveyance, and have enjoined the defendant not to execute two decrees which he holds against the plaintiff. This contract was the adjustment of a dispute made between the defendant decree-holder and the plaintiff judgment-debtor.

It has been objected here in special appeal that this decree is in violation of the provisions of section 206 of Act VIII. of 1859. But we do not think so. That section only relates to the execution of the decree, and not to an independent suit brought to enforce a contract. Were we to hold otherwise, the plaintiff would be entirely without remedy, and there is nothing to lead us to suppose that the Legislature intended to make such a contract as this absolutely unenforceable. What was intended was to prevent this sort of objection being taken on proceedings in execution.

The special appeal is dismissed with costs.

The 9th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Suit for Rent—Inoperative Kubooleut.

Case No. 2121 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 28th July 1873, reversing a decision of the Moonsiff of Bajhaut, dated the 31st January 1873.

Joodhesty Merdha (Defendant), *Appellant,*

versus

Taruck Chunder Chuckerbutty (Plaintiff), *Respondent.*

Baboo Bungshee Dhur Sen for Appellant.

Baboo Rash Beharee Ghose for Respondent.

In a suit for rent against a defendant who occupied some land under the talookdar, but had been induced to execute a kubooleut to the plaintiff upon the latter setting up a title to the howla within which the land was comprised, defendant pleaded an *istifa*, or deed of relinquishment, and continued payment to the party in possession of the howla:

HELD that, as no consideration was shown for which the kubooleut was given, and plaintiff was never in possession, and never received rent, the kubooleut was inoperative, and the suit must be dismissed.

Jackson, J.—IT appears to us that the Judge ought not to have reversed the judgment of the Moonsiff in this case. The defendant seems to have occupied some land under the talookdar, and the plaintiff, or the plaintiff's father, setting up a right to the howla within which the defendant's land was comprised, induced the defendant in 1275 to execute a kubooleut to him. It does not appear that the plaintiff or his father in any shape put the defendant in possession of the land purporting to be leased to him, or ever recovered any rent under the kubooleut; but in fact it appears that in the year following the defendant put in a document called *istifa*, or deed of relinquishment, and continued to pay rent to the party in possession of the howla. The Judge considers that the relinquishment, in order to avail the defendant, ought to have been followed by giving up or surrendering the land, and that the defendant having attorned or given a kubooleut to the plaintiff is bound by his own act, and must now pay rent. Now, there is no consideration shown for which the kubooleut was given. The plaintiff appears to have been at no time in possession of this land, or in a position to benefit the defendant. The defendant has continued, as he did before, to occupy under another party, and to pay rent to him, and as under these circumstances he is not bound, we think, to give up the land which he held under that other party, and as no consideration obliged him to pay rent under the kubooleut, we think the kubooleut is inoperative, and the suit must be dismissed as it was by the Moonsiff. But, inasmuch as the defendant appears to have involved himself in this suit by his own fault, we think there should be no costs. The suit therefore must be dismissed, but without costs.

The 9th July 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Lower Appellate Court—Issuse—Putneedars and Dur-putneedars—Registration — Regulation VIII. of 1819, s. 5.

Case No. 201 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 12th November 1873, reversing a decision of the Moonsiff of Tumlook, dated the 16th July 1873.

Okhoy Coomar Chatterjee and others (Plaintiffs), *Appellants,*

versus

Maharajah Dhiraj Mahtab Chund Bahadoor (Defendant), *Respondent.*

Baboos Hem Chunder Banerjee and *Becharam Mookerjee* for Appellants

Baboo Chunder Madhub Ghose for Respondent.

A Lower Appellate Court ought not to raise a question on a point which has not been put in issue in the first

Court or questioned in the defendant's written statement.

The status of a putneedar or dur-putneedar does not depend upon registration or the consent of the zemindar.

Kemp, J.—THE plaintiffs are the special appellants in this case. They sued for abatement of their putnee jumma on account of 147 beegahs 12 cottahs of land belonging to their putnee which had been appropriated by Government for irrigation-purposes. They asked for a remission of Rs. 238-3-5, and obtained a decree in the first Court for Rs. 230-10-8. We may here observe that the plaintiffs' pleader admitted that this result arrived at by the Moonsiff as to the amount of abatement which the plaintiffs were entitled to was correct, and he further states that he has no objection to a decree at the above rate.

The Rajah's written statement was to this effect: That Pitamber Patro was the original putneedar; that the putnee was sold for arrears of zemindaree rent and was purchased by Ram Churn Bundopadhya who was in possession; that the plaintiffs' names have not been registered in his, the Rajah's serishta, and that the relation of landlord and tenant does not exist between them; and therefore that the plaintiffs cannot sue for an abatement. Section 63, Regulation VIII. of 1819, is quoted in support of this argument. And then, that, according to the terms of the kubooleut, the plaintiffs could not claim abatement of rent. The third ground is that, inasmuch as the Rajah has obtained compensation in the proportion of 9 annas, and the putneedar in the proportion of 7 annas, and as the Rajah, although he had made an application for a remission of the Government revenue, had not obtained any remission on account of the lands taken by Government, therefore the plaintiffs are not entitled to any abatement. Then the principle upon which the abatement has been calculated is questioned, and the Rajah states that it ought to have been calculated according to the principle laid down in Volume XVI., Weekly Reporter, p. 201. These are the objections taken by the Rajah.

The first Court, the Moonsiff of Tumlook, gave the plaintiffs a decree in modification of the claim. On appeal, the Judge has reversed that decision. The Judge first says that the plaintiffs have failed to prove their purchase; second, that they have not gone through the forms required by the putnee law, section 5, Regulation VIII. of 1819, and that, until these requirements of the law have been fulfilled, the defendant is not bound to recognize the transfer of the putnee to the plaintiffs. Then, with reference to the argument that the Rajah had recognized the plaintiffs' tenancy, the Judge is of opinion that the petition of the Rajah in the compensation-case does not amount to any admission of the kind contended for by the plaintiffs. He then sums up his judgment by saying that the plaintiffs, not having shown that they are the defendant's tenants, cannot sue for abatement of rent.

The grounds taken in special appeal are: 1st, that the Lower Appellate Court was wrong in law in dismissing the plaintiffs' suit on the ground that the plaintiffs, special appellants, had not established the factum of their purchase, which was not denied in the Court of first instance, and in respect of which no issue was raised; 2nd, that the Judge is wrong in law in holding that the fact of the special appellants' names not being registered in the zemindaree serishta operates as a bar to their maintaining the present suit; 3rd, that the Judge's decision in the matter of the recognition of the special appellants by the zemindar as their putneedar is defective, inasmuch as he has not referred and given effect to the proceedings under Act X. of 1870 held between the parties to the present suit.

On the first ground of special appeal, we are of opinion that the Judge was wrong in raising the question as to whether the plaintiffs have proved their purchase from Ram Churn Bundopadhya. There was no issue raised on that point in the first Court, and the written statement of the Rajah does not in any way question the purchase of the plaintiffs, but raises the question as to the status of the plaintiffs to bring this suit, inasmuch as their names have not been registered in his zemindaree serishta.

Then, on the second ground of special appeal, we think that the Judge's decision is wrong in law. In a decision to be found in Volume XV., Weekly Reporter, p. 125, Khettur Paul Singh and another (plaintiffs), appellants *vs.* Lukhee Narain Mitter and another (defendants), respondents, it was held by this Court that all putneedars and dur-putneedars have the right to alienate or otherwise transfer their property without the consent of the zemindar, and that, under sec-

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tion 5, Regulation VIII. of 1819, it would not be competent to the zemindar or other superior holder to refuse to register and otherwise to give effect to such alienations; and that the status of a putneedar or durputneedar does not depend upon registration or the consent of the zemindar. That decision then went on to point out the remedy the zemindar has in case the transferee fails to register. That decision was upheld by their Lordships of the Privy Council, and the law, as laid down in that case, was approved of by their Lordships in a decision to be found in Volume XX., Weekly Reporter, p. 381. Then, apart from the question as to the status of the putneedar not being dependent upon the question whether he has registered or not registered the transfer, we think that there has been in this case a sufficient recognition of the transfer and of the status of the plaintiffs by the Rajah, the zemindar. It is clear to us that, when proceedings were taken under Act X. of 1870, the parties who were interested in the proceeds of the compensation which the Government awarded on account of the lands taken for public purposes, namely, the Rajah and the putneedar, were called upon to come forward and state their claims. The Rajah had notice that the plaintiffs were claiming compensation as putneedars; for we find that in his petition to the authorities, whose duty it was to distribute that compensation between the parties entitled thereto, he states that he has no objection to the hustobood being calculated at the rates which shall be fixed with the putneedar or his representatives, namely, the plaintiffs, and the compensation being awarded in accordance therewith at twenty times the amount in the proportion of a 9-anna share to him, the zemindar, and of 7 annas to the putneedar or his representatives. On the notice which the Rajah had that the plaintiffs were claiming compensation for the lands taken by Government, and on the petition which we have just now alluded to on the part of the Rajah, we hold that it is clear that he has recognized the plaintiffs' status as putneedars. We, therefore, think with the first Court that the plaintiffs are entitled to maintain this suit for abatement.

We remand the case for the Judge to decide it upon the other questions which have been raised, and which the first Court has decided. Costs to follow the result.

The 10th July 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Suit to set aside a Certificate of Administration—Act VIII. of 1859, s. 6—Valuation—Jurisdiction.

Case No. 304 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 6th November 1873, modifying a decision of the Additional Subordinate Judge of that District, dated the 24th February 1873.

Russick Chunder Mohunt (Defendant), *Appellant,*

versus

Ram Lall Shaha (Plaintiff), *Respondent.*

Baboos Mohinee Mohun Roy and *Doorga Dass Dutt* for Appellant.

Baboos Sreenath Doss and *Gooroo Doss Banerjee* for Respondent.

A suit may be maintained for a declaration of title which may be used as a means for the withdrawal of a certificate under Act XXVII. of 1860.

Act VIII. of 1859, s. 6, occurring in a Code of Civil Procedure, regulates the practice of Courts, but does not take away jurisdiction from any Court which, like a Subordinate Judge's Court, has general jurisdiction. Accordingly, where an alleged irregularity had in no way prejudiced the appellant, the High Court thought it unnecessary to go into the question of valuation with a view to determine in what Court the suit ought to have been brought.

Ainslie, J.—THE grounds taken by the special appellant are four: *Firstly*, that a suit for cancelling a certificate under Act XXVII. of 1860 could not be maintained without raising all other questions relating to the property in dispute; *secondly*, that the plaintiff brought this suit in a wrong Court, and the Judge has failed to consider that question; *thirdly*, that the decision on the merits is defective, because it is not supported by any evidence to disprove the will, and it was the duty of the plaintiff to start his case by positive evidence before he could call upon the defendant to give any at all. The fourth is that the last issue laid down by the Subordinate Judge in the first Court was not drawn until the case was called on for hearing, when it was too late for the defendant to bring forward evidence on the point.

In respect to the form of the suit, we are of opinion that there is nothing in the law which

prevents a person from suing for a declaration of title which may be used as a means of procuring the withdrawal of a certificate, and so putting an end to the operation of an order under Act XXVII. of 1860, and that the defect in the form of his prayer to set aside a summary order is not fatal.

As to the valuation of the suit, we are of opinion that it does not involve any error, defect, or irregularity affecting the merits or the jurisdiction of the Court. If the suit had been under-valued and had been taken into a Court which had no authority to try it, the matter would have been otherwise; but, under the Civil Courts Act, the jurisdiction of the Subordinate Judge extends, subject to the provisions in the Code of Civil Procedure, section 6, to all original suits cognizable by the Civil Court. Therefore, the Subordinate Judge who tried this case had jurisdiction, unless it was expressly excluded by section 6, Act VIII. of 1859. Now, it is to be remembered that the section occurs in a Code of Procedure, and it seems to us that it is a provision intended to regulate the practice of the Courts, and that it is not intended to take away jurisdiction from any Court which has general jurisdiction. A somewhat similar point was recently decided by a Full Bench* with reference to a case instituted in the Collector's Court, when, according to law, it ought to have been instituted in a Sub-Divisional Court. And this Court held that, although it was an error of procedure, there was nothing in the provisions of section 20 of Act VI. (B.C.) of 1862 which absolutely took away the general jurisdiction of the Collector so as to make the decree void altogether. It appears that, even if the Subordinate Judge ought not to have entertained this suit, still the irregularity has in no way prejudiced the appellant, and consequently we think it unnecessary to go into the question how this suit should have been valued for the purposes of determining in what Court it ought, under section 6 of Act VIII., to have been brought.

The next question, we think, is one which we must also decide against the special appellant. If he had been content with resting his case on the order of the Court directing the grant of a certificate to him, no doubt it would have been for the plaintiff to make out very distinctly the grounds upon which he alleged that the orders should be set aside; but, when the defendant declined to rest his case in that way, and elected to enter into evidence, he cannot prevent the Court from considering the whole of the evidence on the record; and in dealing with the whole of the evidence as it was before him, the Judge came to the conclusion not only that the defendant had failed to make out satisfactorily the genuineness of the will, but that the facts which were disclosed in his evidence were really evidence against him and in favour of the plaintiff, tending to establish that the will was not genuine. It is, therefore, unnecessary for us to consider the fourth objection.

The special appeal will be dismissed with costs.

* 21 W. R. 450.

The 10th July 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Right of User.

Case No. 2091 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 20th May 1873, affirming a decision of the Moonsiff of Shahzadpore, dated the 30th January 1872.

Mokoondonath Bhadoory (Defendant), *Appellant,*

versus

Shib Chunder Bhadoory and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss and *Tarinee Kant Bhuttacharjee* for Appellant.

Baboo Nullit Chunder Sen for Respondents.

A plaintiff's right of user of a pathway to certain premises cannot be affected by the existence of another path by which he may obtain access to the same premises.

Kemp, J.—We think this special appeal must be dismissed with costs. A great deal has been said upon the question that the decision of the Court below ought not to be upheld, inasmuch as it has not been shown that the plaintiffs are not at all inconvenienced by the erection of the wall in dispute; but on that part of the case we think that the plaintiffs' right of user could not be in any way affected by the fact of the existence of another path, by which they might obtain

access to the joint courtyard and other premises. Both Courts have concurrently found, after a local inquiry, that the wall has been built upon joint land; that the plaintiffs have proved their right of user; and that such right was not affected by the short interruption to that right during the rainy season, when, for the purpose of preventing strangers from passing by that path, and thereby destroying the privacy of the female members of the family, the way was stopped for a short time with the consent of all parties.

The special appeal is dismissed with costs.

The 10th July 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Deed of Sale—Secondary Evidence—Oral Evidence—Admissions—Act I. of 1872, ss. 18 & 65.

Case No. 274 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 9th December 1873, affirming a decision of the Moonsiff of Jhenida, dated the 21st January 1873.

Hurish Chunder Mullick (Defendant), *Appellant,*

versus

Prosunno Coomar Banerjee and others (Plaintiffs), *Respondents.*

Baboo Bhoobun Mohun Doss for Appellant.

Baboo Joy Gobind Shome for Respondents.

Secondary evidence of the contents of a document is admissible where the Court is satisfied that the document has been lost, and in such a case it is open to the Court to receive oral evidence of the transaction involved, and it is not necessary to insist on the production of a certified copy.

A deed of sale is not a document of which a certified copy is permitted by law to be given in evidence, *i. e.*, to be given in evidence in the first instance without having been introduced by other evidence.

A statement made by defendant in another suit may be used as an admission within the meaning of s. 18 of the Evidence Act.

Ainslie, J.—The first question in this case is whether the original sale to Mr. Tweedie could be proved by the evidence of that gentleman. The transaction was reduced to writing, and the document appears to have been registered, but the case is taken out of the operation of section 91 of the Evidence Act by evidence which appears to have been believed by the Court below that the document had been lost. The document having been lost, secondary evidence was admissible under clause (*c*), section 65 of the Evidence Act, and in the explanatory clauses which are added to that section, it is said in clauses (*a*), (*c*), and (*d*) that any secondary evidence of the contents of the document is admissible. Therefore it was open to the Court to receive as evidence of the transaction oral evidence which was believed to be true, and it was not necessary for it to insist upon the production of a certified copy. It is contended that the case comes under clause (*e*) or clause (*f*), but it is perfectly clear that the conveyance to Mr, Tweedie could not be a public document within the meaning of section 74, and it also seems clear to us that it is not a document of which a certified copy is permitted by the Evidence Act, or "by any other law in force in British India, "to be given in evidence." By the words, "to be given in evidence," we understand to be given in evidence in the first instance without having been introduced by other evidence. Section 57 of the Registration Act, which was referred to, only shows that, when secondary evidence has in any way been introduced, as in this case, by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purposes of proving the contents of the original; that is, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy, and shall be taken as a true copy; but that does not make this copy a document which may be given in evidence without other evidence to introduce it. Section 86 contains an instance of documents to which this clause seems to refer.

The other question raised was whether the Judge had not erred in using as an admission a statement made by defendant in another suit some time ago. Such a statement seems clearly to be an admission within the meaning of section 18 of the Evidence Act, but it is unnecessary for us to go

into the matter in detail, for it has been already disposed of in a judgment* delivered by the learned Chief Justice to which I was a party, and in which my learned brother

*The 11th June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Cases Nos. 1156 to 1178 of 1873.

Appeals under section 15 of the Letters Patent from the decision passed by the Hon'ble F. B. Kemp, one of the Judges of the High Court, dated the 5th March 1874, in Special Appeals Nos. 1156 to 1178 of 1873, from a decision passed by the Judge of Sarun, dated the 18th February 1873, modifying a decision of the Moonsiff of that District, dated the 31st July 1872.

Lalla Jugdeo Sahoy and others (Plaintiffs), *Appellants, versus*

Digambur Roy and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusuf* for Appellants.

Baboo Mohendro Lall Mitter for Respondents.

Couch, C.J.—In these cases the plaintiff sued a number of persons to recover the arrears of rent due to him for the year 1279 Fuslee, and also a balance of the rent for the year 1278. The question between the parties was what amount of rent the plaintiff was entitled to have from the different tenants.

Besides the oral evidence which the plaintiff produced, there were certain jummabundee papers which he relied upon, as showing that the rent had been raised in 1263, and again in 1273, and finally in 1276 Fuslee, with the consent of the ryots on every occasion.

He produced, as we have said, some oral evidence, and also the depositions of some of the defendants in the different suits, we believe of six.

The Moonsiff made a decree in favour of the plaintiff, and there was an appeal to the Judge, who in his judgment said: "In regard to the jummabundee of 1273 "and 1276 Fuslee, no evidence has been adduced to "prove that the *assamees* consented to such enhanced "jummas, or that they have ever paid rent under them. "There is nothing but the jummabundee papers to prove "their correctness; and it appears to me that at all "events the jummabundee of 1276 Fuslee has been "drawn up with a view to the butwara which took "place in the Collectorate, and I have little doubt the "enhanced jummabundee of 1273 was drawn up for a "similar purpose." He therefore rejected the jummabundee of 1273 and 1276 as unproved. Then he proceeded to say: "Defendant's allegation, however, that "the jummabundee has not been raised since the time "of the settlement is clearly false. The defendant's "deposition taken by the Principal Sudder Ameen in "1262 clearly proves that the jummabundee has been "changed. In the several suits now pending, a number "of the defendants deposed at the same time before the "Principal Sudder Ameen admitting that their jummas "had been raised above what it was at the time of "settlement;" and he modified the Moonsiff's decision, and gave a decree for the plaintiff according to the jummabundee of 1263.

It is to be observed that in the passage which we have just read, he does not distinguish between the defendants who had made a deposition before the Principal Sudder Ameen and those who had not, and he appears to have mixed all the cases together.

From this decision there was a special appeal to this Court, the objection taken by the plaintiff being that the Judge was wrong in not noticing the oral evidence which was given in support of the plaintiff's claim, and to show that the tenants had consented to pay an increased rent, and had actually paid it. There was also a cross-appeal by the defendants.

The appeals were heard before Mr. Justice Kemp, who says in his judgment: "The plaintiffs appeal on two "points: *1st,* that the Judge was wrong in saying that "there was no evidence adduced by the plaintiffs to "prove that the ryots consented to an enhanced jumma "as shown in the jummabundee of 1276; and, *2ndly,* "that the Judge was wrong in assuming the jummabundee of 1263 as the one according to which the "defendants were liable to pay rent. I may mention "that there is a cross-appeal by the defendant who "also objects to the Judge assuming the jummabundee "of 1263 as the correct one." * * * "With reference "to the appeal of the plaintiff, I was at first disposed to "think that the Judge had fallen into an error in saying "that the plaintiff had adduced no proof of the jummabundee of 1276, but, after hearing the evidence of the "putwaree who was examined for the purpose of proving that jummabundee, I can now quite understand "how it is that the Judge says he rejects that jummabundee as unproved, and it is obviously unnecessary "to remand the case simply because the Judge has, in "one portion of his judgment, made use of the expression that the plaintiff has adduced no evidence to "prove the jummabundee, when the evidence being "before the Court, the Court can satisfy itself whether "the Judge came to the conclusion that that jummabundee was not proved after consideration of the "evidence: and it appears to me from the putwaree's "evidence that the Judge has considered it, and that he "has come to that conclusion upon that evidence."

It would seem that the attention of the learned Judge was not drawn to the evidence of the other witness, Bussunt Roy, which is important. Probably, if his attention had been drawn to it, he would have taken a different view of the case.

It cannot, we think, be said that it would appear from the putwaree's evidence that the Judge had considered it. The language of the District Judge, certainly, imports that he had not considered the oral evidence at all. Mr. Justice Kemp seems not to have observed that. Supposing that the evidence of the putwaree to be of such a description that it ought not to have, and would not have, made any difference in the decision of the District Judge, still that does not enable us to say that he had considered it. If he had done so, and thought it not trustworthy, he should have said so.

But the more important matter appears to be that there is nothing to show that the evidence of the other witness was in any way considered by the District Judge. The plaintiff has a right to have that which is material evidence considered by the Judge, and to have his opinion upon it.

The learned Judge also says: "The Judge, I think, "was also quite wrong in saying that there was any "evidence corroborating the jummabundee and jummawassil-bakee of 1263; the evidence alluded to is not "the evidence of the defendants in these suits, and the "jummabundee of 1263 was used in the wassilat suit "between the plaintiffs and their co-sharers for the "purpose of assessing the wassilat, and nothing further."

If upon the re-trial the Judge should come to the conclusion that the jummabundee of 1276 is true, or that the tenants agreed to pay the rent specified in it, or afterwards paid it, which would be evidence of their having agreed to do so, it will not be necessary to try the case with reference to the jummabundee of 1263. But it may become necessary to do so, and the plaintiff will be entitled to rely upon that against the defendants who made depositions before the Principal Sudder Ameen containing admissions of an agreement on their part to pay the increased rent. It is not necessary that they should have been parties to that suit, or that the plaintiff should have been a party with them. The depositions are used against them as admissions, and are certainly admissible.

It will be for the Judge, if it should become necessary to go into that part of the case, to distinguish carefully between the cases of the defendants who made the depositions and of those who did not, against whom

Mr. Justice McDonell concurs. The special appeal is dismissed with costs.

The 13th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Land Acquisition Act (X. of 1870)—Difference of Opinion—Right of Appeal.

Appeal from a decision of Mr. F. L. Beaufort, Judge appointed under Act X. of 1870 for the Town of Calcutta.

Anund Kristo Bose and others, *Appellants,*

versus

W. H. Verner, Collector under Act X. of 1870, *Respondent.*

Mr. Montriou and *Mr. Evans* for Appellants.

The Advocate-General for Respondent.

Where a Judge appointed under Act X. of 1870 and one of the Assessors differ as to the amount of compensation to be awarded, but the difference is so slight that the Judge waives his doubts, and does not express a dissentient opinion, there is not such a difference of opinion as entitles the party claiming compensation to an appeal.

THE property in this case was a strip of land comprising 3 beegahs 9 cottahs 5 chittacks and 28 square feet, lying between Kassi Mitter's Burning Ghât and Kumartooley Ghât, and belonged to the estate of Rajah Sir Radhakant Deb Bahadoor, deceased. It was required by the Government for the construction of a road in continuation of the strand bank road and of a wharf on the east bank of the river Hooghly between Aheeree-tollah Ghât and the Chitpore Canal.

There were no damages under sections 5 and 17 of the Act, and the Collector offered the parties interested the sum of Rs. 22,662-9-4, which was equal to sixteen years' purchase, taking the rental to be that which was stated by the claimants, *viz.*, Rs. 1,597-14-9. The rates payable on the land were calculated by the Collector to amount to 9 per cent. of the rental, but he deducted 8⅓ per cent. on this account, which reduced the yearly value to Rs. 1,416-6-7, which at sixteen years' purchase is Rs. 22,662-9-4. The claimant asked for Rs. 10,000 as damages to the rest of the property. This the Collector refused, as the rest of the land was ordinary tenanted land, and couldsnot be damaged by the severance. The Collector, however, disputed the rental given by the claimants, and stated that a careful inquiry and record of the rents made in December 1873 showed a total of Rs. 827-13, as against Rs. 1,597-14-9 as stated by the claimants.

The claimants asked for compensation for the land at Rs. 1,600 a cottah, amounting to Rs. 1,10,962-3-6, and Rs. 4,000 compensation for a pucca ghât on the land called Rajah's Khas Ghât, and Rs. 10,000, already mentioned, for injury on account of the severance of other property from the river-frontage. The total amount of compensation demanded was, therefore, Rs. 1,24,962-3-6.

Baboo Rajendro Dutt, the Assessor for the claimants, valued the land at Rs. 1,200 a cottah on account of its large river-frontage, and was of opinion that the Rs. 10,000 claimed as damages should be allowed on account of the loss for the riparian advantages of the land in question, and likewise for the loss which Shobha Bazar and other properties belonging to the estate would suffer by the taking away of this property from the Rajah's estate. He also thought that the sum of Rs. 4,000 claimed as compensation on account of the Rajah's Khas Ghât should be sanctioned, because a similar ghât could not be built for anything under that amount.

Mr. Rowe, the Assessor on behalf of the Government, considered that the land was difficult of access from the nearest large public thoroughfare, and that its value was on that account less than it would otherwise have been. He awarded Rs. 26,682-8 as the

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there would not be the same amount of proof. This is a matter which the lower Court will attend to, in case it should become necessary to give a decision upon that part of the case, and to make a decree upon the evidence in the depositions.

The decree of Mr. Justice Kemp, by which he dismissed the special appeal, and also ordered, on the cross-appeal of the defendants, that the suit of the plaintiff should be altogether dismissed, must be reversed, and we must order that the different suits be remanded to the District Court for re-trial. We think that the costs of the appeal in each case should abide the result.

market-value of the land, which he arrived at as follows:—

	Rs.	As.	P.
Annual rent of land as stated by claimant	1,682	0	0
Deduct Police and Lighting rates, included in above, as admitted by claimant, as the same are recoverable from the occupiers...	163	0	0
Total, Rs. ...	1,519	0	0
This amount, *viz.*, Rs. 1,519, at sixteen years' rental, would be	24,304	0	0
Deduct 8 per cent. on the yearly valuation	121	8	0
Total, Rs. ...	24,182	8	0
Add value of the ghât adjoining the sick-house ...	1,500	0	0
Add for severing a portion of the land	1,000	0	0
Grand Total, Rs. ...	26,682	8	0

The Judge, Mr. Beaufort, considered that the valuation of Baboo Rajendro Dutt was very much in excess of the real value of the property, and that his award for the ghât and for the severance was not based on any evidence. He was also of opinion that Mr. Rowe's account was based on an erroneous statement of the annual rental, but that it was otherwise referrible to an equitable principle. The Judge concluded his judgment in the following words:—

"The evidence afforded by the sales of other properties does not, I think, furnish a good test of the property in question. It is very difficult to ascertain the various motives and interests with reference to which the price has been fixed, and the value of property in the consideration of different people will depend, not merely on the general advantages or disadvantages of the position, but also on the circumstances of the vendor or purchaser, or both. I adhere to the view which I have formed in other cases that the best test of the value of land is the amount of the annual produce of it, because it may be assumed that the owner will realize from it as much as it is capable of yielding; and if he has neglected his own interests, still that amount will show what the property is worth to him. I adhere also to the opinion that sixteen years' purchase is a fair allowance. My valuation on this calculation is somewhat more than the valuation of Mr. Rowe, because he has, I think, deducted too much on account of the rates and taxes. In the absence of any evidence of the value of Rajah's Khas Ghât, I willingly accept Mr. Rowe's valuation of it, *viz.*, Rs. 1,500. But I doubt much whether the owners have any well-founded claim to the Rs. 1,000 which Mr. Rowe would award on account of the severance, as the adjoining property would not be injured by the severance apparently, and as that property is also about to be acquired. Something may be allowed on that account, however, and taking the whole account I find that the net total of my valuation differs so slightly from the net total of Mr. Rowe's valuation that I shall not express a dissentient opinion. I concur with Mr. Rowe in awarding Rs. 26,682-8 as the value of the land. To this sum will be added Rs. 4,002-6 as the statutory allowance at 15 per cent. On the whole amount, Rs. 30,684-14, interest at 6 per cent., will be paid from the date on which the Collector took possession.

"Each of the Assessors will be paid a fee of Rs. 250.

"The costs of these proceedings will be paid by the Collector."

The claimants appealed from Mr. Beaufort's judgment on several grounds, none of which were gone into, the question being raised as to whether there was an appeal in such a case as the present.

The Chief Justice delivered the judgment of the Court as follows:—

Section 24 of Act X. of 1870 says that in determining the amount of compensation to be awarded, the Judge and Assessors must take into consideration, *first*, the market-value of the land at the time of awarding compensation; *secondly*, the damage (if any) sustained by reason of severing the land from other land of the owner; *thirdly*, the damage (if any) sustained by the owner by reason of the acquisition injuriously affecting his other property; and, *fourthly*, if, in consequence of the acquisition, he is compelled to change his residence, the reasonable expenses incidental to such change. Section 29 says that in case the Judge and one or both of the Assessors agree as to the amount of compensation, their decision shall be final. Looking at section 24, the amount of compensation must be treated to mean, not the different matters that are to be taken into consideration separately, but the whole compensation. In section 35 the expression again occurs: "If the Judge differs from both the Assessors as to the amount of compensation, he shall pronounce his decision," &c.

Mr. Beaufort has stated that on some points he differs from Mr. Rowe in the

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manner in which he arrives at the amount of the compensation. He expresses a doubt whether there should be an allowance for the severance, but then he says that something should be allowed on that account. His doubt seems to be as to the amount to be allowed. He then says: "Taking the whole account I find that the net total of my valuation differs so slightly from the net total of Mr. Rowe's valuation that I shall not express a dissentient opinion. I concur with Mr. Rowe in awarding Rs. 26,682-8 as the value of the land."

When Mr. Beaufort says that he will not express a dissentient opinion from Mr. Rowe, and that he concurs with him in awarding the sum named as the value of the land, I cannot read it as a difference of opinion between them as to the amount of compensation. I think the fair construction of what Mr. Beaufort says is, "I do not, in some of these matters, entertain the same opinion as Mr. Rowe; I doubt whether his opinion on some of them is right, but the difference between us is so slight that I think I ought to waive my doubts, and ought not to dissent from him." There is not, therefore, such a difference of opinion between the Judge and the Assessors as entitles the party to an appeal. It is not a question of depriving him of an appeal. There need not be words which will take away an appeal which he would otherwise have had. Unless he brings himself within the words of the section, he is not entitled to any appeal. We must see whether the words are such as to give him an appeal in a case like the present. Section 34 indeed says that the award is to be written and signed by the Judge and the Assessors, or Assessor concurring therein, and is to specify the amount awarded under the first clause of section 24, and also the amounts (if any) respectively awarded under the second, third, and fourth clauses of that section. If this is imperative, the award must state how much is given for severance.

There might be a difficulty in having the award signed by the Judge and the Assessor, although they both agreed as to the total amount of compensation, if they entirely disagreed as to the amount to be given for severance. But I do not understand Mr. Beaufort as saying that he is not prepared to concur with Mr. Rowe in the amount to be allowed for severance when it comes to be inserted in the award. I understand him to meaning that he will agree to such an award; and I do not see that there would be any difficulty in having the award drawn up according to the directions contained in section 34. I think in this case there is no appeal to this Court. The appeal must be dismissed.

The 13th July 1874:

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Hindoo Widow—Arrangement with Reversioners—Maintenance.

Case No. 2153 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 9th July 1873, reversing a decision of the Moonsiff of Sewan, dated the 9th May 1872.

Lalla Kundee Lall and others (Defendants), *Appellants,*

versus

Lalla Kalee Pershad and others (Plaintiffs), *Respondents.*

Baboo Chunder Madhub Ghose for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where persons, who are presumptively the next in succession to a widow, come to an arrangement by which she surrenders possession to them, and receives a maintenance from them, such arrangement must be held to be binding as a family-arrangement, and would not be altered by one or other of the reversioners dying during the lifetime of the widow.

Couch, C.J.—THE material question in this case appears to us to be that which is raised in the second issue framed by the Moonsiff, whether the father of the plaintiffs or the plaintiffs accepted the ikrarnama, and accordingly held possession of the disputed property along with the defendants for a period of upwards of ten years or not; because, if it were so, the facts are that, in the lifetime of the widow, and after she had become entitled to succeed to the property, the persons who were presumptively the next in succession, and who, if she had then died, would have been entitled to divide it amongst them, came to an arrangement by which the widow, instead of continuing in possession, was to receive from them the 24 rupees for her maintenance, and they were to take possession of the same shares as they would have had if she had then died.

That appears to us to be an arrangement which the family might come to, and which would not be altered by one or other of them dying in the lifetime of the widow; and so the rights, when she died, being different from what they were when they made the arrangement, each party to it took the chance of what might happen afterwards. The agreement must be held to be binding as a family-arrangement. It would be binding upon the father of the plaintiffs, and therefore is upon them who stand in his place. If, in the form in which the case comes before us, we could give a finding upon that question, the suit might be disposed of now. But we have not authority to do so. And we cannot say that there has been any finding upon the question by the lower Courts. They have decided the case upon the law of limitation. Although the Judge may have used expressions which indicate what his opinion probably would have been, we cannot take them as a finding. We must send the case down to have a finding upon this issue, and, when it is returned to us, we will dispose of the appeal.

The 13th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Bond-suit—Joinder of Causes—Money-decree—Act VIII. of 1859, s. 7.

Case No. 2882 of 1873.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 16th September 1873, affirming a decision of the Subordinate Judge of that District, dated the 21st December 1872.

Grish Chunder Mookerjee (Plaintiff), *Appellant,*

versus

Ramessuree Dabee and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondents.

Where a holder of a bond in which properties are hypothecated as security for money lent brings a suit for the whole claim, and obtains a decree, but a part of that decree is infructuous for want of jurisdiction, he is not precluded, by Act VIII. of 1859, s. 7, from maintaining a second suit to enforce such part of his claim (as was infructuously decreed in the first suit) against a third party who derives his title through the borrower subsequent to the date of the bond.

Mitter, J.—The plaintiff in this case obtained two decrees for money from the Moonsiff's Court of Ousgram in Burdwan. These decrees also declared his lien over certain properties hypothecated to him by three bonds executed by defendants 3, 4, 5, and 6. One of these decrees was based upon a bond dated 3rd Cheyt 1273 for Rs. 500, and the other upon two other bonds dated 26th Kartick 1274, each for an amount less than Rs. 100. On the plaintiff's proceeding to execute these decrees by the sale of one of the hypothecated properties, defendants Nos. 1 and 2 preferred objections under section 246, which were allowed. Hence this suit has been brought to enforce his lien against this property in the hands of defendants Nos. 1 and 2. Defendants Nos. 1 and 2 derive their title by auction-purchase of the rights and interests of the defendants Nos. 3, 4, 5, and 6, on the 5th Assin 1276, in execution of a simple decree for money.

Both the Courts below have dismissed the claim. So far as it was founded upon the bond for Rs. 500, it has been disallowed upon the ground that the instrument not being registered could not create a valid mortgage; and, so far as it was based upon the other two bonds, upon the ground that the Moonsiff of Ousgram had no jurisdiction over properties situated in the district of Beerbhoom. The plaintiff has preferred this special appeal, and has taken exception to the judgment of the Courts below so far as it relates to the two bonds of 26th Kartick 1274. It is contended that if the Moonsiff of Ousgram had no jurisdiction, still the present suit should not have been dismissed, because it has been brought in a Court which has jurisdiction over the property in dispute. It has been further urged that even if the decree of the Moonsiff of Ousgram be considered simply as a decree for money, still the plaintiff is entitled, by a separate action, to enforce his lien, and obtain an order for the realization of his money by the sale of the hypothecated properties. In support of this contention a Full Bench decision of this Court, reported in page 316, I. Weekly Reporter, and the ruling of a Divisional Bench of this Court, reported in page 27, XV. Weekly Reporter, have been quoted. The last-mentioned case is certainly an authority for the proposition that, where a holder of a bond in which certain properties are hypothe

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cated as security for money lent, obtains a decree for money only, he has a right to bring a separate action to enforce his lien over the property hypothecated against a third party who derives his title through the borrower subsequent to the date of the bond. The decision is founded upon an expression of opinion to be found in the Full Bench decision cited above.

The ground upon which the decisions of the lower Court rest regarding these two bonds has not been supported—but the contention of the pleaders for the respondent has been that the decision in page 27, XV., Weekly Reporter, is not correct. It has been pressed upon us that the ruling is directly contrary to the provisions of section 7 of the Civil Procedure Code, because where a holder of a bond in which properties are hypothecated as security for money lent brings simply a suit for money, he must be deemed to relinquish a part of his claim arising out of the cause of action which has accrued to him. His whole claim arising out of that cause of action consists of a claim for money, and also a claim for the declaration of his hypothecation rights. If he omits or relinquishes the latter, he is precluded from setting up that claim again in a fresh suit by the express provisions of section 7 of Act VIII. of 1859.

For the purpose of deciding this appeal, it is not necessary to enter into a discussion of the question of law raised by the pleader for the respondent. In this case there was neither omission nor relinquishment of any portion of his claim on the part of the plaintiff. He did bring a suit for the whole claim and obtained a decree, but a part of that decree was infructuous for want of jurisdiction. Therefore the provision of section 7 cannot be set up as a bar to the present suit. If this portion of the claim had been omitted from the first suit, it is not quite clear even then that the provision of section 7 would have precluded the maintenance of a second suit. In a decision reported in page 376, III. Madras High Court Reports, it has been held that section 7 only refers to a claim, the whole of which can be brought in one Court under section 5 of the Act, but has no application where it has been left optional with a party to bring one suit under the provisions of sections 11 and 12, or bring a number of suits in different Courts having jurisdiction over particular portions of the claim. But it is not necessary now to decide this point, because in this case there has been neither omission nor relinquishment of any portion of the claim on the part of the plaintiff. Therefore the argument of the pleader for the respondent setting up the provisions of section 7 of Act VIII. of 1859 as a bar to this suit wholly fails, and the plaintiff has a right to enforce his lien against the defendants Nos. 1 and 2 whose purchase is subsequent to the date of these bonds. The result is that the decrees of both the Courts below, so far as they dismiss that portion of the claim which is founded upon the two bonds dated 26th Kartick 1274, must be reversed, and the case remanded to try whether these bonds are genuine and *bonâ-fide* instruments or not. The costs to abide the result.

Markby, J.—I concur.

The 13th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Acknowledgment of Consideration-money—Registration—Act VIII. of 1871, s. 17, cl. 3.

Case No. 254 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 17th July 1873.

Sreenath Churn Soor and another (Defendants), *Appellants,*

versus

Nilkanto Dey (Plaintiff), *Respondent.*

Baboo Sreenath Doss for Appellants.

Baboos Unnoda Pershad Banerjee and *Doorga Mohun Doss* for Respondent.

A document which acknowledges the receipt of consideration-money for the conveyance of immoveable property cannot be received as evidence unless it is registered.

Markby, J.—THE document upon which the plaintiff in this case brings his suit is a receipt for a portion of the consideration-money for the sale of certain property, together with an agreement to execute a formal deed of sale; and also an agreement that, in a certain event, this document itself may be treated by the purchaser as a deed of sale.

It is not necessary to consider whether, under Act VIII. of 1871, section 17, clause 2, this document would have to be registered as an instrument which operates to convey in present or in future an interest in immove-

able property. The case in the Privy Council, reported in 16 Weekly Reporter, page 26, is an authority that it must be registered under clause 3, as being an instrument which acknowledges the receipt of consideration for the conveyance of immoveable property. Upon the authority of that case, therefore, we are bound to hold that this document, not being registered, cannot be received in evidence; and we are, therefore, compelled by the law to reverse the decision of the Court below, and to dismiss this suit with costs in both Courts.

The 14th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Joint-Mortgagors—Error of Account—Special Appeal.

Case No. 2047 of 1873.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 18th June 1873, affirming a decision of the Subordinate Judge of that District, dated the 30th November 1871.

Ram Kanth Roy Chowdhry (Plaintiff), *Appellant*,

versus

Kalee Mohun Mookerjee (Defendant), *Respondent*.

Baboos Aukhil Chunder Sen and *Sreenath Doss* for Appellant.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondent.

Where a mortgagee comes to an arrangement with three out of five joint mortgagors by which he consents to take as payment a money-decree against three of them, the amount of the decree must be considered as a sum paid in reduction of the liability of the five.

A mistake of account not being an error in law or procedure is not a ground for special appeal. The remedy lies in an application for review.

Couch, C. J.—THE Judge in taking the account between the parties was right in seeing how the debt stood on the 29th of Bhadro 1274, and in allowing, as he did, Rs. 7,968 as having been due for interest, and as having been paid. The only question of principle which appears to be involved in the manner in which he has taken the account is whether he is right in what he has done as to the Rs. 14,000. We think he is. There being five joint-debtors and mortgagors, the creditor and mortgagee came to an arrangement with three of them by which he consented to take a decree against those three for Rs. 14,000. In taking an account of what the five were jointly liable for, this decree must be considered as if the money was paid at that time. The plaintiff chose, instead of taking the money, to take a decree for it. He might, no doubt, do so, but still it must be considered, in the account with the others, as a sum paid in reduction of the liability of the five. And so far there is no error in the principle upon which the account has been taken by the Judge.

He has also proceeded upon a right principle in charging the defendants, the debtors, with the interest upon the balance which remained after giving credit for the Rs. 14,000, and in charging the plaintiff with such money as he thought ought to be charged to him; for instance, the Rs. 1,031 received from the ijara, and the surplus-proceeds decreed by the Court on the 6th of September 1871. He would be right in this if upon the facts he found that those moneys were received by the plaintiff in such a manner that they ought to be set off against the balance of the principal and interest after giving credit for the Rs. 14,000.

If he has made a mistake in thinking that the surplus proceeds ought to be applied in this manner, when they ought to have been applied to the reduction of the Rs. 14,000, it is not an error in law. It is a mistake as to what the facts were respecting this money. He may have thought that they did not become applicable to the reduction of any debt until the decree of the High Court in September 1871 was made when the plaintiff established his right to have the surplus proceeds. The Court does not appear to have given any direction how they should be applied.

Then, as to the allowance of the interest on the Rs. 4,000, if he has made a mistake in that (which he may have done we do not say that he has not), it is not a mistake in principle. It is not any error in law or procedure. It is simply the mistake of a man who has taken an account between a debtor and creditor of what is due, and has introduced an item into it which he ought not to have introduced. If he has done that the parties ought to have applied to the Judge to review his decision, and have pointed out his mistake to him. It is not a ground for coming to this Court in spe

appeal, and asking it to reverse his decision, and remand the case to him to take a new account. Therefore it appears to us that no ground of special appeal has been shown in this case. All that we could do, or could have been properly asked to do, is to remand the case to have the account taken again. The Court does not do that upon a special appeal when there has been no error in law which may have produced error or defect in the decision. We think the appeal must be dismissed with costs.

The 15th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Auction-purchaser under Act VIII. (B. C.) of 1865—Howladar.

Case No. 400 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 22nd December 1873, reversing a decision of the Officiating Additional Moonsiff of that District, dated the 30th December 1871.

Mohiooddeen Mahomed and another (Plaintiffs), *Appellants,*

versus

Ram Kishore Koondoo and others (Defendants), *Respondents.*

Mr. C. Jackson, Baboo Doorga Mohun Doss, and *Moulvie Murhumut Hossein* for Appellants.

Baboos Bhowanee Churn Dutt and *Bhyrub Chunder Doss* for Respondents.

An auction-purchaser, at a sale held under Act VIII. (B. C.) of 1865, has a right to get rid of an intermediate holding such as a howla, so far as to substitute himself for the howladar, in respect of the collection of the ryots' rents.

Jackson, J.—The objection taken to the decision of the Lower Appellate Court in this case, which appears to be well-founded, is that the finding of fact which the District Judge has arrived at in the concluding part of his judgment of the 22nd December 1873, does not involve a dismissal of the plaintiff's suit. The talook, a superior holding which the plaintiff possesses, is of an ancient date. It was originally part of a larger talook which, about the year 1180, appears to have been divided into three parts, each of which was constituted into a distinct talook, one of them being a moiety of the original, and the other two being 4 annas each, and that which the plaintiff holds being 8 annas, or half of the old talook. It seems that the talooks so constituted have not separate lands assigned to them, but that the talookdars, though having separate interests, collected rents from the ryots of the old talook in the proportion of 8 annas and 4 annas respectively. Now, the defendant holds an intermediate tenure called a howla which extends over the particular lands which have been identified upon an inquiry of the Civil Court Ameen, and the suit of the plaintiff, who is an auction-purchaser at a sale held under Act VIII.(B. C.) of 1865, is to get rid of the defendant's howla, and to have himself placed in khas possession so far as that howla is concerned. There have been, as observed by the learned Counsel for the appellant, a great many trials in this case, but the conclusion at which the Judge has finally arrived is stated in the following words: "It appears that the howla which the plaintiff seeks to set "aside does not belong exclusively to the "talook purchased by plaintiff, respondent, "but that, in fact, when the original talook "was divided, as regards the jummas, into "three distinct talooks, there was no partition "of the lands or sub-tenures. This being "so, the plaintiff, respondent, cannot set aside "the howla. The appeal must, therefore, "be decreed with costs, the original suit "being dismissed." Now, in point of fact, a howladar is not, any more than a talookdar himself, the actual occupier of land. He is only a person receiving in respect of the land a proportionate share of the rent; and, although there is something anomalous at first sight in the position taken by the plaintiff, there seems to be nothing which should prevent the talookdar from getting rid of an intermediate holding, so far as to substitute himself for the howladar in respect of the collection of the ryots' rents with regard to the 8 annas. On that question we think the plaintiff was entitled to the relief sought, and ought to have a decree to that extent. We think, therefore, that the Judge's decision must be set aside, and the plaintiff's suit decreed in the manner above stated. As this decision gives the plaintiff in effect that which he sought to obtain, we think he is entitled to the costs of the proceedings in all the Courts.

The 15th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Suit to set aside a Certificate under Act XXVII. of 1860—Proper Remedy against such Certificate—Declaratory Decree.

Case No. 431 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 4th December 1873, reversing a decision of the Second Subordinate Judge of that District, dated the 27th February 1873.

Rughoobur Dyal Singh, (Plaintiff), *Appellant,*

versus

Ram Narain Kolya (Defendant), *Respondent.*

Baboos Hem Chunder Banerjee and *Saroda Churn Mitter* for Appellant.

Mr. M. L. Sandel for Respondent.

The decision of a Court granting a certificate under Act XXVII. of 1860 is conclusive as to the right to the certificate, and the remedy of any person affected by the certificate lies in a regular suit to recover any sum received by virtue of that certificate. A suit will not lie merely to set aside the certificate.

Where a certificate had been granted to the personal representative of a deceased shebait of debuttur property, who set up no claim to the property, and the manager of the debuttur property on behalf of the surviving shebait brought a suit against the certificate-holder for a declaration under Act VIII. of 1859, s. 15, the District Judge was held to have done right in refusing the declaration.

Jackson, J.—The plaintiff alleged that there was a certain debuttur property formerly belonging to, or administered by, his maternal grand-uncle, Shib Narain; that, after the death of Shib Narain, this property was managed jointly by Monee Dabee, who was one of the wives of Shib Narain, and by Jeebun Coomaree, who was his daughter by another wife. This Shib Narain died in the year 1243. On the death of Monee Dabee, the defendant, claiming to be her heir, obtained from the District Court, in pursuance of a decision of the High Court, a certificate entitling him to collect the debts due to the estate of the deceased Monee Dabee. This suit was brought by the plaintiff, alleging himself to be in possession of the debuttur property by virtue of appointment from Jeebun Coomaree, who, he describes, as a person of very advanced age, and unable to manage the property, she being the only surviving shebait after the death of Monee Dabee. Jeebun Coomaree herself, it seems, died shortly after the commencement of the suit, and this suit was brought in terms to obtain a revocation from the Civil Court of the certificate previously granted to the defendant as the heir of Monee Dabee. The Court of first instance dealt with it as a suit of that description, and no objection to that course appears to have been taken, and, after trying a number of issues which raised the question of the plaintiff's right to succeed to this property and of the defendant's birth and origin, the Subordinate Judge finally came to the conclusion that the plaintiff was entitled to what he asked for, and ordered that "the plaintiff's claim be decreed, and the summary decision, under Act XXVII. of 1860, be set aside, the costs of the plaintiff be paid by the defendant," &c.

This judgment was appealed to the District Court. It came on for hearing before Mr. Field, then acting as the Judge of Hooghly. On the case coming on, Mr. Field recorded the following note: "I let the case stand over till to-morrow to enable the respondent's vakeel to argue the point as to whether this suit will lie." Thereupon the case appears to have been argued, and Mr. Field recorded his judgment. In the commencement of the judgment, we hear for the first time of the suit being regarded by the plaintiff's vakeel before the Judge as a suit for declaration. The Judge, therefore, first notices the suit in that aspect. He says: "I have read the plaint carefully, and I think this contention will not hold. The commencement of the plaint and the prayer at the end ask for and mention one thing only, namely, that have the certificate set aside, and the fact that the plaintiff urges the illegitimacy of the defendant as a ground for having his prayer granted, will not be equivalent to a prayer to have such illegitimacy declared

Then he goes on to say: "But, admitting "that such a prayer were inserted in the "plaint, I do not think it would alter the "matter, for a declaratory decree on such a "point, not carrying any consequential relief, "ought not to be granted by a Civil Court "in the exercise of the discretionary juris-"diction conferred by section 15 of Act VIII. "of 1859." In those words he disposes of the suit for declaration, and then goes on to discuss the plaintiff's competency to bring, and the power of the Court below to entertain, the suit as a suit for reversal of the certificate. Into that question he goes at some length, and he concludes, chiefly upon the authority of a case in 5 Madras Reports, p. 283, that no such suit could be entertained. He therefore reversed the judgment of the Court below, and dismissed the plaintiff's suit *in toto*.

The plaintiff comes before us in special appeal, and he does not contend that the plaintiff could have a decree to set aside the certificate, but his contention is that the ground taken by the defendant in obtaining that certificate, and the case which he set up, and the opinion of the Court upon that case were such as threw a cloud upon his enjoyment of the property in his possession, and so have given him a cause of action. I should not be much disposed to hold that, if, from the facts alleged by the plaintiff and the issues framed in the Court of first instance, it could be concluded that the plaintiff did seek for a declaration, the Court would be precluded from giving it to him by reason of the precise form or prayer of the plaint. I am myself not inclined to believe that a declaration under section 15 of the Code was at all in the mind of the plaintiff when he brought the suit. I agree with the District Judge that, in the circumstances of the case, the Court below ought not, in the exercise of its proper discretion, to have given such a declaration, and I think that the Appellate Court, upon the plaintiff asking for it before the Judge, was right in refusing that declaration. The fact is that the defendant had obtained the certificate as the personal representative of the deceased Monee Dabee. He set up no claim to the debuttur property which was admittedly in the hands of the plaintiff, nor does the plaintiff claim as the personal representative of Monee Dabee. In regard to the certificate, Act XXVII. of 1860, it is to be observed that the decision of the Court granting the certificate is conclusive as to the right to the certificate, and that the remedy of any person affected by the certificate lies in a regular suit to recover any sum received by virtue of that certificate. That is the view taken by the Madras Court, and that declares that a suit merely to set aside the certificate will not lie. Now, if a suit to set aside the certificate will not lie, can it be said that the Court ought, under the circumstances, to grant the declaration, that is to say, to enunciate, in an abstract way, the precise converse of what is held by the Court which granted the certificate? I am saying this upon the assumption that the plaintiff was seeking for the same thing, but that is not the case here. It is not contended in this case that the plaintiff would have been entitled, if he had asked for it, to any consequential relief. It is not suggested that the defendant has collected and has misapplied any debts which he obtained under the certificate and the proceeds of which the plaintiff would be entitled to. It is not even alleged that the defendant was not entitled to those debts, and for aught we know Monee Dabee may have had that property as her *streedhun*, or personal property of her own, to which the plaintiff would have no claim at all. As to a declaration concerning the illegitimacy of the defendant, it appears to me that what the defendant would be entitled to a certificate for constituted no such case as would entitle plaintiff to ask the Court for a declaration upon that question; and, as observed towards the conclusion of the case by Mr. Justice Ainslie, if there is any circumstance to show how useless a suit for declaration was, it is this: That, notwithstanding the apprehension said to be entertained by plaintiff in consequence of the grant of the certificate to the defendant, as soon as Jeebun Coomaree, the person at that time in possession of the debuttur, and who opposed the application of this defendant for the certificate has passed away, the plaintiff has, without dispute or opposition, come into possession of all the property that Jeebun Coomaree then held. That being the case, it appears to me that there is no ground for asking for the declaration; and that, if any such claim had been in the contemplation of the plaintiff, the Subordinate Judge was wrong to grant it, and the District Judge is right in saying that it ought not to be granted. I think therefore that the special appeal entirely fails, and must be dismissed with costs.

Ainslie, J.—Under the circumstances, I cannot say that any cause of action is made out by the plaintiff.

The 16th July 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Hiba—Mahomedan Law.

Case No. 2366 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 30th June 1873, reversing a decision of the Moonsiff of Niklee, dated the 26th September 1871.

Shahjan Bibee and others (Plaintiffs), *Appellants,*

versus

Shib Chunder Shaha and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Nil Madhub Bose* for Appellants.

Mr. J. S. Rochfort for Respondents.

A party, who executed a hiba under which no possession has been held, and which is therefore inoperative under the Mahomedan law, is not thereby precluded from claiming under another and distinct title.

Kemp, J.—THE plaintiff in this suit, the special appellant before us, sued for a share of 1 anna 17½ gundas in Talook Noor Mahomed, No. 85, which had been sold in satisfaction of a decree against her husband Arjan, and purchased by the defendant. Her case is that this share in the talook in dispute is her property under a kabinnama executed by her husband, the said Arjan, and that the property, at the time it was sold, did not belong to her husband, but belonged to her.

The Court of first instance found for the plaintiff, after going very carefully into the whole case.

The second Court, the Subordinate Judge of Mymensingh, Mr. Hutchinson, sets aside the decision of the Moonsiff for very insufficient reasons. In the first place, he appears to have decided the case mainly upon the supposition that the plaintiff, inasmuch as she executed a hiba in favour of her brothers, is precluded from claiming under a different title altogether, namely, under the kabinnama. He, therefore, without going into the question whether the kabinnama was executed by the plaintiff's husband or not, and whether, at the time the property in dispute was sold, the husband was the beneficial owner or the wife, the plaintiff, dismissed the plaintiff's suit, and reversed the decision of the Moonsiff.

Now, with reference to the hiba, we find that it has been held by a competent Court that this hiba was inoperative, inasmuch as no possession was held under it by the donees. Possession under the Mahomedan law is absolutely requisite to establish the validity of a hiba. In this case, the hiba having been found inoperative, there is nothing to prevent the plaintiff from suing under another and distinct title, namely, the kabinnama. The case must, therefore, go back to the Subordinate Judge, who will find upon the issues raised in the first Court on the merits, namely, whether the kabinnama is genuine or not; and if so, whether, at the time of the sale, the plaintiff was the beneficial owner of the property or her husband, the judgment-debtor. Costs to follow the result.

The 16th July 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Cross-Appeal—Act VIII. of 1859, s. 348.

Case No. 2096 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 11th June 1873, reversing a decision of the Moonsiff of Raojan, dated the 5th April 1873.

Moizzunnissa (Defendant), *Appellant,*

versus

Mooraree Dhur Dey and others (Plaintiffs), *Respondents.*

Baboo Debendro Nath Bose for Appellant.

Baboo Aukhil Chunder Sen for Respondents.

The Lower Appellate Court was held to be justified in refusing to enter into an objection raised by the respondent under Act VIII. of 1859, s. 348, in the absence of one of the parties interested in the decision of the first Court.

THE plaintiffs, in this case, three in number, sued the defendants, amongst whom the special appellant Moizzunnissa is one, to recover possession of two kanees of land appertaining to a resumed lakhiraj mehal standing in the name of Noor Ali, the husband of Moizzunnissa, and his brother Asgur Ali.

The plaintiffs allege that a half share of the lands claimed was purchased in executi

of a decree against the heirs of Asgur Ali by plaintiffs Nos. 1 and 2, and the other half share was purchased under a bill-of-sale dated the 30th Joisto 1229 by the same plaintiff No. 1 and Ram Dyal; that thus having acquired the whole of the talook they were in possession by receipt of rent from defendant No. 1, who held it under an ijara from the former maliks; that, although the term of that ijara has expired, yet defendant No. 1, in collusion with the other defendants, has refused to give up possession; hence this suit is brought.

It is not necessary, for the purposes of this special appeal, to refer to the allegations contained in the written statement of any other defendant but that of Moizzunnissa, the special appellant before me.

Moizzunnissa, it appears, is one of the vendors mentioned in the kobala of the 30th Joisto 1229, the genuineness of which she does not dispute. But her case with reference to the share covered by that kobala is simply this, that the vendees (plaintiffs) are not entitled to what is called *goonjais*, or excess land. And with reference to the other half share, which the plaintiffs claim as that of Asgur Ali, her defence is that, long before the plaintiffs' auction-purchase, in 1202 *Mughee*, she acquired this share by purchase under a bill-of-sale executed by Asgur Ali, and Noor Ali, her husband.

The first Court decreed the plaintiffs' claim to the extent of one kanee alleged by the plaintiffs to have been acquired by the kobala dated the 30th Joisto 1229, overruling Moizzunnissa's objection with reference to the *goonjais* land. But, in respect of the other share, the first Court found that Moizzunnissa's allegation of purchase was made out.

There was an appeal by the plaintiffs, Hooraree Dhur and Ram Jeebun, with reference to the portion of the claim disallowed: and it appears that, under section 348 of Act VIII. of 1859, objections were preferred by the respondents with reference to the portion of claim decreed.

The Subordinate Judge, on the appeal, has held that the respondent was not competent to question the decision of the first Court under section 348, because one of the parties interested in maintaining the decree, namely, Ram Dyal, was not a party to the appeal.

In special appeal it is contended that the Subordinate Judge was wrong in not allowing the objection under section 348 on the grounds stated above. But it appears to me that that decision is quite in accordance with the provisions of the law. If the respondents desired to question the decision of the first Court, they ought to have preferred a separate appeal, making all the necessary parties respondents. In the absence of Ram Dyal, who was interested in the decree of the first Court, the Lower Appellate Court was fully justified in refusing to enter into the objection raised by the respondent under section 348.

With reference to the appeal preferred by the plaintiffs, the Subordinate Judge has held that the kobala propounded by Moizzunnissa is not a genuine document, and, coming to this finding of fact, the Lower Appellate Court has decreed the plaintiffs' appeal. The grounds upon which the Lower Appellate Court has come to the conclusion that the kobala of 1202 is not genuine are these:—

1st.—That, in the admitted bill-of-sale executed by her and others in favour of the plaintiffs on the 30th Joisto 1229, the share of Asgur Ali is expressly reserved as his share, and excepted from that conveyance.

2nd.—That Moizzunnissa did not prefer any objection under section 246 of Act VIII. of 1859 when the share in question was attached as the property of Asgur Ali.

3rd.—That, in her answer to this suit, she says that she obtained this property in lieu of her dower, whereas, in the deed of sale produced by her, it is stated that it was sold for a consideration of Rs. 40 in cash.

4th.—That it is not shown why this share should be conveyed to her in lieu of dower by her husband's brother, Asgur Ali, who was not liable for her dowry.

These are the main reasons on which the Subordinate Judge has come to the conclusion that the deed of sale of 1202 is not a genuine document.

It is evident from this that he has not considered a mass of oral evidence which is on the record, and, upon a careful consideration of which, the first Court came to a contrary conclusion.

From the judgment of the Moonsiff it appears that one of the plaintiffs' witnesses has proved a document, namely, an ijara-lease of the year 1212, which, if true, would go to a very considerable extent in supporting Moizzunnissa's allegation, because we find that by that document Moizzunnissa dealt with this property—the whole of it—as belonging to her exclusively. It is true that in that document she does not refer to the bill-of-sale of 1202, but she expressly seems to

declare that she had derived her title to this property in lieu of her dower-claim. But that is a matter of observation pertinent to an inquiry upon a question of fact. But, apart from this, the Lower Appellate Court does not appear to have examined the rest of the oral evidence upon which the Moonsiff strongly relies. But for this defect alone, I would have hesitated to interfere with the finding of the Lower Appellate Court on a question of fact, if it did not appear that some of the grounds upon which that finding is based have no foundation at all upon the record of this case.

First of all the Subordinate Judge strongly relies upon the argument drawn from the admitted bill-of-sale. But, upon examining that document, I find that the argument is entirely unfounded. The bill-of-sale appears to deal with four different properties. With reference to three of them the share of Asgur Ali is expressly reserved, but no such reservation appears to have been made with respect to the disputed property. If this kobala leads to an inference relevant to the question at issue in this case, it rather leads to an inference in favour of the defendant than against her. It is true that, in the schedule of that document, the share not sold is stated to be in the name of Asgur Ali, but this was so mentioned, because the talook stood in his name; just in the same way as the share, which was sold and was admitted to belong to Moizzunnissa, is mentioned as being in the name of her husband, Noor Ali. Therefore the first ground on which the Subordinate Judge relies appears to be wholly based upon a misconstruction of the admitted bill-of-sale.

The Subordinate Judge is equally in error with reference to the third ground mentioned above, namely, that Moizzunnissa in her written statement alleges that she obtained this property in lieu of her dower, whereas, in the deed of sale, it is recited that the property was sold for a consideration of Rs. 40 in cash.

Upon referring to her written statement, I find that she alleges that she paid Rs. 40 as consideration over and above her dower-claim.

It further appears that the Subordinate Judge has not only overlooked the direct evidence in support of the kobala, but has also overlooked the fact that, out of the witnesses examined by the defendants in support of that document, two of them, namely, Tumeezooddeen and Jaffur Ali, were witnesses cited by both parties. I have shown above that two of the main grounds of the Subordinate Judge's conclusion are entirely unfounded.

Therefore, under these circumstances, I am bound to set aside the judgment of the Lower Appellate Court, and to remand the case to that Court for a fresh decision.

The learned pleader for the respondent has quoted a case to be found at page 223, Volume XIX., Weekly Reporter—Nowbut Singh and others *vs.* Chuttur Dharee Singh and others—and has contended that this misconstruction of a document like the kobala alluded to above is not such a misconstruction as would constitute a ground of special appeal. Referring to that decision it appears to me to be wholly inapplicable, because the judgment of the Lower Appellate Court is sought to be set aside in this case, not upon the ground of misconstruction of a document which is the foundation of a suit, but upon the ground that the Lower Appellate Court has based its judgment partly upon certain circumstances which do not really exist, and that there is a defect in the investigation of that Court in its not having taken into consideration important evidence upon which the judgment of the first Court is based.

For these reasons the case must, as I have already said, be remanded to the Lower Appellate Court for re-trial. Costs will abide the result.

The 24th June 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Enhancement of Rent—Azeemabadee Rupees and Sicca Rupees—Conversion into Company's Rupees—Jurisdiction of High Court.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Meer Mahomed Hossein

versus

Alexander John Forbes.

Defendant, representing the grantees of a talook under a sunnud made in 1775; when the rent reserved

* From the judgment of Kemp and E. Jackson, JJ., in Special Appeal No. 811 of 1868, decided on the 3rd August 1868.

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was Sanwat Azeemabadee Rs. 2,599, was sued, by the auction-purchaser, for enhancement of rent to Co.'s Rs. 8,465-2. The High Court held that, under Act X. of 1859, he was not entitled to enhance, as from the time of the permanent settlement (1802) down to 1835, when sicca rupees were converted into Company's rupees, defendant and his predecessor had paid sicca Rs. 2,107 in lieu of Azeemabad Rs. 2,599; but they allowed the Azeemabadee rupees to be converted into Company's rupees according to a fresh calculation, *i. e.*, at a higher rate than Rs. 2,248, at which the conversion had been made when sicca rupees ceased to be a legal tender:

HELD that, as the case was before the High Court in special appeal, they had nothing to do with the evidence. There was no evidence upon which it could be found that Azeemabadee Rs. 2,599 was of a higher value than Co.'s Rs. 2,248; but, even if the High Court had the power of finding and had found such fact, yet, as the parties had agreed, from a period antecedent to the permanent settlement, that the Azeemabadee Rs. 2,599 should be converted into siccas at the rate which had been paid down to 1836, and which had then been converted into Company's rupees, the High Court was wrong in overruling the decision of the Judge who had tried the issues, and had dismissed the plaintiff's suit.

THE appellant, the defendant in the suit, represents the grantees of a talook under a sunnud, which was made in 1775, of certain lands, the rent reserved at that time being Sanwat Azeemabadee Rs. 2,599. The plaintiff represents a person who purchased the zemindaree in which the talook was situate at an auction-sale; and he, as representative of the zemindar, claimed, in the first instance, to enhance the rent to the present value of the lands. He sought to raise the rent of Azeemabadee Rs. 2,599 to Co.'s Rs. 8,465-2. The High Court held that, under Act X. of 1859, he was not entitled to enhance. Act X. of 1859, section 15, says: "No dependent talookdar, "or other person possessing a permanent "transferable interest in land intermediate "between the proprietor of an estate and "the ryots, who, in the provinces of Bengal, "Behar, Orissa, and Benares, holds his "talook or tenure (otherwise than under a "terminable lease) at a fixed rent which has "not been changed from the time of the "permanent settlement, shall be liable to any "enhancement of such rent, anything in "section 51, Regulation VIII. of 1793, or in "any other law, to the contrary notwith-"standing." They found that, from the time of the permanent settlement down to the time when sicca rupees were converted into Company's rupees in 1835, the defendant and his predecessor had paid sicca Rs. 2,107 in lieu of Azeemabadee Rs. 2,599. That rent could not be changed now, even if it could be shown that the calculation under which the Azeemabadee Rs. 2,599 were converted into sicca Rs. 2,107 was erroneous. It would be impossible now to go back to the grant of 1775, and to say that the sicca Rs. 2,107, which has been the rent paid from the time of the permanent settlement, is now to be changed, because it originated out of a grant by which Sanwat Azeemabadee Rs. 2,599 were reserved. The High Court held that this was not an enhancement of the rent, but merely a valuation of the old rent of Azeemabadee Rs. 2,599, and therefore they allowed the Azeemabadee rupees to be converted into Company's rupees according to a fresh calculation.

The Judge found that there had been no change except the conversion. He says: "Both parties having been called upon to "adduce evidence on these points," those were the two issues which the High Court had sent down to be tried, "the appellants "have filed dakhillas or receipts from 1241 "M. S. to 1264 M. S., with the exception "of 1262 M. S., and which have been "attested by Moonshee Jowahir Ali on "their behalf. Those documents show how "much they paid in each year, and to a "certain extent prove that the jumma has "not been changed during those years." The receipts show that the jumma was paid in Company's rupees, and, therefore, to alter the amount of Company's rupees now, you must go back beyond the permanent settlement to show that these Company's rupees, which have been paid for more than the last 20 years, were too small an amount as compared with the Azeemabadee Rs. 2,599 reserved in 1775. He says: "Attested copy "of an urzee of Baijnath Sing has also been "filed in reply to a perwanna issued by the "Collector. He was surburakar of the pro-"perty from 1243 to 1252 M. S. This "paper shows that, in May 1828, or 1236 "M. S., the rent of the istemrar was "sicca Rs. 2,107." He says that this document shows that at that time, *viz.*, May 1828, the rent was sicca Rs. 2,107. "From the copy of the sunnud filed in "former suits, the rent was fixed at Sanwat "Rs. 2,599; 8=2½ Sanwat Azeema-"badee rupees. The document above men-"tioned shows that the rent has been "changed into sicca Rs. 2,107, 9=10½ "sicca rupees; and, again, according to the "batta allowed in sicca rupees at the rate "of 6-10-8 per cent., changed to the "equivalent in Company's Rs. 2,248-1-8. "Beyond this equivalent in the rupees "current at different eras, no change can be "discovered of the rent of the istemrar

"having ever been really changed since the "grant of the sunnud in 1795 A.D. The "respondent, Mr. A. J. Forbes, has sub-"mitted no evidence of any kind to show "the contrary, or to rebut the presumption "that the land has been held at that rent "from the time of the permanent settle-"ment." He then goes on, and in a note at the foot of his judgment, he says: "With "reference to the second issue, namely, the "difference, if any, between the Sanwat "Azeemabadee rupees and the Company's "rupees, the claim for the excess having been "dismissed, there is no necessity to go into "the matter. Regulation XXXV. of 1793, "section 14, which gives the different rupees "current at the time, clearly lays down that "96 old Patna Sanwats are equivalent to "sicca Rs. 100 of the 19th Sun, and to "reduce sicca rupees into Company's, the "sum of 6-10-8 per cent. is allowed, *i. e.*, "Company's Rs. 106-10-8 equal to sicca "Rs. 100." Then he says: "See Muller's Tables." Now, the Regulation to which the learned Judge refers is Regulation XXXV. of 1793. It recites that it was necessary that there should be no other coin in circulation or in use except the sicca rupee of the 19th Sun, and they state the mode in which that was to be brought about. Having stated that sicca rupees only should be received at the treasury in payment of revenue, that they should be received in payment for salt, they prohibited parties from making contracts after a certain date in any other coin than the sicca rupee, stating that, if they entered into any such contract for any sum of money excepting sicca rupees, the contract should not be enforceable in a Court of Law. Then they say: "By the operation of these rules "the various sorts of old and light rupees "must, in course of time, fall to their "intrinsic worth compared with the sicca of "the 19th Sun, as they will produce no "more in the mint, and to which they will "necessarily be brought to be converted "into siccas, as they will be no where pass-"able or in demand as coin from being "no where a measure of value." Then, after this Regulation, it appears that the Rs. 2,599 were, by arrangement between the parties, the one who was bound to pay the rent, and the other who was entitled to receive it, converted into sicca Rs. 2,107. That was before the permanent settlement. The permanent settlement in this district was made in 1802. That is stated in the respondent's case. The rent having been converted into sicca rupees before the permanent settlement in 1802, the permanent settlement was made with the plaintiff's predecessor, and the Government, in fixing the amount of revenue which was to be paid under the permanent settlement, looked to the assets of the estate, and they must have taken the assets of this estate as sicca Rs. 2,107, and estimated the revenue which the zemindar would have to pay accordingly. The permanent settlement was fixed upon the basis that the rent which was payable under the pottah was sicca Rs. 2,107, and from the time of the permanent settlement that is proved to have been the only amount paid in discharge of rent up to the time when the sicca rupee was abolished. That rupee was abolished by Act XIII. of 1836. By section 1 it was enacted that, "from the 1st of January 1838, "the Calcutta sicca rupee shall cease to be "a legal tender in discharge of any debt, "but shall be received by the Collector "of Land Revenue and at all other public "treasuries by weight and subject to a charge "of 1 per cent. for re-coinage." Then it states that the new coin, which is called the Company's rupee, should be taken at the rate of 16 new or Company's rupees for every 15 Calcutta sicca rupees of due weight, that is to say, the Company's rupee was equal to $\frac{15}{16}$ths of a sicca rupee.

From that time, then, the defendant could not continue to pay his rent in sicca rupees, because the sicca rupees had been abolished, and it had been enacted that no tender should be made in sicca rupees. It was therefore necessary to convert the sicca Rs. 2,107 into Company's rupees, and that was done by adding the difference between the Company's rupees and the sicca rupees, and from that time the sicca Rs. 2,107, which had been paid from the time of the permanent settlement, were converted into Co.'s Rs. 2,248, which were paid from that time down to the time of the commencement of this suit.

It appears to their Lordships that, if any question as to the value of the Azeemabadee rupees could have been entered into at all in the present suit, the conduct of the parties in dealing with the Azeemabadee Rs. 2,599 for upwards of 50 years as being the equivalent of sicca Rs. 2,107 would have been much stronger evidence than any evidence which is given in this case by Mr. Palmer from the old almanac, or by Mr. Judah from Prinsep's Tables, in which he stated that there was no actual valuation of the Sanwat Azeemabadee rupee. He states "The information will be found in Prinsep's

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"Tables, in which he also admits some errors "are to be found; at the same time he states "that those tables do not give the equivalent "of Sanwat Azeemabadee in Company's "rupees," they only give it in siccas.

Now the Judge upon that evidence, finding that, from the time of the permanent settlement down to 1836, sicca Rs. 2,107 were the only rent which had been paid, and that from 1836 these sicca rupees had been converted into Co.'s Rs. 2,248, held that the plaintiff was not entitled to recover from the defendant at a higher rate than that which had been paid from 1835 to the time of the commencement of the suit as the equivalent of sicca Rs. 2,107, and dismissed the plaintiff's suit. The High Court, however, thought that the plaintiff was entitled, at this distance of time—notwithstanding the mode in which the parties had dealt with it, notwithstanding the fact that no Azeemabadee rupees had ever been paid as rent from the time of the permanent settlement down to the time of the commencement of the suit—to recover at the rate of Sanwat Azeemabadee Rs. 2,599 to be converted into Company's rupees; and, according to the evidence which has been given in the cause, they converted the Sanwat Azeemabadee Rs. 2,599 into Company's rupees at a higher rate than Rs. 2,248. The case was before the High Court upon special appeal, and therefore, in strictness, they had nothing to do with the evidence in the cause. There was no evidence upon which (even if they could have been allowed to do so by law) they could find that Sanwat Azeemabadee Rs. 2,599 was of a higher value than the Co.'s Rs. 2,248 into which they had been converted; but, even if they had the power of doing that, and had done so, the parties had agreed, from a period antecedent to the permanent settlement, that the Sanwat Azeemabadee Rs. 2,599 should be converted into a different coin, namely, the sicca rupee at the rate which had been paid down to 1836, and which in 1836 had been converted into the suitable equivalent in Company's rupees.

Under these circumstances their Lordships think that the High Court was wrong in overruling the decision of the Judge who tried the issues, and they will, therefore, humbly recommend Her Majesty that the decision of the High Court should be reversed, that the decision of the Judge of the lower Court should be affirmed, with the costs of this appeal and the costs in the High Court.

The 2nd July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Registration—Act XX. of 1866, ss. 66 to 69—Certificate under s. 68—Endorsements on Registered Documents.

Case No. 86 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 17th February 1873.

Mussamut Rohimoonissa (Defendant), *Appellant,*

versus

Shaikh Abdoollah Khan (Plaintiff), *Respondent.*

Baboos Sreenath Doss, Aukhil Chunder Sen, and *Chunder Madhub Ghose* for Appellant.

Mr. C. Gregory, Baboo Kalee Mohun Doss, and *Moulvie Murhumut Hossein* for Respondent.

The registration of a document under Act XX. of 1866 is complete when all the requirements stated in ss. 66, 67, 68, and 69 have been fulfilled; and the certificate mentioned in s. 68 is *primâ-facie* evidence of such completeness.

Where a kobala bore the above certificate, a memorandum from the Sub-Registrar stating that he was not satisfied that the heirship of the party conveying had been established was held in no way to affect the registration.

Where the requirements of the law had been fulfilled, a report made by the Sub-Registrar in which he expressed his intention to reject the document was held not to affect its claim to being a well-registered document within the meaning of s. 49.

Markby, J.—In this case the suit was substantially brought by the plaintiff to eject the defendant Sreemutty Rohimoonissa from the possession of the property in question; and the title which the plaintiff sets up is a title derived from one Moonaim, who, he says, was the heir of one Alfa Bibee, deceased. A good many questions have been raised and considered more or less fully by the Subordinate Judge, but the question which we

have to decide is a very narrow one. The property now in dispute, as well as other property belonging to the family, was said to have been dealt with on different occasions by the members of the family—first, in a tukseemnama ; next, in a wuseeutnama ; and lastly, in a kobala—which last document was also said to have been executed by Moonaim. Now we desire it to be fully understood that we express no sort of opinion whatsoever as to the true construction of these three instruments, even supposing them to be genuine instruments and well proved, for the construction of these instruments might affect the rights of persons who are not now before the Court ; nor do we express any opinion as to the genuineness of the first two documents. All that we say upon that point is that we do not agree with the Subordinate Judge that, upon the mere inspection of these three documents, it is safe to come to the conclusion as to all of them that they are not true and *bonâ fide.* The reason why it is unnecessary for us to go into the two earlier documents at all, and also why it is unnecessary for us to go minutely into the construction of these documents together with the kobala, is because it has been admitted (as, indeed, it could not be denied) that, if the kobala relied upon by the defendant to protect her possession against the plaintiff, namely, the kobala of the 13th Falgoon 1228 Mughee, is a genuine document registered, the plaintiff's title will then be entirely excluded ; because that kobala conveyed away the whole interest of his vendor Moonaim ; and, as the plaintiff's title is subsequent in date to that of this kobala, for the same reason, therefore, also it is unnecessary for us to go into the genuineness of the plaintiff's kobala. It is perfectly useless to him in this suit if the defendant's kobala is genuine. Now, with reference to that last document which has been called a kobala, although, as we have said, we do not intend to go minutely into the true construction of documents which might affect the interest of persons who are not before the Court, we think that the Subordinate Judge has treated it from a somewhat wrong point of view. It was not a kobala in the sense of being a sale by a person of an undisputed title to a stranger ; it was obviously rather in the nature, to some extent at any rate, of a confirmation of a title previously set up. It is, at any rate, certain that it was not possible either for Moonaim, or for those who claim through him, now to say that his succession as heir to the deceased Alfa Bibee was uncontested ; and, in fact, his succession to the property never took effect at the time of her death. It appears from the evidence, and that is the finding of the Subordinate Judge also, that possession of the property of Alfa Bibee never came into the hands of Moonaim. On the contrary, the person, who, under the law, obtained a certificate as the representative of Alfa Bibee, was not Moonaim, but the defendant, Rohimoonissa, to whom the certificate was granted after a petition had been put in on behalf of Moonaim assenting to the certificate being granted to her. That view of the matter is of some importance, because it entirely disposes of the argument of the Subordinate Judge and also the argument that has been used here with reference to the value of the property.

The principal question which we have to determine is whether that kobala, as we will continue to call it for convenience, was duly executed by Moonaim. Now, we must say that it appears to both of us that the evidence given upon this point is unusually good. The persons called are vakeels of the Judge's Court ; they are, therefore, it must be presumed, men of respectability, whose character was at stake ; they are not obscure persons, who, when they left the Court, cannot be traced ; they are persons residing on the very spot where all these transactions took place, and also where the trial took place. It can scarcely be supposed that they would, for no motive whatever, give false evidence in this case. Upon reading their evidence, it also appears that it is just the sort of evidence which men of business, wholly disinterested in the matter, would give in a matter of this kind. Besides the evidence of these vakeels, there is other evidence in the case ; but we ourselves should be perfectly willing to accept the evidence of those witnesses as fully sufficient to establish the genuineness of this conveyance. But, besides that, there are important circumstances to which, we think, sufficient attention has not been paid by the lower Court. This document was undoubtedly registered, that is to say, it was presented in the Registry Office for registration very shortly after it was executed, and we shall come presently to the question as to whether the registration was in law sufficient ; but the deed was undoubtedly produced, and the registrar was fully satisfied that the person who professed to have executed it appeared before him, and acknowledged the execution and more than that, a discussion subsequently arose as to the registration of another doc-

ment—the wuseeutnama, and the consequence of that was that a discussion took place as to the kobala also, which could hardly have escaped Moonaim's attention, and which would have led to his repudiating the kobala, if he had not really executed that document. Further than that, there is upon the record a petition, in which the fact of the execution of this document is fully stated and acknowledged by Moonaim. That is the petition, to which we have before alluded, upon which the certificate was granted. Now, that petition, on the face of it, does not profess to be signed by Moonaim himself, but by a vakeel on his behalf, by whom also it was presented to the Court. That vakeel has been called, and he has stated that the signature to the document is his. His evidence is very brief, but we may take it that he asserts that he presented this document on behalf of Moonaim. It appears on the record that no question of any sort was put to him by the plaintiff's Counsel, though the parties were fully represented in the Court below; and if the plaintiff really challenged the authenticity of this petition, it was his duty to show that the evidence given by this witness was false. Therefore in this case we have not only the evidence of the two vakeels on whom we ought to place a great reliance, but we have the surrounding circumstances which strongly corroborate their testimony.

Then another argument has been urged that it may be that this document was executed by Moonaim, but that it was what is called a paper-transaction and the consideration never passed. Well, if it is quite clear that no consideration did really pass, possibly we might come to the conclusion that it was not a real conveyance of this interest, but that it was some benamee arrangement which ought not to affect the title of the plaintiff. But upon this point also we think the evidence is quite conclusive. The witnesses, to whom we have already alluded, speak positively to this that the money was there ready to be paid over. Some of the witnesses say that they saw that the money was paid over. Besides that we have in the document itself a distinct recital that the money has been paid; and in the petition already referred to there is a distinct allusion that the money has been paid. The only objection taken on this point is that the petition speaks of a separate receipt, and the witnesses do not speak of any separate receipt. We think this is much too narrow a ground to justify the conclusion that all those witnesses committed perjury in this respect. There may be a mistake in the petition as to the particular form of the receipt, but there could be no mistake as to the money having been actually received or no, which was really the important matter; and it is quite consistent with the evidence of those witnesses that a receipt, not of a formal kind, may have passed between the parties without there being any mention of it before them. It seems to us, therefore, that this point also entirely fails.

The only other objection that has been raised is as to whether this kobala is a registered document in accordance with the law. Now, upon that point we have only to see whether certain requirements of the law have been performed. These requirements are fully detailed in Act XX. of 1866, which was in force when this deed was executed; and if these ceremonies have been gone through, then this document is a registered document. For although the sub-registrar has in certain cases discretion whether he register or not, and although he has to exercise his mind in coming to a conclusion upon certain questions of fact before he registers, yet if he goes through the ceremonies which are required by law, the registration has taken place, whatsoever opinion he may afterwards express in the matter. Now, we find on the back of this document a certificate that the document has been registered. That is the certificate mentioned in section 68; that certificate is now upon the document, and that certificate is under the law a *primâ facie* evidence that the document is registered. The only reason why it is said not to be so in this case is not on account of any counter-evidence that has been given to show that the *primâ facie* registration was not a real registration, but because there is also upon the document a Bengali memorandum, signed by the sub-registrar, in which a certain statement is made. Now we think the most favourable view which can be taken in this case for the plaintiff is to suppose (as he has asked us to suppose) that this document remained in the hands of the sub-registrar until this second memorandum was put upon it, which was on the 27th March 1867—the document having been presented for registration on the 27th February 1867. It appears to us that even taking that view of the case, the document must still be considered as properly and fully registered. The registration is complete when all the requirements stated in sections

66, 67, 68, and 69 have been fulfilled, and, as we have said, the certificate is *primâ facie* evidence that they have been fulfilled, and therefore that the registration is complete. All that this memorandum amounts to is a statement that the sub-registrar, for some reason or other, after having given that certificate, or, at any rate, whilst he gives that certificate, is not satisfied that the heirship of the person who professed to be the conveying party in this kobala has been proved. It has been admitted that under the law that would not be a valid reason for refusing to register the document, and the only question which we have to consider is whether that can be treated as a refusal to register. Now, the law distinctly lays down how the registrar is to refuse a document presented for registration. If he refuses to register a deed, he is, under section 82, bound to write on the document "Registration refused," and then he is to make a certain memorandum in a certain book, and so forth. Now, even if we take it in that view which, as we have already said, is the most favourable view we can take for the plaintiff, we think we are bound to hold that whilst that certificate is upon the document, whatever may have been the intention of the sub-registrar in writing that memorandum, that in no way affects the fact that the document is a registered document. A certain report made by the sub-registrar has been referred to in which he is said to have used the expression that he intended to "reject" the instrument. It is not very clear what he meant by that, and we greatly doubt whether that statement could be received in evidence; but even if it be so received, still it appears to us that whatever may be the meaning of that statement, what we have to look to is what are the requirements of the law, and whether those requirements have been fulfilled; and, taking that view of the case, it seems to us that this document is a well-registered document within the meaning of section 49 of the Registration Act. Therefore, so far as the formality of registration is concerned, there is no impediment to the title of the defendant and to her holding possession of the property under that title.

These are the grounds upon which the plaintiff attempted to make out that the defendant's title is not a good one, and we think he has entirely failed. The judgment of the Subordinate Judge was wrong and ought to be reversed. The plaintiff's suit will be dismissed with costs in this Court and in the Court below.

The 6th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mortgage Bonds—Decree—Execution-Sale—Priority of Charge—Liens.

Case No. 2200 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 10th July 1873, affirming a decision of the Moonsiff of Pursah, dated the 15th June 1872.

Dhurm Lall Roy and another (Defendants), *Appellants,*

versus

Dusruth Singh and another (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Bhyrub Chunder Banerjee for Respondents.

A, on the 16th November 1863, executed a mortgage-bond, by which he charged certain property with Rs. 1,000 in favour of B and C. On the 17th he executed another bond, by which he charged the same property in favour of D and E. After this B and C sued the mortgagor on the first bond, and obtained a decree, according to which the property was sold, and was bought by themselves. Somewhat later, D and E also brought a suit against the mortgagor, and obtained a decree for the sale of the property. In attempting to sell it they were opposed by B and C, who were in possession, and their application for execution was refused. D and E then sued B and C to obtain a declaration of their right to sell the property in execution of the decree which they had obtained on their bond of 17th November. The lower Courts gave them a decree:

HELD that the Courts were not right in depriving B and C of the benefit of the decree which they obtained on their bond of 16th November, and giving priority to D and E for their charge of a later date. The sale effected by B and C was subject to all valid liens (if any) of prior date subsisting upon the same property at the time of the sale; but later liens could not but be postponed to that of B and C.

Phear, J.—THE matter in dispute between the parties in this suit has arisen out of five

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bond-transactions. The first of these is a bond executed on the 28th January 1867, by which Alum Chand and another, who together may be conveniently called the mortgagor, charged a certain 4-anna share of a mouzah with Rs. 700 in favour of one Dusruth Singh, one of the two present plaintiffs, and Dhurm Lall, one of the two present defendants, jointly. The second was a bond executed on the 6th May 1867, by which the mortgagor charged the same property with Rs. 250 in favour of Nunkoo, the 2nd defendant. The 3rd was a bond executed on the same day, namely, the 6th May 1867, by the same mortgagor, charging the same property with Rs. 150 in favour of one Buxi, the other co-plaintiff. The fourth was a bond executed on the 16th November 1868, by which the same mortgagor charged the same property with Rs. 1,000 in favour of both the present defendants, Dhurm Lall and Nunkoo. The fifth and last was a bond executed on the 17th November 1868, by which the same mortgagor charged the same property with Rs. 700 in favour of the two plaintiffs.

In this state of the property the defendants brought a suit against the mortgagor for the realization of the charge of the Rs.1,000, created in their favour by the bond of 16th November 1868. They obtained a decree; the property was sold according to the decree, and bought by themselves. Somewhat later, the present defendants also brought a suit against the mortgagor to obtain realization of the charge created in their favour by the bond of 17th November 1868, and obtained a decree against the mortgagor for the sale of the mortgaged property. They then applied for a sale of this property in execution of this decree, but were met by an objection from the present defendants, who were strangers to their suit and decree, that the property had already been sold to them, and was in their possession; and the Court, which was charged with the execution of the decree, sustained the objection, and refused the application for execution.

This suit is brought by the plaintiffs against the defendants to obtain a declaration of their right to sell the property in question in execution of the decree which they have obtained against the mortgagor upon the footing of the bond of 17th November 1868.

Both the lower Courts have arrived at the conclusion that the plaintiffs are entitled to the decree which they seek. It need hardly be remarked that, if they are, and if they sell this property free of incumbrance, according to the terms of their decree, they will entirely deprive the defendants of the benefit of the decree which they obtained for the realization of their bond of the 16th November 1868, and will, in fact, get a complete priority for their charge of the 17th November 1868 over that of the defendants, which was dated the previous day.

It seems quite plain that this cannot be right. And indeed it appears to us that the lower Courts have taken a wrong view of the relative rights of the plaintiffs and the defendants. So far as concerns the bonds of the 16th and 17th November respectively, there is nothing apparent which should serve to deprive the defendants of the priority which the earlier date gives to their charge. The Lower Appellate Court has formed the opinion that it was the intention of the contracting parties in these two bond-transactions, although the plaintiffs were not party to the first, nor the defendants to the second, that they should both stand upon the same level, and that the mortgagees in the two should share the advantages of the double charge between them. As has been already remarked, however, the effect of the decree which has been made in this suit upon this view of the transactions is to give the whole advantage to the later bond-holder in priority to the earlier one. But we find nothing in the judgment of the Lower Appellate Court which affords substantial support to this opinion, or which can in law give the present plaintiffs, under their bond of the 17th November 1868, even equality with the defendants under their bond of the previous date. On the facts stated by the Lower Appellate Court, the sale which the defendants effected in execution of the decree obtained by them on their bond of the 16th November conveyed the property to them free of the later incumbrance. It was pressed upon us that the consideration both for the charge of the Rs. 1,000 in favour of the defendants and of the Rs. 700 in favour of the plaintiffs was made up mainly of debts due from the mortgagor to the plaintiffs and defendants respectively, for which these parties had each prior liens upon the same property. And that therefore the present plaintiffs were, at any rate, entitled to realize their earlier lien out of the property in the hands of the defendants. This may possibly be so. As to this point we express no opinion whatever. The sale effected by the defendants to themselves in execution of the decree which they had obtained upon their bond of

November 1868 must have been no doubt subject to all valid liens of prior date existing upon the same property at the time of the sale. And, if the present plaintiffs have still, either jointly or severally, subsisting liens upon this property of a date earlier than 16th November 1868, there can be little doubt that they are entitled to enforce these liens against the property which the defendants have bought, provided they take the proper steps for this purpose. But it is not pretended that they have yet taken any steps by action or suit to enforce any earlier lien than that dated 17th November 1868, which, if it, as is said, includes and keeps alive the earlier lien, yet, at the same time, certainly comprehends something more; and indeed it is plain from the description of the bonds which has already been given that the present plaintiffs could not join in enforcing any lien except that, if any, which rests upon the bond of 17th November 1868. And that must manifestly be postponed to the lien for which the defendants have sold. Had the plaintiff, Dusruth, sued alone, and made all necessary parties defendants, the relative rights of the different incumbrances might have been precisely determined, and the property equitably applied to the discharge of their claims: the various questions arising out of the fact of the defendants having sold to themselves, and from the union of later with earlier charges, might have been satisfactorily settled. But this course has not been taken. And without, therefore, considering more particularly what remedies the present plaintiffs respectively may have for the purpose of making good any earlier liens, if either of them have any, it is sufficient for us at present to say that we think that the decrees of the lower Courts in the present suit are wrong, and that the suit ought to be dismissed with costs.

Indeed, it is perhaps doubtful whether the suit, in its present form, ought to have been entertained at all, because, as we understand, the decree which the defendants obtained on their bond for the purpose of enforcing their bond of the 16th November 1868, was a decree against the property itself in the hands of the mortgagor, and the decree of the present plaintiffs on their bond of the following date seems to have been of the like character.

The decree of the Lower Appellate Court is reversed, and the suit dismissed with costs in all the Courts.

The 8th July 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Diluviated Lands—Proprietorship of Site—Act IX. of 1847, s. 7—Reg. XI. of 1825, s. 4, cl. 3.

Case No. 155 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 11th March 1873.

The Collector of Rajshahye (Defendant), *Appellant,*

versus

Ranee Shama Soonduree Debia and others (Plaintiffs), *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

Where, after a village was submerged, the proprietor of the permanently settled estate of which it had formed a part continued to pay her full quota of Government revenue:

HELD that the submergence of the site did not deprive the owner of her property, and its re-appearance as an island did not render it liable to be taken possession of by Government under Regulation XI. of 1825, s. 4, cl. 3, referred to in Act IX. of 1847, s. 7.

Birch, J.—IT has been admitted before us by the Government pleader that the lands in dispute are identical with the diluviated lands of Debeenugger, and that they have formed on the old site of the village which belonged to the plaintiff. This being so, al-

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that we have to consider in this appeal is whether the fact of the land forming as an island gives the Government a title to it under clause 3, section 4, Regulation XI. of 1825.

In this case we are fortunate in having a series of authentic maps prepared by the Survey officers, from which we are able without difficulty to trace the changes that have taken place in the course of the Ganges within the last sixteen years in the tract wherein the land in dispute is situated. These maps conclusively show that the Ganges first encroached on the plaintiff's land; that it divided itself for a time, and threw out a new arm or sota; that the main channel again receded, leaving the site of the diluviated portion of Debeenugger washed on the one side by the main channel of the Ganges, and on the other side by the new arm or sota. As the river has receded, this arm has naturally been drying up. At the time when this arm was supposed to be not fordable, the Collector stepped in and resumed the land as an island chur, and we are now called on to determine whether the Government had any right, assuming that the sota was not fordable, to take possession of the land.

In the case of Nogendro Chunder Ghose *vs.* Mahomed Esof, B. L. R., Volume X., p. 429,* their Lordships of the Privy Council thus observe :—

"No express provision is made for the "case of land which has been lost to the "original proprietor by the encroachment of "the sea or river. But, on the other hand, "there is nothing to take away or destroy "the right of the original proprietor in such "a case; which must therefore be determined by the general principles of equity "or justice under the 5th Rule. That the "right of the proprietor in the case last put "exists and is recognized by law in India, is "established by at least two cases decided "at this Board, and therefore binding on "their Lordships, *viz.*, the case of Mussamut "Imam Bandi *vs.* Hurgobind Ghose,† and the "recent case of Lopez *vs.* Muddun Mohun "Thakoor,‡ decided on the 11th July 1870."

In Lopez's case it was remarked that no principles of equity would give the plaintiff's property to the defendant. So in that case, whoever was the owner of the land before the inundation and formation of the sota, remained the owner while the site was submerged and after it became dry. All that has to be ascertained in a case of this description is to whom does the site belong. It is not denied that the site of plaintiff's village Debeenugger and the land in dispute are identical. External marks there may be none, but the identity of the site is clearly established by the maps, and the objection urged in the lower Court by the Collector against the identity has been very properly withdrawn here. This being so, there can be no doubt that the lower Court has correctly applied the law in holding that the submergence of the site did not deprive the plaintiff of her property. That site formed part of her permanently-settled estate, and she continued to pay her full quota of Government revenue, although the village was submerged. As soon as it re-appeared and was taken possession of by Government as an island, the plaintiff took a lease from Government that the property might not pass into other hands. She has now succeeded in showing that the land belongs to her, and not to Government. The appeal of the Government must be dismissed with costs.

Kemp, J.—I concur in the decision just delivered by my learned colleague. The Government took possession of the disputed land under section 7, Act IX. of 1847; see the proceeding of the Superintendent of Dearah Surveys of the 29th of October 1868, pages 2 and 3, Appendix No. 1 of the printed book. Now section 7, Act IX. of 1847, refers to lands which are "liable" to be taken possession of by Government under clause 3, section 4, Regulation XI. of 1825, and I am clearly of opinion, for the reasons given in the judgment just delivered by my learned colleague, in which I entirely concur, that the lands in dispute are not liable to be taken possession of by Government under section 7, Act IX. of 1847. There is also a case which supports the view which we have taken, to be found in Volume VI., Bengal Law Reports, Appendix, p. 93.* In that case Mr. Justice L. S. Jackson had before him the case of Lopez, although he had not the later case decided by the Privy Council, and printed in Volume XVIII., Weekly Reporter, at the time he passed that decision. The pleader for Government admits that that decision in Volume VI. is against him, and he has not been able to show us any decision taking a contrary view. I would dismiss the appeal with costs.

* 18 W. R. (P. C.) 113.
† 7 W. R. (P. C.) 67.
‡ 14 W. R. (P. C.) 11.

*14 W. R. 424.

The 9th July 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Rent-suit—Title—Third Parties.

Case No. 1547 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 24th April 1873, modifying a decision of the Moonsiff of Sewan, dated the 4th December 1872.

Nankoo Kooeree (Defendant), *Appellant,*

versus

Nund Coomar Paurey and another (Plaintiffs), *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Mohendro Lall Mitter for Respondents.

In a suit for arrears of rent, where defendant sets up the claim of a third party, no question of title to land as between plaintiff and that third party can be determined in such a manner as to bind the third party.

THIS special appeal must be dismissed with costs.

No question of right to enhance or vary the rent of a ryot or tenant, and no question relating to a title to land or to some interest in land, as between parties having conflicting claims thereto, has been determined by the judgment in this case. It is true that the defendant sets up a claim of a third party, but any question of title to land as between the plaintiff and that third party cannot be determined in this suit on the objection raised by the appellant in such a manner as to bind the third party. Therefore it seems to me quite clear that the case does fall within section 102 of Act VIII. of 1869 (B.C.), as no question relating to conflicting claims between the parties to the suit has been determined by the judgment.

With reference to the earlier part of the section, it is said that in this suit the question of a right to vary the rent of the ryot has been considered. But it turns out that the only question was whether, taking the rent of the ryot as a fixed sum, the plaintiff was entitled to a greater or lesser share of that rent; there was no question of any right to change the amount of rent payable by the ryot.

The suit being for less than Rs. 100, the special appeal is inadmissible.

The 10th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Suit for Possession—Onus Probandi—Talook—Chittahs.

Case No. 1913 of 1873.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 3rd June 1873, reversing a decision of the Subordinate Judge of that District, dated the 30th December 1872.

Krishno Chunder Goopto and others (Defendants), *Appellants,*

versus

Meer Sufdur Ali (Plaintiff), *Respondent.*

Baboos Aukhil Chunder Sen and *Chunder Madhub Ghose* for Appellants.

Baboos Mohinee Mohun Roy and *Kalee Mohun Doss* for Respondent.

Where a plaintiff holding under a pottah from the zemindar sues to recover land of which defendant is in possession, he is entitled to recover, unless defendant can show that he holds under a grant derived directly or immediately from the zemindar.

The word "talook" imports a permanent tenure; and where a chittah describes the land to which it relates as a "talook," the presumption, in the absence of any evidence to the contrary, is that it implies a permanent interest.

Markby, J.—IN this case the plaintiff holding under a pottah from the zemindar sues the defendant, who is in possession, for the recovery of the land which he describes in his plaint by the Nos. of certain dags. The plaintiff holding admittedly under a pottah granted by the zemindar will be entitled to recover, unless the defendant can show that he held, at the time when this suit was brought, the land in question, either under a grant directly from the zemindar, or from some person who had a title under the zemindar, giving him a right to hold this land against the plaintiff. Now the determination of this question depends, not upon any settlements which the Government from time to time thought fit to make as to the revenue, but upon the titles of the several persons who held under a person who is admittedly the owner of this land, *viz.*, the zemindar. Now, the dealing of the Government with various parties for the purpose of settling the revenue either for longer or

shorter periods, though it might be evidence of the rights of the parties, would not either create or destroy any rights then existing in the property. It appears that the defendant at the time when this suit was brought held under a grant of some sort (whether more or less permanent does not appear to us to be a matter which requires consideration in this case) from the defendant No. 2. But that would be useless to him, unless he could also establish the title of the defendant No. 2; and that he sought to do in more than one way, but amongst others, he sought to establish it by showing that the defendant No. 2 had a talook which would give him, as the defendant contends, a right to this property sufficient to enable him to maintain his possession as against the zemindar, and therefore sufficient to enable his grantee to maintain his possession as against the zemindar's grantee. Now the District Judge, in dealing with this matter, has stated that there is no evidence of the existence of such a talook. But we find that there is upon the record a portion of a certain chittah which establishes, if it is a correct document, that at the time when that chittah was drawn up, in 1836, when steps were being taken by the Government under Regulation VII. of 1822 for the settlement of the revenue of this land, there was a talook known by the name of Surmustkhan which talook was held by the predecessors of the defendant No. 2—that is to say, by certain persons named Obedoollah Khan and Dewan Bibee. Now, so far, the case of the defendant No. 1 is established; but two further questions have been raised as to that chittah—first, that the land to which that chittah relates is not identified with the land for which the plaintiff now sues. That is no doubt correct to a certain extent, for we find that of the daghs specified in the plaint, only the first seven daghs are mentioned in the chittah; but there the chittah stops, and if that left any real doubt as to whether the chittah relates to the whole of the property comprised in the plaint, it would be necessary to remand the case. But we also find that the plaintiff's own pottah, under which document he holds from the zemindar, describes this land as Talook Surmustkhan, and gives a list of the daghs comprised in that talook precisely corresponding with the daghs specified in the plaint. There can be no reasonable doubt, therefore, that the chittah in question, although incomplete, is really the chittah relating to the land now sued for. We cannot say upon that that there is any question open upon which we ought to remand the case to the lower Court.

Then as to the interest of the defendant No. 2 in the talook, it is said that this defendant in his answer to this suit has abandoned all claim to its being a permanent talook. It seems to us that it is immaterial whether that is so or not. We have not had that document read to us, and we do not say whether or no it is so. But that is not the question which we have to determine. The question which we have to determine is what was the state of things when this suit was brought. This suit was brought, not upon any allegation that the rights of the talookdar had been surrendered to the zemindar, but upon the zemindar's own right as against all persons including the talookdar, who is a defendant in this suit.

Then as to the meaning of the word "talook," it has been said before, and we also say again, that *primâ facie* the word "talook" does import a permanent tenure, if there be nothing either in the surrounding circumstances, or in the instrument itself, which creates the interest to show that it was intended to be otherwise; and when we find that the chittah relating to this land describes the land as a talook, we think, in the absence of any evidence to the contrary, we ought to presume that that was a permanent interest. We must also bear in mind that that was a document drawn up under the provisions of clause 1, section 9, Regulation VII. of 1822, and the revenue officer, who was responsible for that document, was bound to put a proper description of the tenure in the document, and he considered that he had sufficiently described the tenure when he called it a talook. That document is by the express words of that section declared to be an evidence available for the purpose of proving the title of the persons claiming tenures in the land in question. Therefore this case stands thus—there was a document which apparently the District Judge has overlooked, which distinctly states that this talook was in existence in the year 1836. There is absolutely nothing in the case upon which any Court could find either that that talook was not a permanent tenure, or that it was not, when this suit was brought, a valid and subsisting one. Therefore, we should not be justified in remanding this case when we see that the Judge would be bound to hold that at the time when this suit was brought, the defendant No. 2 had a valid existing tenure as against the zemindar, and that therefore the defendant No. 1 as

grantee of the defendant No. 2 had a valid existing title as against the plaintiff, the grantee of the zemindar.

Therefore, upon the ground that this chittah establishes a good *primâ facie* case on the part of the defendant, which has not been met, we think that the judgment of the District Judge must be reversed, and the decree of the Subordinate Judge dismissing the suit restored, although not precisely upon the grounds stated in his judgment. The appellant is entitled to his costs of this appeal and of the lower Courts.

The 13th July 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree—Construction—Mesne Profits (Wassilat)—Adjustment in Execution—Limitation.

Case No. 67 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 19th December 1873, reversing an order of the Moonsiff of that District, dated the 31st May 1873.

Bunsee Singh (Decree-holder), *Appellant,*

versus

Mirza Nuzuf Ali Beg (Judgment-debtor), *Respondent.*

Mr. Ameer Ali for Appellant.

Moonshee Mahomed Yusuf for Respondent.

A decree awarding possession with wassilat from the date of suit is rightly construed as awarding mesne profits until the date when delivery of possession shall be effected, and reserving the question of the amount for adjustment in execution.

Such adjustment of mesne-profits is not an execution of the decree, but a continuance of the suit, and the steps towards assessing them cannot be taken until possession is obtained; but they should be instituted promptly within a reasonable time after possession, and be pursued diligently without unnecessary break.

Phear, J.—We think that the Judge has erred both in regard to the construction which he has placed upon the decree and also in regard to the question of limitation.

The decree awards the plaintiff possession of the subject of suit, and also directs that the plaintiff do recover wassilat from the date of suit from the defendants. It is true that it omits in words to specify the time up to which wassilat is to be calculated. But we think that there can be no reasonable doubt that the Court intended its order with regard to wassilat to conform to section 196 of the Civil Procedure Code. That section is in these words: "When the suit is for "land or other property paying rent, the "Court may provide in the decree for the "payment of mesne profits on such land or "other property from the date of the suit "until the date of delivery of possession to "the decree-holder, with interest thereupon "at such rate as the Court may think "proper."

And when the Court decreed, as was done in this case, that possession of the property should be given to the plaintiff, and further went on to direct that the plaintiff do recover wassilat from the date of suit, it in effect makes the exact order which is contemplated by section 196. And it is obvious from the terms of the order that the wassilat or mesne profits, which are the subject of it, must be estimated or adjusted during the execution-proceedings. It is not until possession of the land has been obtained that the full amount to which the plaintiff is entitled under such an order as this can be estimated. And therefore it appears to us that the order which the Court attached to its decree for possession in 1864 did award to the plaintiff mesne profits from the date of suit until the date when delivery of possession should be effected, and reserved the question regarding the amount thereof for adjustment in the execution of the decree, within the words of section 11, Act XXIII. of 1861. And when the present special appellant in November 1872, after reciting that all that remained to him was to collect wassilat, asked for wassilat from 1270 to 1277, according to *fusl bhudwee and fusl khureef*, appended to his application, he was in fact asking for adjustment of the wassilat or mesne profits reserved to be adjusted in the execution of the decree by the decretal order of 1864.

We further think that this application for adjustment or assessment of mesne profits was not on the facts found by the Lower Appellate Court barred by limitation. On another occasion, in the case which is reported in 21 Weekly Reporter, p. 212, we have given the reasons which led us to the opinion that the adjustment of mesne profits under a decretal order is not an execution of a decree, or an application for the enforcement of the decree, within the words of section 2 of Act XIV. of 1859. In the judgment which was delivered on that occasion, it was sa-

"that proceedings after a decree and pending "the matter of execution, taken for the pur-"pose of assessing wassilat, are independent "of the decree, at least in this respect, "namely, that they are not taken by way of "obtaining satisfaction of the decree, but "are merely carried on in pursuance of the "order which was made at the time of mak-"ing the decree to the effect that wassilat "should be assessed or estimated in the "course of the execution-proceedings. The "decretal order may be considered as of two "parts—that which was final and in reality "a decree for possession and for money, and "that which was incomplete, namely, the "award of such damages as should be "afterwards assessed pending the execution-"proceedings."

And applying these words to the present case, it is plain that the steps for the estimating or assessing or adjusting of mesne-profits, from the date of suit up to the date when the plaintiff obtained possession, could not have been instituted until that possession was obtained; that is, could not have been instituted until the 18th January 1870. And the application of the 8th November 1872 was not even three years distant from this date.

At the same time it was pointed out in the case cited that, taking the view that these proceedings are in themselves of the nature of a trial, and that they constituted a continuation of the suit between the parties, they ought always to be instituted promptly, at the latest within a reasonable time after the date on which possession was obtained by the judgment-creditor, and then should be pursued diligently without any unnecessary break, as all necessary proceedings in a court of justice *inter partes* ought to be pursued.

Although, therefore, in our opinion, the proceedings set on foot by the application of the 8th November 1872, for the purpose of assessing wassilat, were not barred by any rule of limitation, yet it was right that the Court should consider whether or not they were instituted promptly, and pursued with sufficient diligence by the plaintiff.

This question does not seem to have been entertained and determined by the Lower Appellate Court, and therefore, while we think the Court is wrong in the decision at which it has arrived on the issue of limitation and the question relative to the construction of the decree, and that for this reason the decree of the Lower Appellate Court ought to be reversed, still we think that the case must go back to that Court for trial of the question whether or not these proceedings for the assessment of wassilat have been instituted and carried on by the plaintiff with promptitude and with due diligence. If the Court should be of opinion that they have been, then it ought to issue the necessary order for the assessment of the wassilat.

Costs of this appeal will abide the event.

The 13th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Criminal Proceedings — Act X. of 1872, s. 430 or 432 — Declaratory Decree — Act VIII. of 1859, s. 15.

Case No. 2118 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 12th May 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 4th January 1872.

Kartick Paramanick (Defendant), *Appellant,*

versus

Kishen Mohun Mitter (Plaintiff), *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboos Hem Chunder Banerjee, Obhoy Churn Bose, and *Mohendro Lall Mitter* for Respondent.

Certain criminal proceedings having been successfully taken against plaintiff's tenants for mischief done in respect to a nullah, coming under either section 430 or section 432 of the Criminal Procedure Code, plaintiff brought a suit in the Civil Court for a declaration that the nullah was his own exclusive property, and therefore not such a stream as could come under either of those sections:

HELD that it was within the discretion of the Court, under section 15 of the Civil Procedure Code, to allow such a suit to be brought.

Markby, J.—IN this case the special appellant before us had taken proceedings in the Criminal Court against the tenants of the plaintiff, either under section 430 or section 432 of the Indian Penal Code, for mischief done in respect to a nullah coming under one of those two sections. These proceedings resulted in the conviction of the parties accused. Thereupon the plaintiff brought this suit for a declaration that this nullah was his own exclusive property, which he or his tenants could either close or open at their pleasure, and therefore, in fact, denying that

this was such a stream as could come under either of those two sections. An issue was raised whether, as the plaintiff alleged, he owned and held the disputed nullah and the lands appertaining to it. That issue, as well as the other issues, have been found in favour of the plaintiff, and he has got a decree declaring against the defendant that this nullah is his property, which, of course, is subject to the ordinary limitation that no person can use his property so as to injure another. The only question which we have to determine now is whether or no such a suit will lie. Now, it is not contended in this case that the matter is not a matter of purely civil cognizance. It is a matter which the Civil Court must eventually decide whether this nullah is the absolute property of the plaintiff, or whether the defendant has any rights over it. It is also clear that the defendant disputes the rights of the plaintiff, as is shown by the issue we have read, nor can there be any doubt that a dispute between the parties as to this matter was imminent, and that that dispute would come before the Civil Court in some shape or other. The only question is whether the plaintiff was bound to take some such proceeding as might be necessary for again stopping up the nullah, and to wait till the defendant himself or his servants commenced to remove or interfere with the obstruction, and then bring a suit for trespass. Now, it seems to us that there being a *bonâ-fide* dispute between the parties, which must sooner or later go before the Civil Court, and that the defendant was really denying the plaintiff's right, and had shown his intention to act upon that denial, the case comes within the discretion of the Court, under section 15 of the Civil Procedure Code, to allow such a suit to be brought. It appears to us that not only does the case come within the law, but that it would be very much more convenient that the question should be raised in this way. It is better for the public peace, and more for the convenience of the public in general, that the plaintiff, instead of (in a manner) setting at defiance the order of the Criminal Court, and again stopping up this channel, should resort at once to the Civil Court, and there as a plaintiff establish his right to the property against the person who has denied it. Upon these grounds we think that the Lower Appellate Court was right in holding that the suit would lie under section 15, and that it has exercised a proper discretion in allowing it to proceed.

The special appeal is dismissed with costs.

The 14th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Court of Execution—Evidence as to Subject of Decree—Duty of Judgment-debtor.

Case No. 123 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 13th February, 1874, affirming an order of the Officiating Extra Moonsiff of Durbhangah, dated the 11th September 1873.

Bhugobat Singh (Decree-holder), *Appellant,*

versus

Ram Adhin Singh (Judgment-debtor), *Respondent.*

Baboo Aubinash Chunder Banerjee for Appellant.

Mr. J. Younan for Respondent.

A Court executing a decree is competent to take evidence in order that it may ascertain what is the subject upon which the decree operates, and the judgment-creditor should not be referred for that purpose to a regular suit.

Where a judgment-debtor maintains that the property which the judgment-creditor specifies is not the subject of the decree, he is bound to point out the actual property concerned.

Phear, J.—We think that the decisions of the lower Courts are wrong in this matter.

The appellant, judgment-creditor, who had obtained a decree upon a bond directing that the property, the subject of the bond, should be sold for the realization of the money secured by the bond, made an application to the Court charged with the execution of the decree, asking that certain property which he specified should be sold in satisfaction of that decree. Either the Moonsiff to whom this application was made, or the judgment-debtor himself, appears to have objected that the property named by the judgment-creditor did not appear to correspond with the property which was the subject of the decree.

If the judgment-debtor made this application, then no doubt it was the duty of the Moonsiff to inquire whether it was well founded or not, and, for this purpose, to take any evidence which might be necessary to determine the question of identity. The Moonsiff seems to have understood the judgment, which is reported in 12 Weekly Reporter, p. 99, as an authority against this course. But, in truth, it is not so; the case merely decided that it is not compete

to a Court which is called upon to execute a decree, to take evidence for the purpose of ascertaining what is the meaning of the decree. The decree must speak for itself. But there is nothing whatever to prevent evidence being taken by the Court in order that it may ascertain what is the subject upon which the decree operates. And indeed this is done every day in cases where the judgment-creditor calls upon the Court to put him into possession of the property which has been decreed to him, and the Court sends down an officer to the locality for the purpose of giving him formal possession. That officer, by the aid of the best evidence which he can discover on the ground, ascertains the land which is the subject of the decree, in order that he may give over possession of it according to the terms of the decree.

Supposing the decree in question had been one which directed delivery to be made of certain bags of rice described by specified marks, and supposing the fact was that the bags referred to had at one time borne these marks, but that they had been subsequently obliterated, would not the judgment creditor, notwithstanding this obliteration, have a right to prove, if he could, that certain bags of rice in the defendant's possession without these particular marks were nevertheless the identical bags which had borne those marks, as, for instance, by tracing their history, and showing that they had always been kept in the same godown?

Nothing could be well easier in the present case than for the Court to ascertain, upon evidence adduced by both sides, whether or not the property specified by the judgment-creditor in his petition of June 1872 is identical with the property which is the subject of the decree. And the Moonsiff should remember that, in an inquiry of this kind, the judgment-debtor, if he maintains that the property which the judgment-creditor specifies is not the subject of the decree, is at least in honesty bound to point out what is the actual property, the subject of the decree.

The Judge was plainly in error in referring the petitioner to a regular suit. A second suit would lie between the parties to a first suit in order to have it determined what was the subject to which the decree in that first suit applied, this process might go on for ever, and there would be no finality to litigation; and indeed section 11 of Act XIII. of 1861 expressly forbids such a suit.

With these views, we think that the orders of the lower Courts must be reversed, and the case sent back to the first Court in order that it may entertain and determine on its merits the application of the judgment creditor, which was made on the 19th June 1872, and afterwards renewed.

The appellant must have his costs in all the Courts.

The 14th July 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Evidence of Defendant on Commission—Jurisdiction.

Case No. 2953 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 15th September 1873, affirming a decision of the First Moonsiff of that District, dated the 20th June 1872.

Rajah Prithee Bullubh Pal Sreechundun Mari Sultan (Defendant), *Appellant,*

versus

Hara Dhun Shome (Plaintiff), *Respondent.*

Mr. M. M. Ghose and *Baboo Doorga Doss Dutt* for Appellant.

Baboo Rash Beharee Ghose for Respondent.

A Court may legally refuse to hear read in evidence the deposition of a defendant taken by commission, where there is no evidence to prove that the defendant was from sickness unable to attend personally at the time of the trial, and the Court declines to dispense with the proof of such circumstance.

THE only point urged in this special appeal is that contained in the fourth ground of the

petition. The present suit was instituted so far back as the 4th of August 1869, and the case has been twice before the Moonsiff and twice before the District Judge. The questions involved in the case are mainly questions of fact, and both the Courts below, on a careful examination of the evidence, have come to the conclusion adverse to the special appellant. It has been strongly pressed upon me that this conclusion is erroneous, and the case ought to be remanded for re-trial, because the Courts below have excluded from their consideration the deposition of the special appellant taken under commission.

It appears that, after the case was remanded, the plaintiff, on the 5th of March 1872, made a special application to the Moonsiff for an order requiring the attendance of the defendant, special appellant, as a witness. On a rule being issued, the special appellant at first objected to be examined as a witness. Amongst other grounds of objection, it was alleged that he would not be competent to give any material evidence, because the transactions he was called upon to depose to were alleged to have occurred during the time of his ancestor. His objections were overruled, and he was ordered to attend as a witness. Failing in this, he again made another application, stating that from sickness he was unable to attend before the Court, and therefore prayed the Court to order a commission to issue for his examination at his house. Although at first this prayer was also rejected, yet, on his repeated solicitation, it was granted, notwithstanding that the plaintiff was strongly opposed to it. On the Commissioner proceeding to the defendant's house at Naraingurh, he failed to attend before him, and the deposition was not accordingly taken. Upon this the defendant again made an application to the Court, stating that it was not from his fault that his deposition had not been taken, but that the Commissioner had gone to a wrong place, because he was not residing at his house at Naraingurh, but at Benaigurh, and again prayed to be allowed to give his deposition before the Commissioner at his Benaigurh house. The plaintiff again opposed this application but unsuccessfully, and the defendant's prayer was granted. Two days before the defendant was examined, *viz.*, on the 6th of May, plaintiff again made an application to the Moonsiff, asking him to re-consider his order, and denying the fact of the defendant being from sickness unable to attend before the Court. Upon this application the Moonsiff took evidence, and decided that his original order should not be altered. The examination of the defendant took place before the Commissioner on the 8th of May, in the absence of the plaintiff or his pleader. The plaintiff again made an application urging various grounds against the deposition being admitted.

The Moonsiff, for the reasons stated in his order dated the 13th of May 1872, rejected this application, but making this observation that the plaintiff was quite at liberty to decline to read it in evidence at the time of the trial if he was so advised. Then what occurred at the trial may be best gathered from the following passage in the Moonsiff's judgment:—

"I may add that the Rajah was examined on "commission; but, as the plaintiff had, before "the Commissioner, declined to examine the "Rajah, and was not present when the latter "was examined, I thought it proper not to "allow his deposition to be read at the trial."

From this observation, and also from other proceedings adverted to above, it is clear that, although the plaintiff moved the Court at first to examine the defendant, yet the deposition of the latter taken under commission was not offered by the plaintiff as evidence at the trial, and most probably it was tendered by the defendant himself. The Moonsiff, for the reasons stated above, refused to allow it to be read in evidence. The question in special appeal is whether this order of the Moonsiff is contrary to law. The District Judge in his judgment does not allude to this question at all, although it appears to have been raised before him in the written grounds of appeal. But I may take it that he concurs with the Moonsiff in this that the deposition should not be allowed to be read in evidence; because, in effect, though not in so many words, that is stated to be the case in the written ground of the special appeal which has been urged before me.

Now, it appears to me that, under the provisions of section 179 of Act VIII. of 1859, the Moonsiff's order refusing to allow the deposition of the defendant to be read in evidence cannot be questioned as erroneous in law. The last part of that section provides that "no deposition taken under a commis-"sion shall be read in evidence without the "consent of the party against whom the "same may be offered, unless it be proved "that the deponent is beyond the jurisdiction "of the Court, or dead, or unable, from sick-"ness or infirmity, to attend to be personally "examined, or distant without collusion "more than a hundred miles from the place

"where the Court is held, or exempted by "reason of rank or sex from personal appear-"ance in Court; or unless the Court shall, "at its discretion, dispense with the proof of "any of the above circumstances, or shall "authorize the deposition of any witness "being read in evidence, notwithstanding "proof that the causes for taking such depo-"sition have ceased at the time of reading "the same."

I have shown above that this deposition was offered at the trial by the defendant against the plaintiff, and certainly the latter did not give his consent to it. This being so, it could be read in evidence, if any one of the circumstances mentioned above had been proved, or the Court, at its discretion, had dispensed with their proof. Now, though on the 6th of May 1872, it was proved before the Moonsiff that the defendant was from sickness then unable to attend to be personally examined, yet there was no evidence adduced to prove that he continued to be so at the time when the trial took place. It was contended that, under this section, it was not necessary to prove the existence of any of the circumstances mentioned therein at the time of the trial, but it was sufficient if any one of them was shown to have existed at the time when the commission was ordered to be issued; and if this were not the right construction, a party might vexatiously withhold his consent at the last moment, and take entirely by surprise his opponent, who might not be ready with the evidence of a fact which had never been questioned before. But, from the plain language of the section, it seems to me that this contention is not correct, and to meet such vexatious objections as suggested in the argument, very large discretion appears to have been given to the Court to dispense with the proof of any one of the circumstances mentioned in the section. There being no evidence, then, to prove that the defendant was from sickness unable to attend to be personally examined at the time of the trial, and the Court declining to exercise the discretion to dispense with that proof, the deposition of the defendant appears to have been rightly refused to be read in evidence. Whether, under the circumstances of the case, the lower Courts were right in declining to exercise that discretion, is a question with which I cannot deal in special appeal. The special appeal is accordingly dismissed with costs.

The 16th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Partition—Right of Suit—Declaratory Decree.

*Appeal under section 15 of the Letters Patent against the decision of the Hon'ble W. Ainslie, one of the Judges of this Court, dated the 28th April 1874, in Special Appeal No. 1730 of 1873.**

Ruttun Monee Dutt (one of the Plaintiffs), *Appellant,*

versus

Brojo Mohun Dutt and another (Defendants), *Respondents.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Sreenath Banerjee for Respondents.

A shareholder in a joint estate has not right to bring a suit in a Civil Court to separate from the estate a small portion which he desires to occupy for his own convenience.

Where the main object of a suit framed and valued with reference to this end fails, the plaintiff is not entitled to turn round and ask for a declaration as to the extent of his share.

Jackson, J.—We agree with the learned Judge who heard this special appeal that in the circumstances of this case the plaintiff was not entitled to the decree he sought for. We apprehend, indeed, that, where a plaintiff desires to obtain a partition of his estate, and where that claim to partition is complicated by a dispute in respect of the amount of that share, he may bring his suit in the Civil Court in order to have his share declared, and to have the partition itself referred to the Collector as provided by section 5, Regulation XIX. of 1814. The object of the plaintiff here, however, was not to effect a division of a revenue-paying estate, nor was it a case coming within the provisions of section 30 of the Regulation, that is to say, to cut off from the estate a specific portion conveyed to him by the owners thereof. It was to enable plaintiff to separate from the estate a small portion which he desired to occupy for his own convenience. We think he is not entitled to ask for any such relief from the Civil Court.

Then it is contended that, even if that part of the relief asked could not be granted, still he might have a declaration as to the

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* *Ante*, p. 11.

extent of his share. We think, if the plaintiff sought a declaration like that, he ought to have framed his suit properly for that purpose, and that he was not entitled, regard being had to the mode in which he framed his suit and the valuation he put upon it, when the main object of the suit failed, to turn round and ask for that declaration. We think, therefore, this appeal must be dismissed with costs.

The 16th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Tenancy—Possession—Misjoinder—Non-Registration.

Case No. 64 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 29th August 1873, affirming a decision of the Moonsiff of Salkhia, dated the 14th June 1873.

Ranee Lalun Monee and another (Plaintiffs), *Appellants,*

versus

Sona Monee Dabee and others (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Mr. M. L. Sandel and *Baboo Umbika Churn Banerjee* for Respondents.

Parties in possession make themselves tenants by use and occupation, and may be sued for rent even though not registered by the zemindar.

Where a single suit for rent against the holders of several tenures is objected to on the ground of misjoinder, the mere fact of non-registration as separate holdings is no answer to the objection. The Court should inquire whether the tenants have not in fact been dealt with as holders of separate tenures.

Jackson, J.—It is admitted in this case that the judgment of the Lower Appellate Court cannot be maintained upon the grounds which the Judge has assigned for his decision, but it is not admitted, nor are we inclined to think, that the judgment is therefore wrong on the merits. The Judge concurs upon the whole case with the Moonsiff, but he has stated in his judgment certain findings of fact which, if correct, would be incompatible with the decision arrived at. The plaintiff brought a single suit for arrears of rent against a number of persons who were the holders of four tenures of land in his estate. These four tenures appear to have been at one time held by one Bijoy Ram Dutt, and it is alleged that at a very distant date, *viz.*, in the year 1202, these four tenures were enrolled together, and a lump sum of rent fixed upon them. However, it seems clear that, subsequent to the death of Bijoy Ram, these four tenures had fallen into different hands, and were acquired at different times by the several parties who are defendants in this suit. It was therefore an objection made before the Moonsiff that these parties were not respectively liable one for the other, and that the suit ought to be dismissed on the ground of misjoinder. That objection was held to be valid by the Moonsiff, and he therefore dismissed the suit, referring the zemindar to separate suits for the separate holdings. On appeal, the Judge, on the question of separate holdings, makes this observation: "I quite admit that the defendants who have appeared have not satisfactorily established their rights to separate holdings. The dakhilas filed in this case are opposed to this view. I may admit even that the non-registration in the zemindar's serishta of the various transactions under which the present defendants hold gives him the right to repudiate such transactions. But, if he does, I think he is bound to proceed only against those whom he recognizes as his tenants." Now, it may be observed very emphatically that these, which were evidently contentions of the plaintiff on appeal before the Judge, were adopted by the plaintiff only for the purpose of upsetting the theory of separate holdings advanced by the defendants, and it seems to us possible that, if the Judge had perceived the weakness of the ground on which he afterwards proceeds, he might have avoided the conclusion to which he comes as to this matter of separate holdings. The judgment of the Moonsiff was upheld, and the order dismissing the suit was maintained on the ground that the zemindar had improperly brought the suit against persons of whom by non-registration he withheld recognition as tenants. This is manifestly a weak ground. If these parties are in possession, they make themselves tenants by use and occupation of the land. But, in point of fact, it appears to us that the Judge has not addressed himself to the objection raised by the defendants. Upon that objection he ought to have inquired whether the tenures, which they respectively held, were in their origin

separate; whether they have not again found their way into different hands as separate tenures; and whether the holders thereof have not been in fact dealt with as holders of separate tenures. If that be so, the mere fact of non-registration, or the fact that the dakhilas had been worded *marfutwaree*, as they necessarily must have been worded, would be immaterial. If the Judge finds (upon a new hearing, the case being remanded for that purpose) that the case is, as we have suggested, it will be for him to uphold the judgment of the Moonsiff, and require the plaintiff to bring separate suits against the several holders of the tenures. If, however, he finds that those four tenures were indissolubly connected at the time of Bijoy Ram Dutt, and that the zemindar, in receiving rents from the present holders, has dealt with them only as representatives of Bijoy Ram and as payers of component parts of the aggregate rental, the case would be different. If the dakhilas show that the payment of separate rentals had been made as for separate tenures, that would be evidence of the holdings being separate. If the evidence shows that the amounts were paid as aliquot parts of the whole rental, that would go to show that the tenure was one. The case will go back to the Lower Appellate Court to be dealt with accordingly. The costs will follow the result.

The 16th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Enhancement of Rent—Principle of Enhancement.

Appeal under section 15 of the Letters Patent against the decision of the Hon'ble W. Ainslie, one of the Judges of this Court, dated the 6th May 1874, in Special Appeal No. 1341 of 1873.

Tikaram Singh (Defendant), *Appellant,*

versus

Mrs. Anne Sandes (Plaintiff), *Respondent.*

Baboo Gopee Nath Mookerjee for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondent.

In a suit for enhancement of rent, where the Lower Appellate Court went on the principle that, although plaintiff had not given evidence as to the rate of rent payable by tenants of the same class as defendants holding adjacent lands of similar quality, yet he had given evidence as to such lands so occupied, of a somewhat better quality, and that the rate of rent allowed, regard being had to the difference, was proper to award in conformity with the spirit of the rent-law: the decision was held to be reasonable, and was accordingly affirmed.

The judgment of Ainslie, J., appealed against was as follows:—

THE only point taken in special appeal is that the Lower Appellate Court has failed to come to any decision on the question whether the defendant is a ryot of the same class as those persons who held the lands with which his land is compared.

There is certainly no specific finding on this point, although there was a finding distinctly the other way in the first Court. I should be inclined to infer from the earlier part of the judgment that this question was in the mind of the Subordinate Judge, and that he really intended to dispose of it by the operative part which he has given.

However that may be, it seems to me that, as the point was not raised in the lower Court, it cannot be contended here that the Subordinate Judge was in error in not deciding it. The appeal will be dismissed with costs.

Jackson, J.—We think that the decision of the learned Judge below in this case is substantially correct. We do not understand the Judge of the Lower Appellate Court to have intended to find that the land occupied by the defendant was precisely similar in character to that occupied by the witnesses or other tenants of a like class holding in the immediate neighbourhood, because, if he had so found, he would no doubt have awarded to the plaintiff rent at the rate paid by those tenants. We understand him to have gone on this principle, which is also the principle adopted by the Moonsiff, that, although the plaintiff had not given evidence as to the rate of rent payable by tenants of the same class holding lands of precisely similar quality and adjacent to those occupied by the defendant, yet he had given evidence as to such lands so occupied, of a somewhat better quality than those occupied by the defendant, and that the rate of rent allowed by the lower Court was such as, regard being had to the slight difference in the quality of the lands, was proper to award in conformity with the spirit of the rent-law. This decision appears to be reasonable, and is in conformity with a decision of the High Court of the North-Western Provinces reported at 1 Agra Reports, p. 57. We think, therefore, that this appeal must be dismissed, and the judgment of the Court below must be affirmed with costs.

This judgment will govern the other two appeals.

The 16th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Code of Criminal Procedure, s. 308—Compensation—Civil Action for Damages.

Case No. 96 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 13th December 1873, affirming a decision of the First Subordinate Judge of that District, dated the 30th April 1873.

William Nicholas Love (Defendant), *Appellant,*

versus

William John Hume Ainsworth, Overseer to the Municipality at Howrah (Plaintiff), *Respondent.*

Mr. W. C. Bonnerjee and *Baboo Nobin Chunder Burral* for Appellant.

Mr. C. C. Macrae and *Baboo Gopeenath Mookerjee* for Respondent.

The expression "taken into account" in the Code of Criminal Procedure, s. 308, means that the compensation awarded by the Magistrate is to be taken into consideration by the Court in a subsequent civil suit, not that it is to be afterwards deducted from the damages awarded.

Jackson, J.—We think it is clear that the expression "take into account" in section 308 of the Code of Criminal Procedure means that the amount, if any, previously awarded as compensation by the Magistrate is to be taken into consideration, and not that it is to be afterwards deducted from the sum that may be given by the Court by way of damages in a subsequent civil suit; and looking at the decision of the Subordinate Judge in this case, considering that he had before him the words of that section, and putting upon his decision a reasonable construction which would bring it within the terms of the law, we have no doubt that he meant to give the plaintiff the sum of Rs. 500 as damages over and above what he got as compensation in the Magistrate's Court. The learned Counsel very properly did not think it fit to take up the time of the Court in arguing upon the other grounds taken in the petition of special appeal. The appeal is dismissed with costs.

The 17th July 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Alteration of Holdings by Zemindar—Consent of Tenants.

Case No. 2656 of 1873.

Special Appeal from a decision passed by the Second Subordinate Judge of Backergunge, dated the 23rd August 1873, reversing a decision of the Moonsiff of Madareepore, dated the 31st December 1872.

Ruheemuddy Akun and others (Defendants), *Appellants,*

versus

Poorno Chunder Roy Chowdhry and another (Plaintiffs), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboos Kalee Mohun Doss and *Lall Mohun Doss* for Respondents.

Where tenants hold land by different agreements, the zemindar has no right, without their consent, to break up existing holdings, and re-distribute lands so as to alter the extent and nature of the holdings.

Ainslie, J.—The plaintiffs brought five suits against the defendants, who are the appellants in this and four other special appeals, for the rents of five separate holdings. The answer of the defendants in all the suits was to the same effect, *viz.*, that they held lands of the plaintiffs by four, and not by five, different agreements, and that the plaintiffs had no right to break up the existing holdings, and re-distribute the lands so as to convert the four into five. From the judgment of the Subordinate Judge it appears that in fact there were four holdings, and that, at the end of the year 1274, the zemindar made a transfer of some of the lands appertaining to one village to another, and altered the area and jumma of the holdings. From the judgment of the first Court, it would appear that all the holdings and jummas had been broken up, and that the present holdings and jummas, though they agree in the total with the old holdings, differ in details. There is no one of the old holdings left untouched. We are of opinion that it was not necessary for the defendants to say in what manner or to what

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extent they were prejudiced by the change which the zemindar wished to introduce. It was sufficient answer to these five suits to say that there are not and never have been such holdings as those alleged in the plaints. The question comes simply to this whether the defendants are shown to have consented to the change made by the zemindar. The Subordinate Judge in his judgment says that the evidence of Anund Chunder Mojoomdar and Eshan Chunder Banerjee proves that, as far as the zemindar is concerned, the change has been given effect to by the alterations in the jummabundee and jumma-wassilbakee papers; but the fact that the zemindar has altered his accounts cannot be taken as evidence of any consent of the ryots. In the matter of consent there appears to be no evidence whatever, except the fact that, from the end of 1274 up to the early part of 1277, the rents were paid partly to one agent of the zemindar and partly to another agent. This was denied by the defendants, but the Court below has found it to be a fact, and from this payment the Subordinate Judge has inferred consent. He says: "Hence I "find that as the evidence on behalf of the "plaintiffs is more satisfactory, and as it has "been proved that, subsequent to the transfer "of the jumma, the defendants consented to "it and paid the rent, their objections with "regard to this claim and the evidence "adduced seem to be ineffectual." It seems to us that it is a very immaterial matter to a tenant in most cases whether he has to pay rent to one agent of the zemindar or to two agents, but that it is very material to him to retain his holding as it has existed from earlier days, and that the mere fact that he has made some payments according to the wish of the zemindar to particular agents is not sufficient material from which any Court ought to infer a consent to a complete change in the extent and nature of his holdings. Had there been any other evidence of consent, no doubt this payment would have been strongly corroborative, but taking it as it stands absolutely alone, we think the Subordinate Judge has gone too far, and that is not a fair and legal inference to draw from this payment that the ryot has consented to the change in his holdings. As the plaintiffs have brought these suits for rents of holdings which are not shown to have been divided with the consent of the tenants, we think that the judgment of the Moonsiff dismissing the suits was a proper judgment, and that this special appeal must be allowed. The judgment of the Subordinate Judge will be reversed, and the appellant will obtain the costs of this special appeal and also the costs of the Lower Appellate Court. This judgment will govern Special Appeals Nos. 2657 (1870), 2671, and 2672 of 1873.

The 17th July 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Ejectment by Superior Holder—Ouster—Damages.

Case No. 1824 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Tipperah, dated the 22nd May 1873, reversing a decision of the Moonsiff of Panchpookhoriah, dated the 22nd August 1872.

Chunder Nath Bhuttacharjee (Plaintiff), *Appellant,*

versus

Juggut Chunder Bhuttacharjee and others (Defendants), *Respondents.*

Baboos Doorga Mohun Doss and *Bharut Chunder Dutt* for Appellant.

Baboo Rajendro Nath Bose and *Moonshee Abdool Baree* for Respondents.

In a suit by landlord to recover arrears of rent from tenants who had been forcibly compelled, by the superior holders of a tenure over the plaintiff, to execute a kubooleut to themselves and to pay rent accordingly, HELD that such wrongful act of the intervenor-defendants (the superior holders) was not, in law, sufficient to constitute an ouster of the plaintiff, but gave the tenant-defendants a cause of action against them for damages.

In this case the plaintiff sued for arrears of rent, and his suit has been dismissed by the Lower Appellate Court on the ground that the plaintiff has been dispossessed from the land of which the rent is claimed by the intervenor-defendants.

The facts found by both the Courts below appear to be these: that the tenant-defendants were originally the tenants of the plaintiff; that they paid rent to the plaintiff and his predecessor up to the year 1273; that the intervenor-defendants, who are the superior holders of a tenure over the plaintiff, forcibly compelled the tenant-defendants to execute a kubooleut; and that from the year 1274, they succeeded in realizing the rents by force from the tenant-defendants. The present suit has been brought for arrears of rent for the years 1275, 1276, 1277, and 1278.

The simple question for decision was

whether the tenant-defendants were actually tenants of the plaintiff or of the intervenor-defendants. Now, it has been found by both the lower Courts that they were tenants of the plaintiff originally, and that they had continued to be tenants of the plaintiff down to the year 1273; and the simple question, therefore, now is, whether they have ceased to be the plaintiff's tenants since that year.

The only fact from which the Lower Appellate Court comes to the conclusion that they are no longer tenants of the plaintiff, and as such liable to pay the rent claimed, is that they have been compelled by the talookdar-defendants to pay the rents of these years to the latter. It seems to me that that fact does not destroy the relation of landlord and tenant between the plaintiff and the defendants so as to relieve the latter of the liability to pay their just debts to their landlord. The wrongful act of the intervenor-defendants by which the tenants were compelled to execute a kubooleut and to pay the rents of this land to them is not by law sufficient to constitute an ouster of the plaintiff. It is a wrongful act which gives to the tenant-defendants a cause of action to sue the wrong-doer for damages.

For these reasons I do not think, on the facts found, that the Lower Appellate Court was right in holding that the plaintiff was not entitled to the rents claimed. This special appeal is decreed with costs.

The 20th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Principal and Agent—Cause of Action—Act X. of 1859, s. 33—Act VIII. (B.C.) of 1869.

Case No. 423 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 3rd December 1873, reversing a decision of the Moonsiff of Muksoodpore, dated the 30th April 1873.

Pearee Mohun Ghose (Defendant), *Appellant,*

versus

Messrs. Jardine, Skinner, & Co. (Plaintiffs), *Respondents.*

Baboo Mohendro Lall Mitter for Appellant.

Mr. R. T. Allan and *Baboo Kumla Kant Sen* for Respondents.

The fact of an agent furnishing his principal with an account under his signature with a letter upon which a balance appeared due, is a cause of action irrespective of Act X. of 1859, s. 33; and the principle is applicable to cases decided under the present law.

Jackson, J.—The first ground of special appeal in this case is that the suit having been brought more than one year after the determination of the agency is out of time under the provisions of section 30, Act VIII. of 1869 (B. C.). But the defendant appears to have furnished, on the 6th Bysack 1277, an account under his signature with a letter upon which a balance appears to have been due, and that has been held in the case of Chowdhry Chutturpal Singh *v.* Fouzdar Roy in Marshall's Reports, p. 405, to furnish a cause of action irrespective of section 33 of Act X. of 1859. That case, no doubt, was decided under Act X. of 1859, but there does not appear to be any reason for thinking that it is not applicable to cases decided under the present law.

The second ground of objection relates to the reception of certain evidence before the Lower Appellate Court. Now it seems that Goluck Chunder Bhuttacharjee, the witness whose evidence is objected to, was a servant of the plaintiff to whom the defendant alleged he had paid the amount of the balance. He was not a witness on behalf of the plaintiff, but was called by the Court itself in the interests of justice, who, if the defendant's story of payment were true, would have proved it, but he states on oath that no money was paid to him by the defendant. We think there is no valid objection to the decision of the Lower Appellate Court, and that this appeal must be dismissed with costs.

The 20th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Suit to set aside an Adoption—Court Fees Act, Sch. II., art. 17, cl. 5—Valuation—Jurisdiction.

Case No. 285 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 18th August 1873.

Bama Soonduree Dossee (Plaintiff), *Appellant,*

versus

Soorjo Coomar Roy (Defendant), *Respondent.*

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Appellant.

Baboos Ashootosh Dhur, Kalee Mohun Doss, and *Doorgá Mohun Doss* for Respondent.

A suit to set aside an adoption, in which the plaint was engrossed on a stamp paper of the value of Rs. 10, having been dismissed, with costs amounting to Rs. 12, plaintiff filed a memorandum of appeal in the High Court, with an affidavit in which the value of the property in dispute was described as being above Rs. 5,000. The High Court ordered the appellant to pay into Court the proper amount of vakeel's fees assessed upon the true valuation of the suit. Failing to do this, the plaintiff's appeal was not allowed to proceed:

HELD, too, that a plaintiff seeking to set aside a solehnama, and thereby aiming at the possession of immoveable property, ought not to be allowed to bring his suit on a stamp of Rs. 10, and to frame it as if it were to set aside an adoption.

Jackson, J.—THE circumstances of this case are somewhat peculiar. The plaint was filed on the 24th February 1873, being dated the 14th Falgoon 1279, in the Court of the Moonsiff of Goalundo, and it describes the suit as a suit to set aside an adoption by Chundun Mala, such adoption being illegal, and the plaint was put in that Court having a stamp affixed to it of the value of Rs. 10—the plaintiff evidently relying upon the provisions of clause 5, srticle 17 of the second schedule attached to the Court Fees Act. No valuation was put upon the plaint. It would seem that by an order of the District Judge, this suit was transferred for decision to the Court of the Subordinate Judge of Furreedpore. In that Court, accordingly, the defendant put in a written statement on the 3rd July 1873, and the very first point taken in the written statement was the absence of any valuation in the suit. The case was finally heard, it would seem, on the 11th August, and judgment was delivered on the 6th August, and by that judgment the Subordinate Judge dismissed the plaintiff's suit, apparently, on the ground of the absence of valuation, and because a declaratory decree could not be made in such a suit, unless the plaintiff would be entitled to consequential relief, if he asked for it. He also held that the suit was clearly out of time. On these several grounds the suit was dismissed, and the evidence was not gone into.

The plaintiff has come in regular appeal to this Court. By the Civil Courts Act (VI. of 1871), section 22, it is provided that appeals from the decrees and orders of Subordinate Judges and Moonsiffs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000, in which case the appeal shall lie to the High Court. The appellant has endeavoured to bring herself within the terms of that section by simply annexing to the memorandum of appeal an affidavit in which the value of the property in dispute is described as exceeding Rs. 5,000—that is, as amounting to Rs. 32,000, or more. It seems to us that in order to entitle an unsuccessful party in a suit tried by the Subordinate Judge and appealed to the High Court, it is necessary that the suit should be valued, so that it might be at once patent that the subject-matter in dispute exceeds Rs. 5,000. The plaintiff in this suit evidently did not desire to signify or explain that that was the value of the subject-matter, because he not only abstained from giving any valuation, but actually brought his suit in the Moonsiff's Court, and the Moonsiff has jurisdiction, by section 20 of the Civil Courts Act, only in cases where the amount or value of the subject-matter in dispute does not exceed Rs. 1,000, and from the commencement to the end of the proceedings, the plaintiff never mended, or offered to mend, the value of the suit by raising the sum above Rs. 1,000. These circumstances coming to our notice, when the appeal came on for hearing, we inquired into the matter, and we found that not only was this so, but that in the decree by which the suit was dismissed the defendant had only the sum of Rs. 12-5 allowed to him as costs. It appeared to us that it would be quite unfair to the defendant, who was in the possession of the judgment of the Court below, to allow plaintiff to come before us in appeal with these inconsistent allegations, that the suit in the Court below should be framed without any valuation, and the defendant, on the suit being dismissed, should only get Rs. 12 as costs, and yet, for the purposes of appeal, the suit should be considered as involving a value of Rs. 32,000, evidently showing that the defendant must have been put to very great costs indeed. We therefore ordered that before the plaintiff could proceed with her appeal, she should pay into Court the proper amount of vakeel's fees assessed upon the true valuation of the suit. A week's time

was first allowed to her for this purpose, and then a further week's time was allowed, and finally, on the appeal being called on to-day, the appellant's vakeel says that his client is not inclined, and is not in a position, to pay the amount. The question then is whether or not we should hear the appeal. We are clearly of opinion that, under the circumstances of the case, we ought not to do so. The suit appears to have been framed in a most extraordinary fashion. It is called a suit to set aside an adoption on the ground that it is illegal. The date of the adoption is not disclosed, but it is merely stated that the plaintiff's mother, at the latter end of Falgoon 1267, gave out that she had adopted the defendant, and as the plaint is dated 14th Falgoon 1279, it is clear that twelve years, within two or three days, must have elapsed since the plaintiff's mother announced to the public that she had adopted the defendant; so that, in all probability, more than twelve years must have elapsed since the cause of action arose. But the cause of action, it is stated in the plaint, did not arise from the date of the adoption, but from the date of a solehnama executed between the parties in 1273, under which, it is said, the defendant was allowed to be in possession of 10-annas share of the immoveable properties left by his adoptive father; and, apparently, it is sought by this suit to have the solehnama set aside, with a declaration that the adoption is invalid, and to arrive by that means to the possession of some title to immoveable property. We are of opinion that the plaintiff ought not to be allowed to frame her suit in that fashion, to seek to set aside the solehnama, and thereby aim at the possession of immoveable property, and bring her suit on a stamp of Rs. 10, as if it were a suit for setting aside the adoption only. The defendant further appears to have raised the contention that this being a suit to set aside an adoption, it ought to have been brought within six years from the date of the adoption. There seems to be good reason for thinking that the contention is well-founded, and if so, it would be a further reason for throwing out the present suit. At any rate this is not a suit which ought to have been carried on in the Court below, and we think that the lower Court was right in dismissing it, and that the appellant ought not to be further heard in this appeal when she has failed to comply with the order of this Court. The appeal must be dismissed, and the appellant must pay the respondent's costs, to be assessed on the valuation stated in the affidavit.

The 20th July 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Right of User—Waste Land—Interruption.

Case No. 2372 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 12th May 1873, reversing a decision of the Moonsiff of Lushkerpore, dated the 30th December 1872.

Shaikh Mahomed Ansur (Plaintiff), *Appellant,*

versus

Shaikh Sefatoollah (one of the Defendants), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Debendro Narain Bose for Respondent.

A right of user over a pathway may be established notwithstanding that the path passes over waste land.

A temporary interruption, such as during the rainy season, cannot affect a right of user.

THIS suit is a good illustration of the danger of putting any arbitrary limitation upon the valuation of special appeals. The suit is valued at Rs. 2, but the subject-matter of it is of vast importance to the plaintiff, and, therefore, if the valuation of a suit were to be looked at alone in estimating the propriety of admitting a special appeal the plaintiff in this case would be entirely shut out from obtaining redress. The subject matter of the suit is that the plaintiff

claims a right of way over some waste lands situated to the south-west of his house, to enable his cattle to reach a piece of waste grazing ground, which ground is common to the village. Therefore it is a matter of very great importance to the plaintiff, if he possesses that right, that he should not be deprived of it.

The Court of first instance, after deputing an Ameen, came to the conclusion on the evidence that the plaintiff had clearly proved his right of user, and that he had enjoyed that right for more than 20 years. He therefore gave the plaintiff a decree to this effect that it be declared that the plaintiff's right of road lies over the place marked in purple colour in the Ameen's map; that the said place be cleared, and a right of road given to the plaintiff. The Subordinate Judge has reversed this decision. There can be no question that the law the Subordinate Judge lays down is clearly wrong, and this much is admitted by the pleader for the respondent who candidly said that he could not support the Subordinate Judge's view of the law. What the Subordinate Judge says amounts to this: That a right of user over a pathway cannot be established where that path passes over waste land. If that was good law, the right of user over almost every pathway in the mofussil would be lost, inasmuch as almost every pathway lies over waste land. Then he goes on to say that, because the cattle do not pass over this path in the rainy season, the plaintiff can have no right of user. The reason for this is obvious, as the pathway is then more than six feet under water, and it would therefore be useless to send cattle to graze in that direction; but this temporary interruption cannot affect the plaintiff's right. Then the Subordinate Judge's illustration of the law is also most extraordinary. He says: "Suppose a party builds a house in a field where horses and palkees passed before, would that give the right to drive horses through that house?" I must confess I do not see the force of this illustration.

I thought at one time that it would be necessary to remand the case, but the valuation of the suit is so very small that I do not wish to put the parties to further expense by prolonging this litigation. I have therefore had the evidence read, and I find with the Moonsiff that the plaintiff has fully proved his case. I therefore decree this appeal, restore the decision of the Moonsiff, and reverse that of the Subordinate Judge with costs.

The 13th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Court of Chancery—Contract—Inadequate Consideration — Hindoos — Mitakshara Law — Acquiescence.

Case No. 131 of 1873.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 28th May 1873.

Jugo Bundhoo Tewaree (Defendant), *Appellant,*

versus

Kurum Singh and another (Plaintiffs), *Respondents.*

Messrs. G. H. P. Evans and *R. E. Twidale* for Appellant.

Mr. H. Millet for Respondents.

Assuming that the same principles are applicable here as in the English Court of Chancery, the High Court held that although in a class of cases without positive fraud a contract may be set aside unless it is shown to have been made upon adequate consideration, yet, as a general rule, before the defendant is called upon to prove that he has given full value for property sold to him, the plaintiff must first make out that the parties to the bargain were dealing on terms so unequal as to render it improper for a Court of justice to enforce any contract they may have made, unless it can be shown that the contract was in fact one which a prudent person with proper advice and assistance might well have made.

In the absence of all evidence to the contrary, a Hindoo must be considered to be governed by the Mitakshara law where it prevails.

Before a man can be held to have given by his conduct an implied assent to a transaction, especially one which operates as a conveyance of a valuable estate, it must be shown that he was fully aware of what the transaction was, and what effect it would have upon his interests at the time he so conducted himself as to indicate assent.

Markby, J.—In this case the plaintiffs sue to set aside a certain mokurruree lease dated the 24th July 1863. They allege that their father, Dookhee Mahtoon, being old and infirm and incapacitated, gave up business in the year 1850, from which time the plaintiff, Kurum Singh, entirely managed his property. That in the year 1863 the plaintiff, Jhagur Roy, being in prison, their father came to Ranchee, when the defendant Jugo Bundhoo Tewaree craftily proposed to the said Dookhee that if he gave him the lease of the mouzah, he would by some stratagem effect the liberation of his son. Your petitioner's father, being utterly uneducated, strickened and enfeebled by age, afflicted

with dimness of sight, and moved by paternal feelings of tenderness in the sure prospect of the release of his son, consented to grant him the lease; thereupon the defendant, availing himself of the ignorance of the old man, fraudulently, on the 23rd Sawun 1920 Sumbut, prepared a mokurruree deed, representing it to be a ticca or farming lease, and had the Cazee's seal affixed to it.

The plaintiffs then go on to say that upon the defendant publicly declaring that he had obtained a mokurruree lease, their father and the plaintiff No. 1 both protested and sought to recover possession by a summary order, but were directed to have recourse to a civil suit, and the defendant has been ever since in wrongful possession.

The plaintiffs also contend that the property being ancestral, the alienation, even without fraud, is void as against them.

The issues raised were as follows :—

1st.—Whether the plaintiffs' suit is barred under clause 7, section 1, Act XIV. of 1859, the claim not having been preferred within three years from the date of the order passed under section 318 of the Criminal Procedure Code ?

2nd.—Whether the plaintiffs fall under any class of Hindoos to whom the Hindoo law is applicable ; and, if so, whether the Mitakshara law is applicable to the question of alienation in this suit ?

3rd.—Whether the plaintiffs' father was in a fit state to transact business at the time of executing the deed of alienation, and whether he was fully aware of its nature and effect ?

4th.—Whether the deed was obtained by the defendant from the plaintiffs' father by fraudulent means, or any undue influence or misrepresentation ?

5th.—Whether the alienation made by the father was made with the knowledge and consent of his sons (the plaintiffs) ?

6th.—Whether there was any cause or legal necessity sufficient to justify the alienation on the part of the father ?

7th.—Whether, subsequent to the father's death, the plaintiffs, the sons, have actually received rent from the defendant, and whether their doing so is tantamount to an admission of their consent to the alienation, and consequently to the validity of the defendant's title ?

It is to be observed that there is no issue as to the execution of the deed.

The mokurruree lease was produced by the defendant and filed with his written statement on the 21st August 1872. The issues were settled on the 28th August 1872, and there can therefore be no doubt that the mokurruree lease produced is that which the plaintiffs allege to have been obtained from their father by fraud, and which they seek to set aside.

The witnesses called by the plaintiffs to speak to the circumstances under which the mokurruree lease was executed are Choonnoo Mahtoon, Hurreea Singh, and Tohal Singh. They say that Dookhee came to Ranchee to get his son released, and that the defendant told him that, if he would grant the lease, the defendant would get his son liberated ; that whilst at Ranchee he put up at the house of one Beharee Doss ; and two of these witnesses say that Dookhee Mahtoon was very aged and infirm, and had lost his sight : they say also that the lease was not read over before it was signed, and that besides themselves no one else was with Dookhee Mahtoon when he executed the lease. The name of the witness Tohal Singh appears as one of the attesting witnesses to the lease.

The defendant has called Beharee Doss, Lall Sree Bunwaree Sahoy, Megnath Moneda, three of the attesting witnesses to the deed, and another, Tohal Singh, whom he puts forward as the fourth attesting witness. He has also called Deo Narain Roy, Runjun Singh, and Kurum Singh (not the plaintiff); and he has given his own evidence. Their account of the transaction is that when Dookhee Mahtoon executed the lease he was in full possession of his faculties ; that his son, the plaintiff Kurum Singh, was present ; and that the lease was read over in the son's presence before it was signed.

Upon a consideration of this evidence, we feel bound to say that we think that there is no comparison between the two in point of credibility. The Deputy Commissioner has wholly disbelieved the evidence of the defendant's witnesses, and we should feel great difficulty in forming a judgment upon this point diametrically opposed to his, did it not appear to us that his judgment was based, to a considerable extent, upon a misconception of what the witnesses say. The Deputy Commissioner considers that some of the witnesses state that the deed was written out and executed on one day, and attested the next, whereas other witnesses state that the deed was executed and attested upon the same day. In fact, however, there is no such conflict of testimony. Our translation at first seemed to support the Deputy Commissioner's view, but we have referred to the original depositions, and all the wit-

nesses agree that the document was written on one day, and executed and attested the next.

On the other hand, there are two circumstances which the Deputy Commissioner has overlooked which appear to us to tell strongly upon this point in the defendant's favour. In the first place, the three witnesses of the plaintiffs tell a story which is not that put forward in the plaint or the issues, and which is not now insisted on. There is no pretence that Dookhee Mahtoon ever executed more than one document, and, as we have said, no question was raised that the document so executed was the document produced by the defendant. But these witnesses tell a different story. They speak to a different document altogether, not attested by the same persons, and granting, not a mokururee tenure, but a three years' tenure only.

It might, no doubt, have been competent to the plaintiffs to say, upon this evidence being given, that they were taken by surprise; that they adopted this evidence as true, and have asked to alter the issues accordingly. But they did not do so. As to the course taken in the Court below we have no exact information; but the issues were not altered; and in this Court the Counsel for the plaintiffs, though not abandoning this evidence, has very carefully abstained from adopting the view which these witnesses put forward. This, no doubt, it would be very dangerous, if not impossible, for the plaintiffs to do; because, as we shall show presently, this view of the case was not a new one; it had, in fact, already once been put forward and had been abandoned. We think, therefore, that we must take it (notwithstanding some portions of the Deputy Commissioner's judgment in which a different view appears to be taken) that the plaintiffs do not now, any more than they did when this suit first commenced, deny the execution of the mokururee lease produced by the defendant; and this being so, and there being no pretence that two deeds were executed, it is impossible to accept the story told by these witnesses as true.

In the next place (and this also the Deputy Commissioner has failed to observe), Kurum Singh was distinctly challenged to come forward and give his evidence. The defendant desired that he should be summoned, and he was summoned, and his pleader promised that he should attend; but the promise was never fulfilled. It appears to us that Kurum Singh's refusal to come forward greatly strengthens the defendant's case.

There are other circumstances which favour the case of the defendant on this point. The witness, Lall Sree Bunwaree Sahoy Deo, seems to be a respectable zemindar, unconnected with either party. It is not likely that he would commit gross and deliberate perjury. Nor is it likely that Deo Narain, also a zemindar, would make a false statement for the defendant's benefit. He also appears to be quite an independent person.

The Deputy Commissioner places very great reliance on the fact that a property now producing Rs. 1,200 a year has passed into the hands of the defendant for what he justly calls by comparison the paltry sum of Rs. 115; and, no doubt, if that were an exact statement of this transaction, it would be a matter, to say the least, of very great astonishment. Whether even then the Deputy Commissioner would be fully justified in the use he has made of this circumstance is perhaps open to question, but we need not consider this more particularly, because here again we are compelled to say that we cannot concur with the Deputy Commissioner in his finding on the facts. It is extremely difficult at this distance of time to ascertain exactly what the state of things was when this mowrosee lease was granted, but this is clear that Dookhee's possession was not uncontested. His title to anything beyond 42 haths was wholly denied by one Ram Mohun Singh and the elder Ranee, whilst it was supported by the younger Ranee. There were enquiries then pending as to who was in possession, and proceedings were also being taken in the Criminal Courts. These proceedings ultimately resulted in the defeat of Ram Mohun and the elder Ranee, but that was not till after the grant of the mokururee, and it is impossible to say now with certainty what the chances of success were when this document was executed. It must be borne in mind that Dookhee Mahtoon had no pottah, and of necessity, therefore, his title was a very precarious one, had he been driven into the Civil Court to establish it.

The dilemma to which the Deputy Commissioner has sought to reduce the defendant is, we think, a false one. He asserted, no doubt, in the former proceedings that he was in possession of the whole property comprised in the lease; and he did so successfully. But, as we have said, that possession was a contested one, and as regards the point now under consideration, the question is not so

much who was able to succeed in a case under section 318 of the Criminal Procedure Code, but what rents were actually collected by Dookhee Mahtoon? Whether in any of the cases put forward the defendant has asserted more than was actually the case, it is, upon the information before us, impossible to say. But we do not think it follows merely from the result of these decisions that the evidence which the defendant has now given on this part of the case is entirely false. Nor is it a sound argument that the increase in the income shown by the defendant's accounts does not correspond with the decrees obtained by the defendant. Though the ryots in these cases may have predilections of their own, still their interest will always lead them to side with the winning party; and whenever the defendant was successful in one case, a large number of ryots would very likely go over to his side.

The real question is what rents had Dookhee Mahtoon been able to collect; and the person who could give the best information upon this is Kurum Singh, whose own case is that he managed the property at the time when the lease was granted, and who could show us exactly what was collected; but he does not choose to come forward.

We are far from saying that the defendant has established affirmatively that he paid the price which the property might have been made to fetch, had Dookhee Mahtoon been a man of the same skill, energy, and ability as the defendant. There could be no market-price of land sold under such circumstances. The purchase was a mere speculation; and very likely Dookhee Mahtoon was wanting in the qualities which would enable him to make head against the powerful opposition he had to encounter. But, after allowing for all this, and whilst we disagree with the Deputy Commissioner in thinking that the inadequacy of the consideration is so gross as to warrant in itself an inference of fraud, we still think that the price paid was below that which might have been obtained for the mokururee tenure. But though the consideration may have been inadequate, we do not think this is a case in which a Court of justice can set aside the transaction on the ground of the inadequacy of consideration. This part of the case, and in fact the case throughout, has been argued upon the assumption that the law upon this subject is identical with that of the English Court of Chancery. It is, however, a matter which at the proper time will require consideration whether the provisions of the Indian Contract Act upon this point are not applicable. We prefer, however, to deal with this case on the assumption made by both sides in the argument that the same principles are applicable here as in the English Court of Chancery. There appears to be a class of cases in which it is held in England that without positive fraud the contract may be set aside, unless it be shown that it was made upon adequate consideration; and the plaintiffs have contended that this is one of those cases. But we believe that, as a general rule, whenever the defendant has been called upon to prove that he has given full value for property which has been sold to him, the plaintiff has first made out that the parties to the bargain were dealing on terms so unequal as to render it improper for a Court of justice to enforce any contract they may have made, unless it can be shown that the contract was in fact one which a prudent person with proper advice and assistance might well have made. We need not, however, repeat the reasons for holding that the plaintiffs have not given us any reliable account of the transaction in question. They have not, in our opinion, laid before us a true account of the relative position of the parties at the time. It is impossible, therefore, to hold in their favour that they are entitled to the special protection of a Court of justice. The very first condition of such protection is that they should lay a complete and truthful statement of the circumstances attendant upon the transaction which they impeach before the Court whose protection they seek. It is impossible, without this, to say that they are entitled to any relief.

Moreover, we think, the lapse of time since the lease was granted goes very far to prevent the plaintiffs from coming into Court to set aside the lease upon this ground. The lease has now been acted on for many years. We have no doubt that the defendant speaks the truth when he says that he has laid out large sums of money upon the property; and many of the tenants have probably also acted on the faith of the defendant having a good title. We ought, therefore, not to disturb a state of things which has been so long acquiesced in, except upon very strong grounds.

In our opinion, therefore, the grant of the lease by Dookhee Mahtoon is not a transaction which can be impeached upon any of the grounds taken in the third or fourth issues, and that the suit, so far as it asks to set aside the lease on these grounds, must be dismissed.

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It remains, however, to consider the other issues. The first issue has been abandoned.

The second issue has been decided in the plaintiffs' favour by the Deputy Commissioner, and we think rightly. We agree with him in thinking that, in the absence of all evidence to the contrary, the plaintiffs being Hindoos must be considered as governed by the Mitakshara law which prevails in the district. There is no satisfactory evidence to the contrary. There is an attempt to prove the departure by the plaintiffs from certain customs and observances of Hindoos, but nothing which would show that they are not still Hindoos in fact as well as in name, and as Hindoos governed by the Hindoo law of the district.

Primâ facie, therefore, the alienation of property by Dookhee Mahtoon, which is admitted to be ancestral, would be void without the concurrence of the sons—they having an actual vested interest in the property. It is also clear that they never expressly concurred in the alienation. If, therefore, it is binding upon them, it must be upon the ground that they have by their conduct given an implied assent to the alienation by their father.

Now, in order that a man may give an implied assent to a transaction, especially one which operates as a conveyance of a valuable estate, it must be shown that he was fully aware of what the transaction was, and what effect it would have upon his interests at the time he so conducted himself as to indicate his assent.

The first question, therefore, is whether Kurum Singh did know this. No one could answer this question as well as himself: and the defendant desired to examine him upon the point. But as Kurum Singh has not chosen to come forward, we must make some strong presumptions against him, and we must presume that he knew what his own rights were, and what his father's rights were, and that a lease by his father could not be made without his assent. That is the Mitakshara law by which he claims to be bound. But it is also generally understood that an alienation by the father with the assent of his sons is a good and valid transaction; and such transactions not unfrequently take place by the son merely signifying his concurrence without actually putting his hand to the deed which conveys away the interest. If, therefore, as the witnesses for the defendant state, Kurum Singh was present and heard this document read out and made no objection, the reasonable presumption is that he assented to it. That is, in our opinion, the inference which a reasonable man would draw from his conduct. Therefore as Kurum Singh has not ventured to state that he did not understand and did not consent to the transaction, we think we must presume that he did both.

The conduct of Kurum Singh since the mokurruree was granted is also such as to lead to the inference that he acquiesced in the transaction. The mokurruree pottah was immediately acted upon by the defendant; and Dookhee Mahtoon and Kurum Singh did at first actually oppose his doing so. It was then put forward in a proceeding under section 318 of the Code of Criminal Procedure, by both these parties, that the lease was a temporary one (*meadah*) and not mokurruree. The pottah was produced, and it was ascertained to be mokurruree. It was also pleaded that the property was the property of Kurum Singh alone, and apparently it was also urged (as now) that even if the property belonged to the father and sons jointly, the alienation by the father alone was ineffectual. But the defendant being found to be in possession, the parties were referred to the Civil Court to try the question of title.

After this the parties remained perfectly quiet for six years—the rent due under the mokurruree pottah being regularly paid and received up to Dookhee's death in 1870. After this, how could any one imagine that the objections urged in 1864 were still insisted on? The Deputy Commissioner observed that the receipt of rent would not be sufficient to establish consent. Possibly not. But until Kurum Singh has explained how it was that he was compelled, after having once asserted his rights, to withdraw from the litigation, we cannot help inferring that Kurum Singh felt that, against the evidence then available to the defendant, any attempt to impeach the defendant's title on the ground that he had not given this consent was hopeless.

As regards the plaintiff No. 2, Jhagur Roy, it seems to be an admitted fact, upon the whole evidence, that he was in the Ranchee jail when the mokurruree pottah was executed. Although the defendant in his written statement relies upon the fact that both the plaintiffs gave their assent to the mokurruree transaction, yet no details with reference to this matter are given. One of his witnesses, however, Nanek Singh, alleges that at that time he was in the jail along with Jhagur Roy, and he deposes to a conversation between the father and the son after the

granting of the mokurruree pottah. According to this witness, it seems that when Jhagur Roy was informed by his father of this mokurruree, he approved of it. Jhagur Roy, in his deposition, denies having any interview with his father while he was in the jail. If the witness, Nanek Singh, is to be believed in preference to Jhagur Roy, it is clear that it must be held that the latter gave his consent to the mokurruree granted by his father. For the reasons stated below, it seems to us that we ought to accept the testimony of Nanek Singh in preference to that of Jhagur Roy.

Jhagur Roy in his deposition says that while he was in the jail he did not see his father. Now the statement of Nanek Singh upon this matter is more probable. That the father was in Ranchee at that time is an admitted fact, and that he would return home without seeing his son, who was in the jail at that time, is very unlikely, especially when we find that, according to the evidence on both sides, he had purposely come to Ranchee to effect the liberation of his son, if by any means that could be effected. Then we find that the subsequent conduct of Jhagur Roy is consistent with the hypothesis that from the beginning he was a consenting party to the mokurruree transaction. The pottah was executed in July 1863, when he was in the jail, and, according to one of the witnesses examined by him and his co-plaintiff, *viz.*, Tehal Singh, he was released about two months afterwards. From a decision, dated 22nd February 1864, on the record, it appears that although his brother, Kurum Singh, questioned the mokurruree transaction, he did not come forward at that time and dispute his father's power to grant the mokurruree. Shortly after this, we find Jhagur taking service under the defendant as *bhandaree*, and managing this very property on behalf of his master. Although this fact is denied by Jhagur Roy, it has been established by a strong body of witnesses, supported by numerous letters proved to have been written by him to his master. Then, again, on the 27th March 1867, Jhagur Roy seems to have been examined in a suit between the present defendant and Ranee Gung Kooer. In one part of his deposition he says: "Besides the eight mouzahs in suit, Mouzah Nowagon and two *kats* are held as mokurruree by the plaintiff." It can hardly be believed that if he was not a consenting party to this transaction, he would have used the language he did. He would not certainly have stated that Mouzah Nowagon was held as mokurruree by the defendant, the plaintiff in that case, without some reservation of his right. Lastly, it appears that although Jhagur Roy was of sufficiently mature age at the time when the mokurruree was granted, because shortly after we find that he entered into the service of the defendant as *bhandaree*, yet he did not question the transaction for a period of about nine years—a circumstance of itself sufficient to raise the presumption that he was a consenting party to it. But as we have shown above, this presumption does not rest upon his silence for a long period alone, but upon his subsequent acts and conduct, which clearly lead to the inference that he gave his full assent to the mokurruree transaction now sought to be questioned.

Under all the circumstances, we think the plaintiffs have failed to establish their case. We do not say the case is free from difficulty; but it must be borne in mind that the difficulty has arisen almost entirely from the fault of the plaintiffs. They have allowed a very long time to elapse without coming forward to assert their rights; their witnesses have not told the truth; and one of the plaintiffs, the one who knows most about this matter, has obstinately refused to give any evidence at all.

We reverse the decision of the Deputy Commissioner, and dismiss the suit with costs in this Court and in the Court below.

The 18th July 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Suit for Arrears of Rent—Evidence of Contract—Plaint—Issues.

Case No. 1474 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 3rd March 1873, affirming a decision of the Moonsiff of Mudhoobanee, dated the 28th August 1872.

Luchmeeput Doss (Plaintiff), ***Appellant,***

versus

Shaikh Enaet Ali (Defendant), ***Respondent.***

Baboo Mutty Lall Mookerjee for Appellant.

Baboo Boodh Sen Singh for Respondent.

In a suit for arrears of rent plaintiff must show that there was some contract to pay rent entered into by

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defendant. This may be shown either by the evidence of some specific contract, or by evidence of previous payment from which a contract could be inferred.

Although a plaintiff need not be tied down to the exact form of his plaint, yet, when he seeks to introduce any change, he must show that the view of the matter which he now puts forward had been in the contemplation of the parties, so that they had an opportunity of bringing forward evidence on the point, and that the evidence on the record was directed to the substantial case set up.

THIS was a suit for arrears of rent amounting to less than Rs. 100. The appeal in the Court below was disposed of by the Additional Judge of Tirhoot, but the case is open to special appeal inasmuch as his judgment contains what is really a finding on the rights of the plaintiff as against the defendant, both of whom claim the land to which this suit refers. The Judge has observed as follows: "These cases have been instituted "as rent-suits nominally, but I find they "have been brought virtually with a view "to keep alive a decree which is barred, "because execution was not taken out within "time as per the District Judge's decision, "dated 23rd February 1872, and confirmed "on appeal by the High Court on 18th "September 1872, or to obtain possession of "the property somehow in a summary way, "and not knowing how else to set about it, "they have now come into Court with false "and fabricated documents. The whole "argument turned on the former decree, "which showed me what plaintiffs were "driving at."

It was contended that there was really no judgment on the question of title bringing the case within the section, but I think that the passage above quoted is virtually a declaration that the plaintiff had no right to this land. The question argued in appeal was whether the possession given in the course of the execution-proceedings, which were afterwards held to have been irregular, has not become entirely inoperative by that subsequent decision. It appears that proceedings were taken in 1862 on a decree of 1844, by which possession of 180 beeghas was awarded to the plaintiff, and on the 5th January 1864 he obtained an order for possession. Some years afterwards he attempted to execute the decree further and to obtain mesne-profits. An objection was then raised by the defendant that execution was barred by limitation, and it was finally decided by the High Court on the 18th September 1872 that inasmuch as the proceedings which terminated on the 18th February 1864 had not been commenced within time, and as at that time the Court ought to have declared that execution of the decree was barred by limitation, those proceedings could not give to the plaintiff a right to execute his decree any further. But it is quite clear that the Court could not, and did not, on that appeal, make any order in respect of the order passed by the District Court on the 5th January 1864. On the other hand, it has been found by the Lower Appellate Court that although there was an order for possession, and some steps had been taken to notify the assumption of possession in 1864, yet that order has been infructuous, and the plaintiff has never received the rents and profits of the property under it. The object of the suit is not to determine who was the person legally entitled to the rents of this particular land, but simply to ascertain whether the defendant owes the plaintiff a certain definite sum as arrears of rent for specific years. If it be assumed that the plaintiff had a right to the property under his decree executed in 1844, and that nothing has been done to set aside the order of 1864, still it would be necessary for him to show that there was some contract to pay rent entered into by the defendant. Of course, this may be shown in various ways, either by the evidence of some specific contract, or by evidence of previous payment from which the Court would infer a contract. The plaintiff has filed certain jumma-wassilbakee papers, and called two witnesses. The Court, however, has rejected this evidence as not trustworthy.

Then it was argued that although there may not have been specific contract to pay rent, still the plaintiff would be entitled to a fair compensation for use and occupation of the land; but this will hardly help the plaintiff, because there is absolutely no evidence as to what would be a fair compensation for the land, except the evidence of previous payment of rent, which has been rejected as not trustworthy. Although the Court need not be strict to tie the plaintiff down to the exact form of his plaint, yet, when he seeks to introduce any change, he must show that the view of the matter which he now puts forward was one which had really been in the contemplation of the parties, so that they had an opportunity of bringing forward evidence on the point, and that the evidence on the record was really directed to the substantial case set up, but there was nothing of the kind in the present suit. If the plaint be read as a claim for compensation for use and occupation of the land, the suit must fail, unless the plaintiff is

allowed opportunity of producing fresh evidence, and that he is certainly not entitled to. Consequently this appeal must be dismissed with costs.

The 20th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Disability of Heirs (Hindoo Law)—Onus Probandi—Decree for Land or Compensation.

Case No. 369 of 1874.

Special Appeal from a decision passed by the Additional Subordinate Judge of the 24-Pergunnahs, dated the 25th November 1873, modifying a decision of the Second Moonsiff of Baraset, dated the 19th February 1873.

Futtick Chunder Chatterjee (Defendant), *Appellant,*

versus

Juggut Mohinee Dabee (Plaintiff), *Respondent.*

Baboos Doorga Mohun Doss and *Bykunt Nath Doss* for Appellant.

Mr. J. S. Rochfort and *Baboos Unnoda Pershad Banerjee, Bhowanee Churn Dutt,* and *Aubinash Chunder Banerjee* for Respondent.

The party who seeks to exclude one of the heirs to property from a share of the inheritance, is bound to show the cause of the exclusion.

A Court decreeing a claim to a certain quantity and description of land, or to adequate and proper value for the same, is bound to declare either what the land is to be, or what the compensation.

Jackson, J.—In this case the defendant and the plaintiff both appeal against the judgment of the Lower Appellate Court. The main appeal is by defendant. He raises two grounds. The first is that the Lower Appellate Court has improperly dealt with the question as to the disability of the defendant's uncle Bishnoo Chunder Chatterjee. The plaintiff claimed to recover the share which would have been Bishnoo Chunder's on the ground that Bishnoo Chunder was crippled from his birth, and therefore could not, and did not, take the estate. On that point the Subordinate Judge says: "The defendant states that the said person," that is, Bishnoo Chunder, "was not lame from his birth; that he got his share; and that as the plaintiff's father died in his presence, he (defendant) obtained his share. But no proof is forthcoming with regard to these points, and it does not appear that the aforesaid Bishnoo Chunder obtained any share." And therefore he holds that in that state of the evidence the plaintiff is entitled to the share which would have gone to Bishnoo Chunder. Now it appears to us that as Bishnoo Chunder would be one of the heirs, it lies upon the plaintiff, who seeks to exclude him, to show the cause of that exclusion. It would not lie upon the defendant to establish the affirmative, but upon the plaintiff to show the exclusion; and looking at what the nature of the evidence was, and the rule of the Hindoo law as to exclusion of persons on the ground of being crippled, we do not think that in this state of the evidence we ought to send the case back to the Lower Appellate Court, because we think there was no evidence on which the plaintiff could shut out Bishnoo Chunder.

As to the second point raised by the defendant, which is that the Lower Appellate Court is wrong in holding a certain gift to have been made to Byddo Nath, the husband of Doorga Monee, we think that that was really a gift to Byddo Nath in consideration of his marrying Doorga Monee, and not to Doorga Monee herself.

Then there is a cross-appeal by the plaintiff, who contends that under the facts proved the plaintiff should have had a share of the building (dwelling-house) in which she dwelt together with the defendant, being then joint in mess. Now it is clear that the building was erected at the cost of the defendant and with his materials, although on joint ground, and we do not think that the plaintiff is entitled to any share of the building. Then it is complained that the order of the Lower Appellate Court with regard to the land which the plaintiff is to get in lieu of the plaintiff's share of the site of the building ought to have specified the quantity. In this we are disposed to agree with the plaintiff. What the Subordinate Judge says on this point is this: "But as "the said building has been erected on the "ijmalee land belonging to both the parties "the plaintiff is entitled to receive from the "defendant land of the same description "equal to the half of the said land elsewhere "or the adequate and proper value for the "same." But he does not declare either what the land was to be, or what the adequate or proper compensation for it was. He leaves things in such a state as would compel the parties to further litigation in this matter. We think, therefore, that the Subordinate

Judge should take up the matter again, and should determine what is a proper and fair sum of money to be paid by the defendant to the plaintiff, in case the parties should not be able to agree amongst themselves as to the land to be exchanged in lieu of the plaintiff's share in the site of the building. With this exception, we think the objections taken by the plaintiff should be disallowed, and that she should have no costs, because the matter on which the decree of the Court below requires amendment is one which might have been dealt with and set to right if an application had been made to that Court, and a special appeal to this Court was unnecessary.

The defendant's appeal is allowed so far as 4 annas of Schedule (ৰ) is concerned, with proportionate costs.

The 20th July 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Mortgage Bond—Lien on Immoveable Property —Small Cause Court's Jurisdiction.

Case No. 455 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 18th November 1873, reversing a decision of the Subordinate Judge of that District, dated the 9th December 1872.

Poholi Mullick (one of the Defendants), *Appellant,*

versus

Fukeer Chunder Patnaik (Plaintiff), *Respondent.*

Baboo Juggut Chunder Banerjee for Appellant.

No one for Respondent.

In a suit to enforce a lien created by a mortgage-bond on property which was sold by the mortgagor (R) ten months later to defendant, the Lower Appellate Court held that the defendant as standing in his vendor's shoes was concluded by a judgment obtained in the Small Cause Court by the plaintiff against R a month after the date of the bond :

HELD that as the Small Cause Court could not have jurisdiction to decide as to the lien, its decree would only be relevant as showing that the defendant at the time owed the money to plaintiff, and that it would be open to defendant to question the execution and *bona fides* of the bond as affecting the property which he had taken by conveyance.

Jackson, J.—We think the judgment of the Lower Appellate Court in this case is erroneous. The defendant, it seems, purchased the property now in dispute from Ruhman Khan by a conveyance dated the 11th March 1867. The present suit is brought by plaintiff claiming to enforce a lien upon this property created by a mortgage-bond executed by this Ruhman Khan to the plaintiff on the 15th May 1866, or about ten months before the date of the conveyance. The Subordinate Judge who tried the suit originally dismissed it on the ground of gross contradictions in the testimony adduced by the plaintiff as to the amount of the consideration given for the bond. This decision being appealed against, the District Judge held that the defendant was concluded by the previous judgment obtained in the Small Cause Court by the plaintiff against the vendor Ruhman Khan, which seems to have been given in June 1866, that is, a month after the date in which the bond is dated; and the Judge relies upon a precedent in the case of Abdool Gunee against Kishanund Dass in 17 Weekly Reporter, p. 350. He considers that this decision is conclusive, and that the defendant standing in his vendor's shoes is estopped from urging that the bond is not valid and *bonâ fide*, there being nothing to show that the previous decree of the Small Cause Court had been collusively obtained. The Small Cause Court's decree is not before us, but we must assume that it was to the effect to which it could only be, *viz.*, a decree that the plaintiff was to recover a stated sum of money from the defendant Ruhman Khan. The question, therefore, is whether that is conclusive evidence against the present special appellant as to the execution of the bond by which the property in dispute is hypothecated. The case relied upon by the District Judge appears to us to be clearly distinguishable from the present, and not to support the decree which is now before us. That was a suit brought by a person who claimed under one Dribo Singh, asking for a declaration that the plaintiff is entitled to attach and sell an 8-anna share of talook Ejapore as being the property of Dribo Singh. The observation of Mr. Justice Macpherson, who gave judgment in that case, or rather that portion of it which is applicable here, is as follows: "In that suit the "issue was raised and tried whether talook "Ejapore belonged to Dribo Singh or not, "and the Court expressly decided that it did "not, and that the zemindaree was liable to "be attached and sold in execution of Abdool "Gunee's decree as belonging to Rajaram. "It appears to us that it is not open to

"Dribo Singh now to come into Court and "ask for a declaration of his right to an 8-anna "share as against Abdool Gunee, when he "failed wholly in the suit in 1858. If he had "a title to one-half of the whole pro-"perty, which he chose to keep back when "the suit of 1858 was pending, he cannot "now set up that title and ask the Court to "give him a decree establishing it. And if "Dribo Singh cannot claim this 8 annas of "the estate as against the appellants, no "more can the present plaintiff, who has no "*locus standi* in Court at all except through "and under Dribo Singh." That was a suit brought in a Court of competent jurisdiction, which finally determined, as between Dribo Singh and the defendant, the title of Dribo Singh under whom the plaintiff claimed. In the present case, it is obvious that the Small Cause Court could not have any jurisdiction to decide as to the lien upon the immoveable property which was supposed to be created by this bond. The decree, therefore, would be only relevant as showing that the defendant at that time owed the money in question to the plaintiff. It would, we think, be open to the present defendant to question the execution and *bona fides* of the document as affecting the property which he had taken by the conveyance dated March 1867, and the case therefore must go back to the Lower Appellate Court in order that that issue may be tried. The costs will follow the result.

The 21st July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Value of Land—Natural Agency—Act VIII. (B.C.) of 1869, s. 18—Depositions taken by Ameen—Evidence.

Case No. 2004 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 11th June 1873, modifying a decision of the Moonsiff of Attiah, dated the 31st August 1872.

Khajah Abdool Gunnee (Plaintiff), *Appellant,*

versus

Bhuttoo Sheikh (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

An increase, either permanent or likely to last for a considerable time, caused by natural agency in the productive powers of the land, is one of the elements to be taken into consideration in determining its increased value within the meaning of Act VIII. (B.C.) of 1869, s. 18.

The depositions taken by an Ameen may be read as evidence when the case comes back to the Court again.

Markby, J.—THE judgment of the Lower Appellate Court, so far as it finds that the measuring pole used by the plaintiff is not a standard pole used in the village, will stand. But as regards the first and second grounds of enhancement, both of which, we consider, were open to the plaintiff, the judgment of the Lower Appellate Court must be set aside, and the case remanded to ascertain what will be the increased rent which the plaintiff is entitled to, because we think that that judgment is erroneous on two points. In the first place the Judge says, with regard to the assertion of the plaintiff that inundation had increased the productive powers of the land, that natural agency is not a sufficient ground for increasing the rate of rent within the meaning of section 18, Act VIII. (B.C.) of 1869. Now, if by a natural cause there has been produced, not a mere temporary increase in the productive powers of the land, but an increase which will either be permanent or at any rate likely to last for a considerable time, that is one of the elements to be taken into consideration in considering the increased value of land within the meaning of that section.

There is also another error which is fatal to the judgment of the Subordinate Judge. He says as to the testimony of the witnesses examined by the Ameen on the land itself it is inadmissible as evidence, because those witnesses might have been produced in Court. Now, under the provisions of the law, the depositions taken before the Ameen may be read as evidence when the case comes back to the Court again.

Upon these grounds, therefore, we think that the judgment of the Lower Appellate Court, so far as it deals with the first two grounds of enhancement, must be reversed, and the case remanded to consider the point which we have already pointed out. Costs will abide the ultimate result.

The 21st July 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Khas Possession—Shikmee Right—Onus Probandi.

Case No. 2446 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 10th July 1873, modifying a decision of the Moonsiff of Attiah, dated the 23rd November 1871.

Lukhee Dossee and others (Plaintiffs), *Appellants,*

versus

Rhidoy Nath Surmah and another (Defendants), *Respondents.*

Baboo Nulnit Chunder Sen for Appellants.

Baboos Sreenath Doss and *Bykunt Nath Doss* for Respondents.

In a suit for khas possession of certain plots of land which plaintiff alleged to have fallen to her share under a butwarra of a talook originally ijmalee, where defendants pleaded long possession under a shikmee right:

HELD that plaintiff was not entitled to eject the defendants, unless she could show that she had been in khas possession within twelve years previous to the suit.

THE plaintiff sued for khas possession of several plots of land, alleging that the talook in which these plots are situated was originally an ijmalee talook, and that, under a butwarra made in Jyte 1264, the plots in dispute fell to her share. The present appeal is connected with plots 9 and 10 only. With reference to these plots, the defendants state that they had been in possession of them for a very long period under a shikmee right, and in support of their claim they examined witnesses and put in a pottah dated 1240 and other documents including dakhilas. Both Courts have found that the plaintiff is not entitled to khas possession of plots 9 and 10, but that she must be content with receiving rent from the defendants, who do not dispute her malikee title. The first Court observes that it is clearly proved by the evidence of witnesses examined by the plaintiff herself that even before the partition the defendants have been in possession, and that the plaintiff had failed to produce any proof or file any documents whatever to show to the satisfaction of the Court that she had khas possession of the said lands within twelve years previous to her dispossession. Clearly, the plaintiff had to show in this case that she was in khas possession some time within twelve years previous to the suit. The defendants have set up a shikmee right, and unless the plaintiff can show that she had been in khas possession she is not entitled to eject the defendants from their tenure and take khas possession.

The decision of the lower Court will be affirmed and the special appeal dismissed with costs.

The 21st July 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Enhancement of Rent—Judgment by Confession.

Case No. 2513 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Mymensingh, dated the 14th August 1873, affirming a decision of the Moonsiff of Jumalpore, dated the 4th January 1873.

Bhubo Soonduree Chowdhrain (Plaintiff), *Appellant,*

versus

Kasheenath Acharjee (Defendant), *Respondent.*

Baboo Okhil Chunder Sen for Appellant.

Baboo Kishen Dyal Roy for Respondent.

In a suit for rent at an enhanced rate, where plaintiff is unable to establish the grounds upon which he claims enhancement, he may have a decree for rent according to the jumma for which defendant admits liability.

THIS is a suit brought by the plaintiff, special appellant, for rent at an enhanced

rate after service of notice. Both Courts have found that the plaintiff has not been able to establish the grounds upon which he claims enchancement. The first Court, however, gave the plaintiff a decree for rent according to the jumma admitted by the defendant. No appeal was preferred by the defendant, the ryot, against that portion of the decision of the first Court which gave the plaintiff a decree for the rent according to the jumma admitted by the defendant, but on the appeal of the plaintiff on the question of whether she was entitled to enhance, the Subordinate Judge has thought proper, not only to dismiss the plaintiff's suit for enhancement, but also to deprive her of the benefit of the decree of the first Court with reference to that portion of it which gives her a decree for the rent according to the jumma admitted by the defendant. The Subordinate Judge supports his judgment by quoting a decision of the Privy Council, dated the 24th of January 1873, in the case of Shoora Soonduree Debia and another, representatives of the late Gopal Lall Thakoor *vs.* Gholam Ali, published in Volume XIX., Weekly Reporter. That was also a suit for arrears of rent in pursuance of a notice of enhancement. The contention on the part of the appellants, amongst other points raised, was that even if they were not entitled to enhance the rent, they were entitled to recover rent at the rate specified in the kubooleut. Their Lordships say that no issue was raised whether the rent at the rate specified in the kubooleut had been paid or satisfied, and that there was nothing in the case to show whether it had been paid or not. Therefore their Lordships were of opinion that the plaintiffs were not entitled to a decree in that suit for the rent at the rate fixed by the kubooleut.

Now in this case the liability for rent at the rate admitted by the defendant was not disputed, and he did not appeal against the decree of the first Court directing him to pay to the plaintiff rent according to the jumma admitted by him, the defendant. Therefore the decision of the Privy Council is not in any way applicable to the circumstances of the present case.

So much, therefore, of the decision of the Subordinate Judge which reverses the decision of the first Court with reference to that portion of it which decrees the plaintiff's claim for rent according to the jumma admitted by the defendant must be set aside.

Each party to pay his own costs of this appeal.

The 22nd July 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson and F. W. McDonell, *Judges.*

Special Appeal—Issues.

Appeal under section 15 of the Letters Patent of the High Court against the decision of the Hon'ble W. Ainslie, one of the Judges of this Court, dated the 6th May 1874, in Special Appeal No. 1367 of 1873.

Shib Suhaye Singh and another (Plaintiffs), *Appellants,*

versus

Nursingh Lall and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboo Doorga Doss Dutt for Respondents.

A case is not to be decided in special appeal upon a question which was not raised or tried or considered by the lower Courts.

The judgment of Ainslie, J., appealed against, was as follows :—

It seems to me, without entering into the other questions raised in the special appeal, that the objection that the plaintiff has no right to sue for partition of a portion only of the joint property must prevail. It is clear from the words of the plaint itself that at the date of a former partition, the parties agreed to hold certain property jointly; also that this is a portion of that property, and only a portion of it. I fail to see how the interference of one of the shareholders, supposing that interference to be established, can give the plaintiff a right to divide this specific piece of land without asking for a partition (supposing that circumstances allowed him to claim one) of all the property still held in common. I think that the suit

ought to be dismissed. The judgment of the Lower Appellate Court will be reversed, and the judgment of the first Court restored with costs.

Before the Appeal Bench, Baboo Bhowanee Churn Dutt, for the appellants, contended that Mr. Justice Ainslie ought not to have allowed the objection of the respondents in special appeal that "a suit for the partition "of a portion of some joint family-property "would not lie," inasmuch as that issue was not raised in any of the lower Courts. If the objection had been taken in the Lower Appellate Court, it would very likely have been granted here; but as it was taken for the first time in special appeal, it certainly ought to have been disallowed. Moreover, Mr. Justice Ainslie misconstrued the plaint in supposing that the suit was for a partition of a portion of some joint property. The plaint not only distinctly alleges, but it has also been proved, that there is no other joint property belonging to the parties than the property in the suit. But even granting that the issue could be raised in special appeal, though it was not taken in the lower Courts, I am still prepared to show that Mr. Justice Ainslie erred in law in holding that the objection that the plaintiffs have no right to sue for partition of a portion *only* of the joint property must prevail.

In the case of Bhurrut Thakoor *vs.* Syud Meer Murtaza, 21 W. R., p. 225, Mr. Justice Phear held, that "one of the co-sharers of a "joint estate suing conjointly with the "others would, under Regulation XIX. of "1814, be entitled to a separation of a "mouzah from the rest of the zemindaree, "and an assessment upon it of a proper "proportion of the total jumma; and, "having done this, he would alone be entitled "to have an order for partition of that "mouzah as between himself and his co-"sharers therein." Again, in the case of Sreemutty Shama Soonduree Dossee *vs.* Kartik Churn Mitter, Bourke's Rep., p. 326, Mr. Justice Macpherson held, that "the "doctrine that when, after a partition of a "joint family-estate, a portion of the estate "remains undivided, the portion which "remains undivided cannot afterwards be "partitioned, refers to a partition made by a "father amongst his sons and their co-heirs. "It does not refer to the case where a "partition has been made by the joint "owners amongst themselves." *Vide* also 5 W. R., p. 49.

Baboo Doorga Doss Dutt, for the respondents, contended that he was not estopped from taking the objection in special appeal as to whether or not a suit would lie for the partition of a portion of joint family-property, although this point was not raised in either of the lower Courts. It very frequently happens that in the lower Courts most important points are omitted to be taken; in fact, in some cases the true and proper issues are totally omitted, whilst others are taken and allowed which do not bear materially upon the circumstances of the case. Would it then be considered consistent with justice, if, when the proper issues are afterwards raised in special appeal, they are disallowed on the ground that they were not taken in the lower Courts? But at all events, in this case the appellants have no cause for complaint. They ought to have protested against the objection being taken in special appeal by the respondents. Not having done so, the objection was allowed by Mr. Justice Ainslie, and the question was argued on both sides. The appellants are therefore barred now from taking this objection at this stage of the proceeding. Their mouths are completely closed upon this point.

With regard to the question as to whether or not a suit would lie for the partition of a portion of joint family-property, it has been held in the case of Manabhai Vallabdas *vs.* Nathbhai Haribhai, 7 Bom. H. C. Rep., Ap. C. J., p. 47, that "a member of an undivided "family cannot sue his co-sharers for his "share in a single undivided field, portion "of the family-property. He must sue for "a general partition of all the property "liable to partition."

In the case of Mithoo Lall *vs.* Gholam Nuseerooddeen and others, 4 Agra H. C. Rep., p. 276, where a co-sharer in a joint undivided estate sued to have his rights ascertained and partition made in respect of an orchard which formed part of the joint estate—*held* that the Civil Court was not entitled to decree partition, or give possession of a separate share in the orchard, and there is no law which entitles a share-holder to obtain partition of a portion of an undivided estate against the will of the other co-sharers.

The case of Shama Soonduree Dossee *vs.* Kartik Churn Mitter, cited on the other side, is in favour of the respondents, because in that case the ancestor had already partitioned the property, and there was, therefore, no necessity for a suit being brought in order to have the property partitioned. Moreover,

joint owners ought not always to be harassed by suits to have some portion or other of joint property partitioned; if this mode of bringing suits be allowed, most absurd results will follow. A person would then consider himself justified in bringing a suit for the partition, not only of a house, but also of a room in the house. Under the circumstances, therefore, the appeal ought to be dismissed.

The judgment of the Appeal Bench was delivered as follows by—

Couch, C.J.—The question upon which Mr. Justice Ainslie has decided this special appeal was not raised in either of the lower Courts. The defence before the Moonsiff was quite different from raising any such question as that the suit was for a partition of only a portion of the joint property, and could not therefore be allowed. It is not necessary for us to give any opinion upon the general question whether a suit for partition of part of the property of a joint Hindoo family can in any case be allowed. The case decided by me and reported in 7 Bombay High Court Reports, A. C. J., 46, certainly does not decide that question. The judgment shows that the case was decided upon grounds peculiar to itself, and I did not intend to decide any such general question. In this case we must abide by the rule that a case is not to be decided in a special appeal upon a question which was not raised or tried or considered by the lower Courts. Parties must not be allowed to come before this Court in special appeal and raise a question or take an objection which, if raised or taken in the first Court, or even in the Appellate Court, might have been met in those Courts by adopting a course which cannot be adopted when the case comes before this Court in a special appeal. On that ground, therefore, I think the decision of Mr. Justice Ainslie ought not to be allowed to stand. His decision being reversed, it is necessary to determine whether there is any ground for saying that the decision of the Subordinate Judge is erroneous in law. No error in law has been pointed out. The objections which have been taken, and which are stated in the grounds of appeal, appear not to be supported by the facts of the case. The grounds of appeal appear to have been prepared without a proper knowledge of what the case was. I think there is no ground for saying that the decision of the Subordinate Judge is wrong, and that therefore the appeal ought to be dismissed with costs.

Jackson and McDonell, JJ.—We agree.

The 22nd July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Execution of Decree (in Part or as a Whole)—Decree on Mortgage—Non-Registration—Act XXVI. of 1864.

Case No. 2213 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sylhet, dated the 23rd June 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 27th March 1872.

Jugjeebun Goopto (Defendant), *Appellant,*

versus

Goluck Monee Debia (Plaintiff), *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

Baboo Gopal Lall Mitter for Respondent.

Although an application to execute a decree in part is informal, yet if the proceedings taken thereupon are in effect in execution of the decree as a whole, they are good and valid.

A decree which directs the sale of mortgaged property is not rendered invalid by the fact of the mortgage not having been registered as required by Act XXVI. of 1864.

Markby, J.—THE only substantial points which seem to us necessary to be noticed in this special appeal are these: first, it is contended that the proceedings in execution of the decree of Bhoobunessuree against the defendant No. 2 were taken at the instance of only one out of the three persons to whom that decree had been transferred; and that they were therefore wholly invalid on the ground that no proceedings can be taken in execution of a part of the decree. Now, it has more than once been held by this Court, and it appears also to have been held between these very parties, that although an application to execute a decree in part is informal, yet the proceedings taken thereupon, if those proceedings are in effect in execution of the decree as a whole, are good and valid proceedings. Therefore, without entering into the question whether this is an objection which would in any way affect the title of the plaintiff, even if it were a good objection, we think that the objection is not in itself a good one.

Then the second objection is that the decree which declares the lien of Bhoobunessuree, under which decree the plaintiff holds his title, is not effectual for the purpose of establishing any lien, because the mortgage upon

which that lien was declared was not registered as required by Act XXVI. of 1864. No authority has been shown to us for holding that a decree which directs the sale of the mortgaged property would be invalid on that ground, and we think that it would not be so.

The third point really reduces itself to only a question of costs. In the first Court the defendant No. 1, who was called the principal defendant, denied that he was in possession exclusively of this property; he said that he was only in possession of an undivided one-third share of it. No doubt if that were so, although the decree would be a decree generally to eject him and to give possession to the plaintiff, the suit would have been somewhat differently valued; but merely upon the question of costs we do not think we should be doing justice between the parties, if we remanded the case to inquire into a matter which has no bearing upon the merits at all.

The special appeal is dismissed with costs.

The 22nd July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Possession—Tenants—Trespasser.

Case No. 2241 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Tipperah, dated the 10th July 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 16th September 1872.

Maharajah Beer Chunder Manicko Bahadoor (Plaintiff), *Appellant,*

versus

Abjul Goonin and others (Defendants), *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Moulvie Serajul Islam for Respondents.

Long possession of land confers a good title, whether be possession has been as trespassers or as tenants.

Markby, J.—It appears to us that this suit was rightly dismissed. The plaintiff sued the defendants as trespassers for having dug a tank in the land in which the plaintiff said they were strangers, and he asked damages for their doing so. The defendants, on the other hand, proved, that as a matter of fact, they have been in possession of the land for more than thirty years. Now if they were in possession as trespassers for more than thirty years, they have acquired a good title to the property. But even if they were in possession as tenants, this suit, which is for recovery of possession, or damages against them as trespassers, could not be maintained. Therefore, upon the claim made in the plaint and the facts proved, the Court below was right in dismissing the suit.

The special appeal is dismissed with costs.

The 22nd July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Evidence—Copies—Power to call for Originals—Act I. of 1872, ss. 76 & 77.

Case No. 489 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 12th December 1873, reversing a decision of the Moonsiff of Jhenidah, dated the 17th January 1873.

Hureehur Mojoomdar and others (some of the Defendants), *Appellants,*

versus

Churn Majhee and others (Plaintiffs), *Respondents.*

Mr. J. S. Rochfort and *Baboo Sreenath Banerjee* for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

A Court in which a suit may be pending has authority to send for the records from any other Court in which they may be, the ordinary rules of that other Court notwithstanding.

Documents tendered as evidence are properly rejected on the ground that they are copies inadmissible under the Law of Evidence, and it is entirely a matter of discretion to the Court in rejecting a copy to allow the party to file the original.

Ss. 76 and 77 of the Evidence Act refer to public documents, and are inapplicable to kobalas, &c.

Jackson, J.—We are of opinion that the judgment of the Lower Appellate Court in this case cannot be sustained. The plaintiffs sued to recover possession of a certain julkur, now in the hands of the defendants, alleging themselves to have got a valid lease

of that julkur granted in the year 1257 B. S. by persons who are called Boses in this suit, and who are said to be entitled to grant such lease under a document of a much earlier date granted by the Rajah of Nuldanga. The Boses just mentioned appear, for what purpose we do not know, to have been made defendants in this suit; possibly, however, in order that they might put in statements in support of those made by the plaintiffs.

The defendants in possession denied that the lease set up by the plaintiffs was a *bonda-fide* lease, and denied that the plaintiffs ever had possession of the julkur in dispute, which, according to them, was created in the year 1272 by Mr. Tweedie, the lessor of the defendants, who for the first time took possession of the right of julkur which had previously been enjoyed by the people of the neighbourhood, and they also claimed by virtue of a putnee granted by the same Rajah of Nuldanga.

The Moonsiff of Jhenidah, who tried this suit, rejected a quantity of documents tendered by the plaintiffs, chiefly on the ground that they were copies such as the Law of Evidence did not allow him to receive, and further proof on the plaintiffs' part having, in his opinion, failed, he dismissed the suit. The plaintiffs appealed to the District Judge, and the appeal was heard by Mr. Falcon, the Additional Judge, who commences his judgment by stating his opinion that the Moonsiff had been rather too hard upon the plaintiffs. He says: "No doubt the onus "is on them to show their title to the julkur. "This, however, can be sufficiently proved "by long possession." If he had gone on to show that the plaintiffs had given evidence of long possession of such a nature as to create a title in them, we could understand that ground, but he passes over that to a consideration of the plaintiffs' documents. He says: "The Boses' pottah and isthar "of 1198 are in several respects doubtful "documents, and the Moonsiff had full "discretion to reject them." If the Moonsiff had full discretion to reject them, the Judge ought to have been very thoroughly satisfied, before he reversed the judgment of the Moonsiff, that the documents are such as ought to be admitted. He proceeds: "The Moonsiff has gone on to reject all the "certified copies filed by plaintiffs on the "ground that they ought to have produced "the originals. Probably, the mere fact of "the original being in another Court is not "a sufficient reason for filing a copy, unless "it be shown that, under the ordinary rules "of the Court, the original could not be "removed from the custody of that Court."

We are not aware that the Law of Evidence could be altered by reason of the ordinary rules of a particular Court preventing a party from removing the original documents from the custody of that Court. There is nothing to prevent the Court in which a suit may be pending from sending for the records from the Court in which they are, and inspecting after proper proof the necessary papers. The Judge then fortifies himself with so high an authority as the Privy Council. He says: "It has been held that "a copy of a document coming out of a "public office, and certified by the officer in "charge of that department to be a true "copy, is admissible in evidence in India." The Judge refers to the case of Raja Raj Venkataperumul Raj Bahadoor against Pemmasamy Venkatadry Naidoo in 4 Weekly Reporter, p. 121. In that case the document in question purported to be a kyfeut addressed to the Honorable Company, and to have been given by the third defendant in the case; it was dated 19th July 1842, and was certified to be a true copy, signed "J. D Bourdillon, Collector." Objection was taken to the admissibility of that document as evidence, and it was contended that that was a copy of a copy. Their Lordships observe: "With regard to the "admissibility of evidence in the Native "Courts in India, we think that no strict "rule can be prescribed. However highly "we may value the rules of evidence as "acknowledged and carried out in our own "Courts, we cannot think that those rules "could be applied with the same strictness "to the reception of evidence before the "Native Courts in the East Indies, where it "is perfectly manifest the practitioners and "the Judges have not that intimate acquaint-"ance with the principles which govern the "reception of evidence in our own tribunals; "we must look to their practice, we must "look to the essential justice of the case, and "not hastily reject any evidence, because it "may not be accordant with our own "practice." In that case the document in question had been received in the Court below. An objection was taken to that in the Privy Council, and their Lordships sixteen years ago observed that the rules of evidence as used in the English Courts were not familiar to the Courts and practitioners in India. They therefore allowed the document to be used in evidence as it was a document addressed to the East India Company. I

should be mentioned that since that case was decided, the Courts and practitioners in India have had the advantage of a compact body of rules of evidence provided by the Legislature. It is no longer necessary to practitioners to look to rules scattered over many books to see what the particular rules of evidence may be. Those rules have been clearly laid down in the Evidence Act of 1872. In this case the documents in question, on being tendered in the first Court, were rejected, and it was in the Appellate Court that the Judge relaxed the rule and allowed to be offered in evidence documents which it seems to us were properly rejected by the first Court. It is not necessary for us to refer to the case in 11 Weekly Reporter, to which the Judge also alludes. If necessary, we should probably say, with much respect to the Judges who decided the case, that it would be extremely dangerous to relax the rules because the Courts here are Courts of equity and good conscience. We have already said that we have a compact body of rules framed by the Legislature for our guidance, and that the Judge in admitting the copies has received evidence which had been properly refused by the Court below.

The Judge goes on: "I think that when "a Court rejects copies, as it has done here, it "should at least give the party an opportunity of filing the original. Here the "Court could have called for the original "record so as to satisfy itself as regards "the jumma-wassil-bakee papers and "kubooleuts, and if plaintiffs had filed a "copy of the kobala of 1213 taken from "the District Registrar's office, instead of "the District Collector's, it would undoubtedly have been admissible under sections 76 "and 77 of the Evidence Act." It would be entirely a matter of discretion to the Court in rejecting a copy to allow the party an opportunity of filing the original, provided he asks for it; but it does not appear that the plaintiffs made any such application in the present case, and we are unable to see how sections 76 and 77 of the Evidence Act should have warranted the reception of a copy of the kobala in this case, if taken out of the District Registrar's office. Those sections refer to public documents. It appears to us that the documents here spoken of could under no circumstances be called public documents.

The Judge then goes on: "The rejection "of these documents seems to have taken "place at final hearing of the suit, which left "plaintiffs no opportunity of retorting except "in the Appellate Court; and here, on the "one hand, they have produced the original "jumma-wassil-bakee papers and kubooleuts "filed as long ago as 1859, and have, on the "other hand, objected that defendants' putnee "pottah was also not filed in original, and "that they are not satisfied that the Rajah "included this fishery in the putnee and "did not reserve the Boses' rights." Now, here it may be observed that although the plaintiffs produced the original jumma-wassil-bakee papers, the question arises whether those papers were relevant at all, and although we gave notice to the vakeel for the plaintiffs that we should desire to hear him on this point, he has not said a word about it. The Judge says: "I wish "to refer specially in this decision to the "pottah filed with the corresponding kubooleuts, the jumma-wassil-bakee papers filed "in 1859 and still forming part of that "record, and the ijara pottah filed by the "Mojoomdar defendants. There can be no "doubt from these that the lease from the "Boses to the plaintiffs have certainly been "executed before 1859." Now, no doubt, if those papers show that the lease set up under the Boses was in existence before 1859, the plaintiffs would, of course, be entitled to the benefit of that proof; but it does not from that follow that the plaintiffs' case is made out. Then the special appellants' pleader has referred us to a very significant circumstance, which, we find, is not noticed at all in the judgment of the Judge. It appears that on an application being made for certified copies of the kubooleut of 1259 and the jumma-wassil-bakee papers of 1260, which we presume are the jumma-wassil-bakee that the Judge refers to, the record-keeper reported that those papers did not contain any signature of the hakim, but merely bore the signature of the amlah and the seal of the Court. Such a significant fact as that ought to have made the Judge extremely cautious in dealing with those papers.

Finally, the Judge, instead of coming to any positive conclusion either that the Rajah had granted the lease to the Boses, or that, on the other hand, plaintiffs, although not entitled by any documentary title to hold the julkur, had possession of it sufficiently long to create a title in them, ends his judgment in these words: "On the whole, I "think it must be held that the Rajahs either "granted the julkurs to the Boses, or slept "too long over the invasion of their rights "by the Boses, for the putneedar to be able

"now to resume the julkur." It appears to us that the Judge was bound to find for the plaintiffs, if he found at all, upon specific evidence. We have said that evidence was improperly received and dealt with by the Lower Appellate Court in this case. We have also shown that the alternative finding recorded by the Judge is open to objection, and we think we should add that it does not appear if, without the documents which were irregularly and improperly admitted, there was sufficient evidence on the record to justify a decree in plaintiffs' favour. We think the Judge should come to a finding on this point, and the case will therefore be remanded to the Lower Appellate Court in order to find, discarding the evidence which has been improperly admitted on the record, whether, upon the evidence that remains, the plaintiffs have made out the title claimed in the suit. The costs will follow the result.

The 22nd July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Succession—Right of Suit—Preferential Heirs.

Case No. 497 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 10th December 1873, modifying a decision of the Additional Sudder Moonsiff of that District, dated the 29th April 1873.

Sreemutty Sookoorunnissa Khatoon (one of the Defendants), *Appellant,*

versus

Nudiar Chand Ghose (Plaintiff), *Respondent.*

Mr. C. Jackson and *Baboo Grish Chunder Ghose* for Appellant.

Baboos Chunder Madhub Ghose and *Nullit Chunder Sen* for Respondent.

Where a party claims as representing a particular person, and the defendant succeeds in showing that there is another person in existence who is a preferable heir, that is an answer to the plaintiff's suit, which ought accordingly to be dismissed.

Jackson, J.—THE special appeal here relates to immoveable property described as being 8 annas or half share of property formerly belonging to Nymuddi, who had two sons, Emam Buksh and Alimuddi. Emam Buksh was married to Sookoorunnissa, who is the first defendant, and Alimuddi married Mookoolunnissa, whose daughters are the second and third defendants. The plaintiff's case is that Alimuddi dying, his property remained in the hands of his wife Mookoolunnissa, to whom he had granted a hiba in 1259, and that Mookoolunnissa afterwards dying was succeeded by her daughters, defendants 2 and 3, who conveyed the property to him (plaintiff). The real defendant Sookoorunnissa, who had already one-half share of this property in her hands under a gift from her own husband Emam Buksh, claims to hold the other half under a putnee lease granted by Mookoolunnissa. The Courts below adjudicated upon this putnee lease and found it untrue. The defendant therefore cannot now claim to hold under this lease. but she raises before us certain grounds of special appeal, one of which is that, inasmuch as Alimuddi had a sister named Atubur Bibee, who, as one of the heirs of Nymuddi, was in part entitled to this property, and as Alimuddi was married by nikah to one Banoo, who, it is alleged, had sons by him, and as, in addition to the defendants 2 and 3, Alimuddi had a son who was also entitled to a certain share, the share claimed by plaintiff cannot, under any circumstance, amount to 8 annas of this property. Now the Courts below have disposed of this objection upon grounds which appear to us not entirely satisfactory. The alleged claim of Atubur Bibee seems to stand upon very different grounds from those set up on behalf of Banoo and others. Atubur Bibee is found by the Courts below to be an undoubted legitimate sister of the two sons of Nymuddi, and upon general principles of the Mahomedan law she would be entitled to a share of Nymuddi's property. As regards the others, Aizooddeen, the son of Alimuddi, is found to have died before his father, a minor and unmarried, and he therefore would take no share. As to Banoo, her marriage is questioned, and the Judge appears to be of opinion that she was no more than a kept-woman;

that she was not married; and that her sons were not the legitimate children of Alimuddi. As to these persons, therefore, it appears to us that they are merely suppositious heirs; that they would have no rights of their own; and that the defendant in naming them as heirs has set up a defence which she cannot maintain. As regards Atubur Bibee the case is different, and it appears to us that if the defendant claimed under any other person than Mookoolunnissa, who is the very same person under whom the plaintiff claims, it would be a good defence in the present suit to say that Mookoolunnissa is not entitled, as far as the share of Atubur Bibee is concerned. The respondents before us did not show how she (Mookoolunnissa) is entitled to that share, or can exclude Atubur Bibee; but it seems to us, under the circumstances of the case, that as the plaintiff and the defendant both claim under Mookoolunnissa, that is to say, plaintiff as her representative and defendant under a deed granted by her under which she says her share is 8 annas, it does not lie in the defendant's mouth to say that her share is less. We think, therefore, that the objection as to the amount of share must be disallowed. We have observed that the reasons which the Lower Appellate Court gives for excluding the share of Atubur Bibee are reasons in which we cannot agree. He says: "The defendant's vakeel, "however, urges that her appearance ought "to be insisted on, but this seems to me "quite an erroneous idea. I do not think "there is any necessity when a person clearly "shows no inclination to assert a right which "he must know is menaced, to force him to "do so." Now this involves clearly a misconception. The right of Atubur Bibee in this case was not menaced, because she was no party, and would not be affected by the result; and we have no doubt that where a party claims as representing a particular person, and the defendant succeeds in showing that there is another person in existence who is a preferable heir to the ancestor, or the person under whom the claim is made, if the existence of that preferable heir is made out, that is an answer to the plaintiff's suit, and the suit ought to be dismissed. The Moonsiff took very much the same ground, and must, we think, be answered in the same way. He also says: "Atubur "Bibee has not appeared in this case, and "she can very well defend her own right, "if she has any, in this property, against "any intruder."

There is a further ground of special appeal which relates to certain daghs. The Judge disposes of this matter in this way. The Moonsiff, it seems, refused a decree to the plaintiff, being of opinion that the plaintiff had given no evidence in respect of daghs 15 and 20 of Schedule 1 and certain other daghs which he enumerates, and he says that, in the absence of any evidence on plaintiff's part, the defendant's objection in respect of those daghs must stand good. The Judge says: "There are certain "daghs which the Moonsiff considers that "plaintiff has not satisfactorily shown to be "in possession of the defendant, and in "respect of some of these a cross-appeal is "filed; but I must say that it appears to me "that the plaintiff has produced some proof "that these daghs are in the defendant's "possession which the defendant rests on a "bare denial, and I must say that considering "how extremely suspicious the whole of the "defendant's case is, I think that no weight "can be given to a bare denial." That passage appears to mean that because the case of the defendant was generally of a suspicious character, and because the defendant had given no evidence, the plaintiff would be entitled to a decree in respect of those daghs upon giving any sort of evidence, no matter whether satisfactory or otherwise. In this view we cannot concur. The suspicious character of the defendant's case in other respects will not entitle plaintiff to any particular part of these daghs, and on defendant denying possession it lay upon the plaintiff to prove by sufficient evidence that the defendant was in possession, because it is clear that if defendant was not in possession the plaintiff would have no cause of action in regard to those particular daghs. The case, therefore, will go back on this point in order that the Lower Appellate Court may pronounce whether, upon the evidence offered, it is satisfactorily proved that these daghs are in the possession of the defendant. If so, the plaintiff would be entitled to a decree. If not, the Moonsiff was right in dismissing the suit in that particular, and his order will be affirmed.

The 23rd July 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Mortgage-bond—Decree—Execution-sale—Equity of Redemption—Second Mortgage.

Case No. 2690 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 20th August 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 21st April 1873.

Doolal Chunder Deb (one of the Defendants), *Appellant*,

versus

Goluck Monee Debia (Plaintiff), *Respondent*.

Baboo Joy Gobind Bose for Appellant.

Baboo Rajendro Nath Bose for Respondent.

Where a mortgagee sues upon his mortgage-bond, and his claim is decreed, the decree should be satisfied out of the mortgaged property, and not out of the right, title, and interest which remain in the mortgagor. The purchaser at the execution-sale acquires all the interest which passed by the mortgage to the mortgagee and any interest which remained in the mortgagor, *i.e.*, his equity of redemption.

If there was a second mortgage, all that it could pass from the mortgagor was his equity of redemption, and the decree in a suit on such mortgage could only authorize the sale of the equity of redemption unless the first mortgagee was made a party, and his mortgage shown to be invalid, and the second mortgage to have priority.

Couch, C.J.—The plaintiff was the second mortgagee of certain property, and having obtained a decree upon her mortgage she has brought a suit asking to have the mortgaged property sold in execution of the decree. The defendant's title is derived from a sale by auction in execution of another decree which was obtained by the first mortgagee of the property in a suit in which he claimed to have the money due upon his mortgage-bond realized out of the mortgaged property. The decree made in that suit was that his claim be decreed. That must certainly be considered as a decree for the sale of the property mortgaged in order to pay the money due upon the mortgage. That was the proper decree under such circumstances, and the decree which the mortgagee undoubtedly asked for. It would not be at all proper for the Court, where the mortgagee sues upon his mortgage-bond, to decree that his claim should be satisfied, not out of the property mortgaged, but from the right, title, and interest, whatever it might be, which remained in the mortgagor. The decree made in the suit upon the first mortgage authorized the sale of the mortgaged property, and the person who bought at the sale in execution of that decree bought all the interest which passed by the mortgage to the mortgagee, and any interest which remained in the mortgagor. There had been a second mortgage under which the plaintiff claims, and all that could pass from the mortgagor under that was the interest that remained in him after the first mortgage had been made—what is generally called the equity of redemption, which might or might not be valuable. But the plaintiff could not obtain the right she now claims by any decree which the Court could make except in a suit to which the first mortgagee was a party, and his mortgage had been declared to be invalid and the second mortgage to have priority. Except in such a suit as that, the decree in a suit on the second mortgage would only authorize the sale of what was left in the mortgagor. Here it amounted to nothing, for the previous decree entitled the party who obtained it to sell the whole of the mortgaged property and to be paid out of it. It does not appear that any surplus remained which would have been applicable to the satisfaction of the second mortgage. If there had, the plaintiff would have been entitled to receive it. But the rights of the parties were those of a first and second mortgagee. The plaintiff could have no right to the property until the first mortgage was satisfied, and no right to have it sold except subject to the first mortgage, and the rights which had been acquired under it and under the decree in the suit brought by the first mortgagee. It appears to us that the plaintiff has no right to have the property sold in satisfaction of her mortgage, and so to defeat the title acquired under the first mortgage. Both the lower Courts have taken an erroneous view of the rights of the parties. Their decrees must be reversed, and the suit of the plaintiff must be dismissed with costs.

We assume that there was no surplus left after satisfying the first mortgage. If there was any such surplus, our dismissing the present suit is not to prejudice the plaintiff's right to it.

The 8th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Jurisdiction—A Court's Power to declare another Court to have acted without Jurisdiction.

Case No. 441 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 28th November 1873, reversing a decision of the Additional Moonsiff of that District, dated the 16th December 1872.

Gunnesh Pattro (Plaintiff), *Appellant,*

versus

Ram Nidhee Koondoo (Defendant), *Respondent.*

Mr. Mendies and *Baboo Bama Churn Banerjee* for Appellant.

Baboos Kalee Mohun Doss and *Bhowanee Churn Dutt* for Respondent.

Although one Court cannot set aside the proceedings of another Court for want of jurisdiction, yet when a matter arises before a Court in the ordinary course of its jurisdiction, and one of the parties relies on, or seeks to protect himself by, the proceedings of another Court, then in that way the jurisdiction of the Court whose proceedings are pleaded may be inquired into. Accordingly in a suit in which plaintiff asked for a declaration of title, and a Revenue Court's want of jurisdiction appeared on the face of its decree, a Moonsiff was held to be justified in holding that the Revenue Court had no jurisdiction.

Markby, J.—In this case it appears that upon a decree passed by the Deputy Collector, sitting in the Revenue Court, the property of the plaintiff was put up for sale and purchased by the defendant, who was himself the decree-holder in the suit in the Revenue Court. Thereupon the plaintiff instituted a suit in the Civil Court asking, amongst other things, that his title to the property might be declared notwithstanding those proceedings of the Revenue Court. Now, that was a matter over which the Civil Court had full jurisdiction, and, if it thought that it was a proper case for making a declaratory decree, it had jurisdiction to make such a declaration; and although the plaintiff's possession had not actually been invaded, yet as it was obvious that the defendant would immediately take proceedings under his auction-purchase, it was a proper case for entertaining the suit. The first Court inquired into the plaintiff's title, and held upon that inquiry that inasmuch as it appeared upon the face of the decree that the land was bastoo land within the town of Midnapore, the Revenue Court had no jurisdiction to entertain the suit before it, which was a suit for enhancement of rent; and it being admitted that, but for the sale in execution of the decree of the Revenue Court, the plaintiff's title was good, the first Court decreed the suit in favour of the plaintiff. Now, no doubt, incidentally to the inquiry into the plaintiff's title, the Court did inquire and decide that the Revenue Court had no jurisdiction. There was nothing to prevent it from doing so. For although one Court cannot set aside the proceedings of another Court for want of jurisdiction, yet when a matter arises before a Court in the ordinary course of its jurisdiction, and one of the parties relies on, or seeks to protect himself by, the proceedings of another Court, then in that way the jurisdiction of the Court whose proceedings are pleaded in protection may be inquired into; and therefore, although the Moonsiff in this decree no doubt goes beyond his power when he sets aside the proceedings of the Revenue Court, and so far we do not support his decree, yet so far as he merely declares the plaintiff's title, we think his decree was right.

I have already pointed out the distinction between this case and the case where the suit is brought simply for the purpose of setting aside a decree of another Court for want of jurisdiction. There is also a distinction between this case and the case where a party comes before the Court and invokes the power of a superior Court for the purpose of setting aside proceedings of an inferior Court, as under section 15 of the Charter of this Court, or under the powers of prohibition possessed by the Courts of Westminster in England. There the Court applied to, having a discretion, very frequently refuses to interfere, on the ground that no objection has been taken to the jurisdiction of the Court whose proceedings it is sought to set aside, but no case has been

produced either from the Courts in this country or in England where the Court has refused to inquire into the jurisdiction of another Court in a case where that question incidentally arises in the manner which I have already pointed out. It is also necessary to point out in this case that the ground upon which the Moonsiff has held that the Revenue Court had no jurisdiction is, that it appears on the face of the decree of the Revenue Court that the case was not one in which it had jurisdiction. How the matter would have stood if the decree upon the face of it had been a good one, and either the Revenue Court had found, or the parties might be taken to have admitted, that the land was of that nature that the Revenue Court had jurisdiction over it, is a matter which does not arise in this case. All that is necessary to say in this case is this that want of jurisdiction appearing on the face of the decree the Moonsiff was justified in holding that the Revenue Court had no jurisdiction, and that the plaintiff's title was a good title notwithstanding the proceedings which had been taken in that Court.

Upon these grounds, therefore, we think that the decision of the District Judge must be reversed, and the decision of the Moonsiff restored, subject to the slight modification which I have indicated. The appellant is entitled to the costs of this appeal and of the lower Courts.

Mitter, J.—I am of the same opinion. One of the questions raised by the pleader for the respondent is whether the lower Court is right in holding that the Revenue Court had no jurisdiction to pass a decree for enhancement of rent with respect to bastoo land in the town of Midnapore. It is contended that the lower Court's decision upon this point is not right, and under the provisions of Act X. of 1859 the Revenue Courts had jurisdiction. If this question had come before me for the first time, probably I would have been inclined to hold that this contention is right. But looking to the recent course of decisions upon this point in which almost all the Judges of this Court have expressed a contrary opinion, I do not think I shall be justified in differing from them, because my opinion is not decidedly clear in favour of the jurisdiction of the Revenue Courts. This being my view upon this question, for the reasons given in the judgment of my learned colleague, I also think that the judgment of the Lower Appellate Court ought to be reversed, and that of the first Court restored with costs.

The 21st July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rent-suit—Plea of lakhiraj—Res-adjudicata.

Case No. 463 of 1873.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 29th April 1873, reversing a decision of the Moonsiff of Pandooah, dated the 30th April 1872.

Mohesh Chunder Banerjee (Defendant), *Appellant,*

versus

Joy Kishen Mookerjee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Mohinee Mohun Roy and *Chunder Nath Bose* for Respondent.

The High Court, in special appeal, ought not to refuse to allow a plea of *res adjudicata* to be taken before it by reason of its not having been taken in the Courts below, if it is one which the Lower Appellate Court ought to have taken up and decided for itself.

Where a suit for rent is brought by the zemindar of a revenue-paying estate against an under-tenant and the defendant pleads that the land is lakhiraj, the decision makes the issue a *res judicata*, whether plaintiff does or does not ask for a declaration of his mâl right to the land.

Jackson, J.—THIS was a suit for declaration brought by the zemindar, in which the defendant denied that he held any land in the plaintiff's talook, and also denied the plaintiff's allegation that the land which he held was mâl land.

The defendant set up ancestral lakhiraj right and denied that he was liable to pay any rent to the plaintiff.

It came out upon the trial that there had been a previous decision between these parties in a suit for rent of previous years, and upon the whole of the evidence adduced the Moonsiff considered that the plaintiff failed to make out his right to receive rent; in fact, he decided affirmatively that the disputed land was lakhiraj, and that there was no reliable evidence in support of the plaintiff's case. He therefore dismissed the suit.

This decision was appealed, and on appeal the Second Subordinate Judge on the evidence reversed the judgment of the first Court, and gave plaintiff a decree.

The defendant has appealed specially here, and the first ground he has urged, and the only ground on which argument has been heard, is that which stands second in the grounds of special appeal, *viz.*, that substantially the issue raised in the present suit between these parties having been previously raised and determined in a former suit between these parties, the plaintiff is concluded by the judgment then arrived at, and is not entitled to raise the same question in any other suit and in any other manner. That is substantially the ground taken in special appeal.

It is urged on behalf of the respondent in the first place that the ground had not been taken in the Courts below, and we are asked to refuse the defendant permission to allow it to be taken here. The precedent on which the special appellant relies is a case in 21 Weekly Reporter, p. 207, in which judgment was given by me. That decision which, so far as I know, is the only one in which the matter has been considered since the recent ruling of the Full Bench on the finality of decisions of the Revenue Courts, was not before the Subordinate Judge, and certainly not before the Moonsiff, when the decision in this case was given. But the point is one which, we think, the Subordinate Judge ought to have taken up and decided for himself. We ought not, therefore, by reason of this point not being taken in the lower Courts, to refuse it to be taken now.

It is further contended that, supposing the point is one which ought to be allowed to be taken, the case in 21 Weekly Reporter is distinguishable from the present, and Baboo Mohinee Mohun Roy has argued with great force that the issue raised in the present case is not, as it was in the case in 21 Weekly Reporter, co-extensive and identical in the two suits, that is to say, that the issue raised in the present suit is a wider and larger issue than that raised in the suit in which the Additional Judge of Hooghly gave decision on the 1st June 1871. It appears to us, however, that the point decided and the point for decision were essentially and absolutely the same. In that case, as in the present, the claim was for rent. The defence was the same, and the point decided was the same. It makes no difference that the plaintiff in the present suit asks for a declaration of his mâl right to the land which the defendant occupies, because a suit for rent brought by the zemindar of a revenue-paying estate against an under-tenant assumes that the land in respect of which the rent is claimed is mâl; and whether declaration is asked for or not the result must be the same. The defendant's plea in both the cases raises the whole question, is he or is he not liable to pay rent to the plaintiff? This point has been gone into in the previous suit by the Moonsiff and the Additional Judge, both of whom had full jurisdiction (not a restricted one, as the Revenue Court had) to take cognizance, and did take cognizance of the question. Baboo Mohinee Mohun Roy has surprised us very much by suggesting that the judgment of the Judicial Committee—we speak of the judgment in the case of Sudanund Mohapatter *vs.* Soorjo Monee Dayeenund—would not apply where the particular matter in claim is not the same, so that in point of fact, if the remark is correct, the zemindar may sue every year the same tenant, and although every year it might be solemnly decided that the land held by the defendant is lakhiraj and not mâl, the defendant might be every year vexed by a demand for rent. That is a position which appears to us to be wholly untenable. The question raised and decided here being identical with that raised and decided in the previous suit between these parties, we think the plaintiff is precluded from raising it again. We think, therefore, that the judgment of the Lower Appellate Court must be set aside, and this appeal allowed with costs.

As far as we have been able to look at the facts, it is satisfactory to find, we must say, that we have been able to set aside the judgment of the Lower Appellate Court and restore the judgment of the Moonsiff.

The judgment of the Lower Appellate Court being set aside, the defendant will be entitled to recover back the costs of the case, which, we understand, have been already realized from him.

The 22nd July 1874.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Religious Endowment—Mohunt's Suit for Declaration of Title—Act XX. of 1863.

In the Matter of

Kishore Bon Mohunt, *Petitioner,*

versus

Kalee Churn Giree, *Opposite Party.*

Baboo Aukhil Chunder Sen for Petitioner.

Baboo Kalee Mohun Doss for Opposite Party.

A suit for the removal of the present Mohunt of a religious endowment, and for the appointment of petitioner in his place, is not of such a nature as is contemplated by Act XX. of 1863.

Kemp, J.—THE opposite party to this rule, Kalee Churn Giree, is an inhabitant of Dacca. He petitioned the Judge of Chittagong, setting forth that the present Mohunt of the shrine of Shumbhoo Nath and Chunder Nath of Sitakoond in that district was not a fit and proper person to be the Mohunt. The petitioner claimed under the will of a former Mohunt, and also under a deed of approval, summotee puttro, signed, as he alleges, by some respectable inhabitants of the district. He further stated in his application that he had brought a regular suit under the provisions of Act VIII. of 1859; that that suit had been dismissed by the Judge of Chittagong, and that he had been told that he ought to have applied under section 18, Act XX. of 1863; that he appealed to this Court against the order of the Judge of Chittagong; and that this Court ruled that, whether the endowment came within the purview of section 4, Act XX. of 1863, or not, the petitioner was bound first to obtain the permission of the Civil Court to bring his action under the provisions of section 18, Act XX. of 1863. The petitioner, therefore, under that section applied to the Civil Court of Chittagong to remove the present Mohunt Kishore Bon, and to appoint the petitioner in his place. The preliminary application under section 18 sets forth that the applicant desires a declaration that he is entitled to the guddee of Sitakoond, and that he is entitled to possession of all the lands appertaining to that endowment including resumed lakhiraj, confirmed lakhiraj, and talookee lands. He values the lands, the shrine, and the buildings attached thereto, at 46,654 rupees 4 annas 5 gundas.

Now the application which has been made in this case is clearly one which is not contemplated by section 14, Act XX. of 1863. Section 14, Act XX. of 1863, is to this effect: "Any person or persons interested in any "mosque, temple or religious establishment, "or in the performance of the worship or of "the service thereof, or the trusts relating "thereto, *may*, without joining as plaintiff "any of the other persons interested therein, "sue before the Civil Court the trustee, "manager, or superintendent of such "mosque, temple, or religious establishment, "or the member of any Committee appointed "under this Act, for any misfeasance, breach "of trust, or neglect of duty, committed by "such trustee, manager, superintendent, or "member of such Committee, in respect of "the trusts vested in, or confided to, them, "respectively, and the Civil Court may "direct the specific performance of any act "by such trustee, manager, superintendent, "or member of a Committee, and may decree "damages and costs against such trustee, "manager, superintendent, or member of "a Committee, and may also direct the "removal of such trustee, manager, superin-"tendent, or member of a Committee."

We therefore think that the preliminary application made by the petitioner in the case is not one coming within the purview of section 14 of the Act. It is not an application charging the Mohunt with any misfeasance, breach of trust or neglect of duty: the application is for the removal of the present Mohunt and for the appointment of the petitioner. The object of the application is to have it declared that the petitioner is entitled to the guddee, and that he is also entitled to possession of the lands connected with the endowment.

Then we are further of opinion that the petitioner is not such a person as is contemplated under section 15 of the Act. That section says: "The interest "required in order to entitle a person "to sue under the last preceding section," namely, section 14, "need not be a pecu-"niary, or a direct or immediate, interest, "or such an interest as would entitle the "person suing to take any part in the manage-"ment or superintendence of the trust. Any "person having a right of attendance, or hav-"ing been in the habit of attending, at the "performance of the worship or service of "any mosque, temple or religious establish-"ment, or of partaking in the benefit of any

"distribution of alms, shall be deemed to be "a person interested within the meaning of "the last preceding section."

Now, the application of the petitioner in this case does not state that he sues under any right of attendance, or that he has been in the habit of attending the shrine, or that he partakes in the benefit of any distribution of alms. He grounds his application entirely upon the will of the former Mohunt, and upon an alleged election by respectable people of the district.

Under section 18 of the Act it is true that the Court need not take any evidence, but, upon a simple perusal of the application, the Court may determine whether there are sufficient *primâ facie* grounds; and if in the judgment of the Court there are such grounds, leave may be given for the institution of the suit; but it is, we think, the duty of the Court acting under this section to see that there are some sufficient grounds for giving a party permission to institute a suit under the provisions of this Act, for such permission does not only contemplate that the Court may direct the removal of such trustee, manager, superintendent, or member of a Committee entrusted with the management of the endowed property, but it also contemplates that the Court shall call upon such trustee, manager, superintendent, or member of a Committee, to file in Court an account of his trust. We therefore think that this direction ought to be exercised wisely, and that, on the petition of a party who does not bring his application under the provisions of section 14, and who has not shown that he is entitled to bring such application under the provisions of section 15, the Judge ought not to have permitted the application to be made at all. We think it is very unfortunate that the petitioner should have been referred by this Court to a suit under section 18, Act XX. of 1863, for even if the application made by the petitioner were one which the Court could entertain under section 14 of that Act, that section does not preclude a party from suing under Act VIII. of 1859. The section merely says that a party who comes in making a preliminary application under Act XX. of 1863 "may" do so under the provisions of section 14 of that Act.

We therefore think that the order of the Judge of Chittagong, dated the 6th of June 1873, must be set aside as passed without jurisdiction, and this rule be made absolute with costs payable by the opposite party, the petitioner in the Court below. Pleaders' fees, 10 gold mohurs.

Pontifex, J.—I concur in thinking that this suit is not of such a nature as is contemplated by Act XX. of 1863, and that the Judge acted without jurisdiction in admitting it under that Act.

The 23rd July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Decisions of Civil Courts—Evidence—Act I. of 1872, ss. 13 & 43.

Case No. 2556 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Chittagong, dated the 6th August 1873, reversing a decision of the Moonsiff of Raojan, dated the 11th June 1873.

Neamut Ali (Plaintiff), *Appellant*,

versus

Gooroo Doss (Defendant), *Respondent*.

Mr. C. Gregory for Appellant.

Baboo Umbica Churn Banerjee for Respondent.

In a suit to establish an itmamee right to certain lands, plaintiff produced certain transcript decisions of the Civil Court in suits in which a former holder of the tenure of the person who was said to have created the right, was a party; but the Lower Appellate Court rejected them as evidence on the ground that the defendant was not a party to the suits:

HELD that the proceedings in such suits came within the meaning of "any transaction" in the Evidence Act of 1872, s. 13, and were admissible as evidence in the case under s. 43, not as conclusive, but as of such weight as the Court might think they ought to have.

Couch, C.J.—THE plaintiff sued to establish his itmamee right to 2 kanees 12 gundas and 2 cowries of land mentioned in the plaint, and to obtain possession of 2 kanees 7 gundas and 1 cowrie of it from the defendant, the plaintiff apparently being in possession of the remainder.

The principal question in the suit is whether the lands mentioned in the plaint were an itmamee tenure of the plaintiff. The Moonsiff found with respect to some, the numbers of which are given in his decree, that they were, and he made a decree in the plaintiff's favour for them.

There was an appeal by the defendant from this decree. The Subordinate Judge, who tried the appeal, says in his judgment that amongst other matters which the plaintiff produced in support of his case were

four transcript decisions of the Moonsiff and Additional Principal Sudder Ameen made at different times in suits in which Goluck, who was admitted to be a former holder of the tenure of the person that was said to have created the right which the plaintiff claimed, was a party. They showed that there was such an itmamee as the plaintiff alleged, but he altogether rejected them as evidence on the ground that the defendant, the appellant before him, was not a party to the suits, and that he could neither be bound by them nor could they be treated as title-deeds in favour of the plaintiff and adverse to the defendant. We suppose by "as title-deeds" he meant as evidence of title, and he has in fact held that they were not evidence of the title which the plaintiff alleged that he had.

The Subordinate Judge would be right in saying that, under section 43 of the Indian Evidence Act, 1872, they are not evidence, if only the sections that are particularly referred to there are looked at. Section 43 says: "Judgments, orders or decrees, other than those mentioned in sections 40, 41, and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act." Now these decisions were not admissible in evidence, or, to use the term in the Act, were not relevant under section 40, for that applies only to cases where the judgment, order or decree is used as being a bar to a suit. It says: "The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit, or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial." That was not the case here. Then section 41 applies to judgments which confer or take away a legal character, or declare a person to be entitled to such a character, or to be entitled to any specific thing absolutely. These judgments are conclusive. The section describes what are commonly known as judgments *in rem*, but it goes beyond what is strictly a judgment *in rem*, and the words used ought to be carefully looked at in considering what judgments are within this section.

It does not apply to the present case nor does section 42, which is intended for judgments, orders or decrees which relate to matters of a public nature. But there are words in section 43 which introduce another section of the Act. They are: "Unless the existence of the judgment is relevant under some other provision of this Act." And if judgments of the description of those produced by the plaintiff are evidence at all (and we cannot think it was intended that they should not be), they must be admissible or relevant by section 13, which says: "Where the question is as to the existence of any right or custom, the following facts are relevant: Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence. Particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from."

Here the right, the existence of which was in question, was the right of the plaintiff to the itmamee lease. And in the suits in which the decrees were made, the right was claimed and asserted successfully. The word "transaction" is certainly large enough to allow the proceedings in such suits as these to be admitted as evidence, not as conclusive, but as of such weight as the Court may think they ought to have. And in this section there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used. Of course the value of it will be very different where it was given in a suit to which the person against whom it is used was not a party, and had no opportunity of contesting the matter, and where he was party to the suit and had the opportunity of producing any evidence he might think fit. Unless the Indian Evidence Act has excluded judgments and decrees which had previously been always considered as very good evidence, and which are indeed in many cases almost, if not quite, conclusive, it is clear that the decisions referred to were admissible in this case, and that the Subordinate Judge was wrong in treating them as not being any evidence of the plaintiff's title. They ought to have been considered, and it is possible that if he had not taken the erroneous view of their admissibility, he would have been of the same opinion as the Moonsiff, that the plaintiff had proved his itmamee lease.

There is another question which the Moonsiff had tried, but which the Subordinate Judge omitted to try, apparently because, having found that there was no itmamee lease, it did not become necessary for him to try it. This question is whether Gooroo Doss was really the purchaser of the superior tenure,

or whether it was Goluck Sen who bought it, using Gooroo Doss's name. In the one case the itmamee lease might not be affected; in the other, it would be. If Gooroo Doss was really the purchaser, he would have a right to avoid the tenure; but if Goluck Sen was the purchaser, and was using Gooroo Doss's name, he would have no such right. Therefore it may become necessary for the Subordinate Judge to determine that question. It would have been better if, notwithstanding the view which he took of the admissibility of the evidence and of the plaintiff's failure to prove the itmamee lease, he had gone on and decided the question which the Moonsiff had decided. It might have made it unnecessary to remand the case. It is often desirable that the Appellate Court should not limit itself to deciding a single question upon which it may think the case turns, but on which, when it afterwards comes to be looked at, it does not appear to turn, and other questions have to be determined. It would often be unnecessary to remand a case to the lower Court, as we should be able with the findings before us to finally dispose of it. We cannot do so on this occasion. We must reverse the decision of the Subordinate Judge, and remand the suit to him to hear the appeal. The costs will follow the result.

The 23rd July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Contract—Kobala—Signature—Delivery—Act I. of 1872.

Case No. 2666 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 26th August 1873, reversing a decision of the Moonsiff of Futtickchuree, dated the 9th May 1873.

Shaikh Omed Ali (Defendant), *Appellant*,

versus

Nidhee Ram and others (Plaintiffs), *Respondents*.

Baboo Hem Chunder Banerjee for Appellant.

Baboo Aukhil Chunder Sen for Respondents.

In a suit for possession of land on the ground of title under a kobala, it is not enough for the plaintiff to prove the writing and signature of the kobala; he must also prove that it was delivered as a complete instrument.

The practice of looking more at the illustrations in the Contract Act than at the words of the sections of the Act pointed out to be a mistake.

Couch, C.J.—The claim in the plaint is for possession of the land which is the subject of the suit on the ground that the plaintiffs had become entitled to it by a kobala executed by the defendant, dated the 26th of Srabun 1228.

The defence is that the kobala had not become a complete conveyance of the land; that an appeal being pending in a suit between the plaintiffs and the defendant, terms of compromise were agreed to by which the defendant was to give a kobala and the plaintiffs were to give an itmamee pottah; but when the application was made to the Court of the Principal Sudder Ameen to record the compromise, the Judge, having his judgment prepared, refused to do so, and delivered judgment for the defendant; that the transaction was not completed, and consequently the plaintiffs did not acquire a title.

The plaintiffs through the form of their plaint, as well as in consequence of the time of bringing the suit, must, in order to succeed, show that the kobala had become a complete instrument; for the date of the transaction is August 1866, and the plaint was not filed until the 31st December 1872. It was too late to bring a suit to have the compromise carried into effect by the execution of the proper instruments, supposing that the plaintiffs could have made out a case for specific performance of the agreement.

The question then really is, had there, before the judgment was given, been not merely a signature of the kobala and lease, and a delivery of them to Dewan Ali for the purpose of his keeping them until the compromise was recorded, and then having the lease registered (which would be necessary in order to make it a binding instrument), but a delivery of the kobala to some person for the plaintiffs as a complete instrument, and operating as a conveyance of the land —whether, in fact, the transaction had been completed as regards the conveyance of the land by the execution and delivery of the kobala before the judgment was given, or whether it remained incomplete and was to be completed by the recording of the compromise, and the delivery of the instruments to the parties who would then be entitled to them, and by the registration of the lease. If the transaction was incomplete, and was

not intended to be complete until the compromise was recorded, then the plaintiffs fail to show that they have become entitled to this land by virtue of the kobala. It is not enough to prove that the kobala was signed; they must prove that it was delivered as a complete instrument, and was made over to Dewan Ali as such, and not merely as a signed document to be completed afterwards by being delivered to the plaintiffs.

The Subordinate Judge appears not to have seen this distinction. He says: "As the defendant, after admitting the inditement of the kobala, pleads the non-delivery of the same, the onus of proving that fact rests with him, according to the illustration of section 102 of Act I. of 1872." That is not so. It is not enough that the defendant admitted, as the Subordinate Judge says, the writing of the kobala. The plaintiffs were obliged to prove something more than the writing and signature of the kobala; they had to prove that it had been delivered as a complete instrument. There was no onus of proof on the defendant to show that the instruments had not been delivered. What is here laid down as to the onus of the proof is altogether wrong; and the illustration which is referred to does not at all support the proposition stated by the Subordinate Judge. If he had looked at the words of the section and not at the illustration, he might not have fallen into this error.

We have noticed more than once a disposition on the part of Subordinate Judges and Moonsiffs to look more at the illustrations in the Contract Act than at the words of the sections of the Act. That is a mistake. The illustrations are only intended to assist in construing the language of the Act. We must say that we are surprised at the way in which this illustration has been used by the Subordinate Judge. He has not only laid down the law as to the burden of proof erroneously, but it is apparent that this erroneous view of what the plaintiff was bound to prove pervades the whole of his judgment, and we cannot say that the decision has not been greatly affected by the mistake which he made as to what was the question to be tried, and upon the determination of which the result of the suit depended.

We must reverse the decree of the Subordinate Judge and remand the case for re-trial. We think it is desirable that the Judge should take the case up on his own file and decide it himself instead of its going back to the same Subordinate Judge. The costs will follow the result.

The 23rd July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Ejectment—Onus Probandi.

Case No. 629 of 1874.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 15th December 1873, affirming a decision of the Moonsiff of Kulna, dated the 3rd September 1873.

Bheem Chunder Howlee (one of the Defendants), *Appellant,*

versus

Nirto Moyee Dossee and others (Plaintiffs), *Respondents.*

Baboo Gopal Chunder Goopto for Appellant.

Baboo Sham Lall Mitter for Respondents.

In a suit for ejectment as a trespasser, if the defendant establishes possession as a tenant, plaintiff is bound to show that the tenancy has been put an end to.

Markby, J.—If the allegation is true that the defendant No. 5 has been recognized as a tenant either by Shama Churn himself or by the plaintiff, and that his tenancy has not been duly put an end to, this suit, which is brought against the defendant as a trespasser, cannot be maintained; and, for the purpose of trying this issue, it is not necessary that the defendant No. 5, who is the appellant before us, should be put to the proof of his dur-mokurruree lease. It is sufficient to show that he was in possession as a tenant; and if he establishes that, it would be for the plaintiff to show that that tenancy has been put an end to. Therefore, as the case has not been tried on that point of view by the Lower Appellate Court, we are compelled to remand it for that purpose.

Costs will abide the ultimate result.

The 23rd July 1874.

Present :

The Hon'ble F. B. Kemp, *Judge.*

Special Appeal—Evidence—Act VIII. of 1859, s. 355.

Case No. 2534 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 21st August 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 24th March 1873.

Abdool Luteef (one of the Defendants), *Appellant,*

versus

Mahomed Kamil (Plaintiff), *Respondent.*

Baboo Grish Chunder Ghose and *Moulvie Serajul Islam* for Appellant.

Baboo Bama Churn Banerjee for Respondent.

The High Court is entitled in special appeal to examine the evidence of a witness summoned by the Lower Appellate Court under Act VIII. of 1859, s. 355, which was not before the first Court.

THE defendant is the special appellant. The plaintiff sues on the basis of a kobala from Rujub Bibee and Dodoo Bibee, dated the 13th of Aghran 1277. The plaintiff alleges that the tank in dispute was purchased by him under that deed, and that the defendant has dispossessed him from that tank and has erected a tatee on the east and north, and a privy on the south of the tank. The suit, therefore, is for possession and for the removal of the tatee and privy. The defendant's case was that the suit was barred by the statute of limitation; that the tank in suit did not belong to the plaintiff's vendor; that it was owned and held by the late Azim Meah; and that the defendants purchased the tank in dispute with other lands from the heirs of Azim Meah. The first Court tried the issue of limitation with the merits, and found that the tank in dispute was not included in the plaintiff's deed of conveyance, and that the plaintiff had not been able to prove that his vendor had any title in the tank in dispute. The Moonsiff, therefore, dismissed the plaintiff's suit. Subsequently, the plaintiff applied to the Moonsiff for a review of judgment and filed certain chittahs. The Moonsiff appears to have examined these chittahs, and he found that the plaintiff's statement, that his vendor's rames were mentioned in these chittahs as dukhulkars of the tank in dispute, was not established, but, on the contrary, that other parties were mentioned as in possession. He therefore rejected the application for review, and adhered to his former judgment.

On appeal, the Subordinate Judge, Baboo Mohesh Chunder Sen, has reversed the decision of the first Court. In the appellate stage of the case, the Subordinate Judge has admitted evidence which was not before the first Court. He has examined Aleemoollah, the vendor of the defendant; he has also sent for the survey map and the chittahs from the Collector's Court. Now, with reference to the evidence of Aleemoollah, the defendant says that he was at enmity with him, because he had purchased some lands belonging to him in execution of a decree. It is true that the Subordinate Judge has stated his reasons for summoning this witness under section 355, but when I examine this witness' evidence, and in this special appeal I consider that I am entitled to do so inasmuch as this evidence was not before the first Court, I find that when he is cross-examined, he says, I know nothing of the possession of Rujub Bibee, that is, the plaintiff's vendor; and he also says: "আমি নূতন পয়খানা দেখি নাই." I have seen no newly-erected privy. Now it is one of the allegations of the plaintiff in the plaint that this privy has been newly erected by the defendant. Therefore I attach no weight whatever to the evidence of Aleemoollah.

Then with reference to the chittahs, the Subordinate Judge has clearly gone wrong. He says that daghs Nos. 733 and 737 of the chittahs show that the disputed tank was measured as belonging to the plaintiff's

vendors. Now, this is not the case, for on referring to the chittahs, I find that daghs Nos. 733 and 737 are stated in the chittahs under the head of "rukum-jumee," or "description of land," to be "chara beeta" and not "pooshkurnee." I also find under the heading of the chittah "nam dukhulka," or "name of parties in possession," the name of Azim Meah, who is not the vendor of the plaintiff, and therefore the Subordinate Judge has clearly gone wrong in his opinion of these chittahs which, if anything, prove the defendant's case.

Then with reference to the deed upon which the plaintiff comes into Court, the plaintiff had already filed a suit which he was allowed to withdraw by the Moonsiff, with permission to bring a fresh suit, and therefore the plaintiff ought to have come prepared with all the documents in support of his title; but it appears that so far from doing so, with the exception of his deed of conveyance, all the other evidence was supplied by the Subordinate Judge of his own motion. Then with reference to the title-deed upon which the suit is based, it is very clear, on perusal of that deed, that all that was conveyed to the plaintiff was the "nishkur baree," of Rujub Bibee and Dodoo Bibee; anything beyond that was not conveyed by that deed, and the tank in dispute did not pass under that deed. Further, I find that in the appellate stage a third party petitioned the Court, stating that Rujub Bibee had no title to convey even in the "nishkur baree," and that he was the rightful heir. The Subordinate Judge upon that petition passes a most extraordinary order. He says that it is clear that this petition has been put in by the respondent before him, namely, the defendant, but he gives no grounds whatever for coming to that conclusion, and, without any inquiry upon that point, he rejects the petition. However, be that as it may, as it is clear that the deed upon which the plaintiff sues does not pass the tank in dispute, and as it is clear that the chittahs upon which the Subordinate Judge relies do not show that daghs Nos. 733 and 737 are described as a tank in the possession of the plaintiff's vendors, but as "chara beeta" land in the possession of some one else, and as the evidence of Aleemoollah taken as a whole, and looking to the answers which he gave in cross-examination, is of very little worth, I would uphold the decision of the first Court and reverse that of the Subordinate Judge.

The suit of the plaintiff will be dismissed, and this appeal decreed with costs.

The 24th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble C. Pontifex, *Judge.*

Contract—Act IX. of 1872, s. 27—Cases of Hindoos in Calcutta—Small Cause Court.

Case stated for the opinion of the High Court by the First Judge of the Court of Small Causes at Calcutta under section 7, Act XXVI. of 1864.

Madhub Chunder Poramanick, *Plaintiff,*

versus

Raj Coomar Doss and others, *Defendants.*

Mr. Bonnerjee for Plaintiff.

Mr. Kennedy for Defendants.

The Contract Act (IX. of 1872) applies in the Calcutta Small Cause Court to suits between Hindoos for damages for breach of contract.

The words "restrained from exercising a lawful profession, trade or business" in s. 27 do not mean an absolute restriction, and are intended to apply to a partial restriction—a restriction limited to some particular place.

Case.—THE plaintiff sued the defendants for that the plaintiff having opened a shop in Causereeparrah, in Simlah, in the town of Calcutta, for the sale of copper utensils, the defendants proposed to the plaintiff to cease carrying on the said business in the said locality, on the ground of its being detrimental to their business, and offered to

agreed, in consideration of his doing so, to pay to the plaintiff all sums which he had then disbursed as advances to workmen, whereupon the plaintiff did agree and consent to cease carrying on the said business, and did accordingly cease; and that the defendants have neglected and refused to perform their part of the contract, to wit, to reimburse the plaintiff in all sums that he had advanced to workmen, whereby the plaintiff has sustained damages to the amount stated.

The plaintiff was a brazier, and had established a shop in the part of Calcutta named in his cause of action. The body of braziers carrying on business in the same locality held a public meeting, at which it was resolved, among other things, that none of their body would employ more than four under-workmen, and that then the trade would return to its former prosperity. The plaintiff then interposed and said he could not conform to this resolution, as his business was so organized that it required from sixteen to twenty under-workmen to carry it on profitably; but he was willing to remove his shop elsewhere, if his already expended advances were recouped to him. There was a general shout: "We will pay your advances: those who take on your workmen will pay." Plaintiff objected that he did not wish to have a hundred guarantors to look to, but if any four or five would undertake to pay him the advances which he had already given to his men, he would remove. The defendants undertook accordingly, and the plaintiff sues them on this undertaking, which was verbal. The sum advanced to the workmen was proved to be Rs. 900. It was contended by the Counsel for the defendants that this agreement was void under section 27 of Act IX. of 1872, being an "agreement by which the plaintiff was restrained from exercising a lawful profession, trade or business," and not coming under any of the three exceptions following that section.

I held that the defendants' agreement did not come within section 27 of Act IX. of 1872, inasmuch as there was nothing in it restraining the plaintiff from setting up he same trade in some other locality, or even n the very next house to that which he then occupied for it. It was a mere engagement on his part to remove his business out of hat house; and perhaps it might be construed to have been the intention of the arties that he should remove it from that ocality, but not an engagement restraining im from exercising that business altogether. I thought also that if this engagement did come within the meaning of section 27, it would only be void to that extent—*viz.*, to the extent in which it restrained one of the parties from exercising his trade; but that it would still operate to make the consideration-money payable to him. I illustrated my meaning by saying that if a factory were established in Belgrave Square, London, persons interested in its removal might make a valid contract for the removal of it, and would be bound to perform their part of such contract. I gave judgment in favour of the plaintiff; but, at the request of the learned Counsel, made it contingent on the opinion of the High Court upon the question which he had raised; and I have now the honor to ask the opinion of the Honorable the Judges upon that question.

The sum of Rs. 230 has been paid into Court as security for costs of reference under section 8 of Act XXVI. of 1864.

Before the High Court, Mr. Bonnerjee, for plaintiff, contended that the Indian Contract Act of 1872 does not apply to Hindoos. Under section 17 of 21st of George III., c. 70, the Hindoo law is to be applied to Hindoos in matters of contract, &c. This section of the Statute has not been repealed, and so long as it is in force, the Hindoo law of contracts must govern all contracts between Hindoos. It cannot be contended that the Statute of George III. has been repealed by implication, for section 2 of the Contract Act distinctly provides that "nothing herein contained "shall affect the provisions of any Statute, "Act or Regulation not hereby expressly "repealed." Besides, a special Act of Parliament cannot be repealed by a subsequent General Act, by implication or in any other manner, except by express words of repeal—FitzGerald *vs.* Champneys, 2 Johnson & Hemming's Rep. 31. The Trustees of the Birkenhead Docks *vs.* Laird and the Birkenhead Dock Company, 4 De Gex Mac. & Gord. 732; S. C., 18 Jur. 883. The London and Blackwall Railway Company *vs.* The Board of Works for the Limehouse District, 3 Kay & Johnson's Rep. 123. Thorpe *vs.* Adams and others, 6 L. R., C. P. 125; and The Conservators of the River Thames *vs.* Hall and others, L. R., 3 C. P. 415.

In Ram Lall Mookerjee *vs.* Haran Chander Dhur, 12 W. R., appeals from Original Jurisdiction, 9, approved in Hakma Manji and others *vs.* Memam Ayab Haji and others,

7 Bom. H. C. Rep., O. C. J. 19, it was held that Act XXVIII. of 1855 did not repeal the Hindoo law relating to usury, though it professed to repeal "all laws in force in any part of the said territories relating to usury."

The Small Cause Court, under section 37 of Act IX. of 1850, administers the law of the Supreme Court, and though the Supreme Court is abolished, the Small Cause Court is bound to administer the Hindoo law of contracts to Hindoos.

Mr. Kennedy, for the defendants, argued that the Statute of George the III., section 17, chapter 70, only operated upon the Supreme Court, and now that that Court is abolished, it has no longer any application. It had become obsolete on the passing of the "Indian Contract Act, 1872," and there existed therefore no necessity to repeal it. The High Court administers law and equity by virtue of its Charter, which (Charter of 1862, clause 18) distinctly provides that the law and equity of the Supreme Court were to be administered until other provision is made by the Governor-General in Council. The other provision contemplated by the Charter has, so far as the law of contract is concerned, been made by the Legislature.

Under Act XXVI. of 1864, the Small Cause Court has to administer the same law as the High Court, and the Law of Contract of the High Court is the new Act.

It has been contended that the Act applies to Hindoos in the mofussil only. Where is there any provision exempting the Hindoos in the presidency-towns from the operation of the Act? The Act is clearly meant to extend generally to the whole of British India. If Mr. Bonnerjee's contention were correct, it would apply only to a very limited part of British India, though the 1st section of the Act says it extends to the whole of it. "British India" must, therefore, mean the whole population. In fact, the illustrations to section 108 of the Act prove undoubtedly that the Legislature intended that the Act should apply to Hindoos, otherwise it is inconceivable why, in the illustration to section 108, "A, B, and C," should be mentioned as "joint Hindoo brothers." Besides, the repealing section of the Contract Act says, the Act shall not affect the provisions of any statute, &c., "not inconsistent with the provisions of "this Act." The Statute of George III., section 17, chapter 70, is inconsistent with the provisions of this Act, and is therefore impliedly repealed by it. In the case of the Conservators of the River Thames *vs.* Hall and others, L. R., 3 C. P. 415, Mr. Justice Byles says: "The Court must be satisfied "that the two enactments are inconsistent "before they can from the language of the later "imply a repeal of an express prior enact-"ment." The Statute of George III. is quite inconsistent with the provisions of Act IX. of 1872, and there is therefore a necessary and an irresistible implication that the Legislature intended by passing this Contract Act to repeal the former Statute.

Mr. Bonnerjee in reply: The words "not "inconsistent with the provisions of this "Act" do not refer to the whole of the 2nd paragraph of the Contract Act. They refer to the words "nor any usage or "custom of trade, nor any incident "of any contract," and not to the anterior words "any Statute, Act or Regulation." The Statutes, &c., therefore are left absolutely untouched. If Mr. Kennedy's construction of the words be correct, then the "Common Carriers Act" (Act III. of 1865) is also impliedly repealed, because that Act is inconsistent with the provisions of Act IX. of 1872. But such clearly could not have been the intention of the Legislature. The Statute of George III., section 17, chapter 70, has not therefore been repealed, nor has it become obsolete, inasmuch as there are portions of that Statute which still applied. Its operation has been transferred from the Supreme to the High Court.

Judgment of the High Court.

Couch, C.J.—The case sent for our opinion by the First Judge of the Small Cause Court states that the plaintiff sued the defendants for that the plaintiff having opened a shop in Causereeparah in Simlah, in the town of Calcutta, for the sale of copper utensils, the defendants proposed to the plaintiff to cease carrying on the said business in the said locality, on the ground of its being objectionable to their business, and offered and agreed, in consideration of his doing so, to pay to the plaintiff all sums which he had then disbursed as advances to workmen, whereupon the plaintiff did agree and consent to cease carrying on the said business, and did accordingly cease; and that the defendants refused to perform their part of the contract, to wit, to reimburse the plaintiff in all sums that he had advanced to workmen, whereby the plaintiff has sustained damages to the amount stated.

The plaintiff was a brazier, and had established a shop in the part of Calcutta named in his cause of action. The body of braziers carrying on business in the same locality held a public meeting, at which it was resolved,

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among other things, that none of their body would employ more than four under-workmen, and that then the trade would return to its former prosperity. The plaintiff then interposed and said he could not conform to this resolution, as his business was so organized that it required from sixteen to twenty under-workmen to carry it on profitably; but he was willing to remove his shop elsewhere, if his already expended advances were recouped to him. There was a general shout: 'We will pay your advances: those who take on your workmen will pay.' The plaintiff objected that he did not wish to have a hundred guarantors to look to, but if any four or five would undertake to pay him the advances which he has already given to his men, he would remove. The defendants undertook accordingly, and the plaintiff sues them on this undertaking, which was verbal. The sum advanced to the workmen was proved to be Rs. 900. It was contended by the Counsel for the defendants that this agreement was void under section 27 of Act IX. of 1872, being 'an agreement by which the plaintiff was restrained from exercising a lawful profession trade or business,' and not coming under any of the three exceptions following that section.

The Judge held that the defendants' agreement did not come within section 27 of Act IX. of 1872, inasmuch as there was nothing in it restraining the plaintiff from setting up the same trade in some other locality, or even in the very next house to that which he then occupied for it. It was a mere engagement on his part to remove his business out of that house; and perhaps it might be construed to have been the intention of the parties that he should remove it from that locality, but not an engagement restraining him from exercising that business altogether. He thought also that if the engagement did come within the meaning of section 27, it would only be void to that extent—*viz.*, to the extent in which it restrained one of the parties from exercising his trade; but that it would still operate to make the consideration-money payable to him.

An illustration is then given, and it is said that the learned First Judge gave judgment in favour of the plaintiff, but at the request of Counsel made it contingent on the opinion of this Court upon the question which had been raised.

The case as stated assumes that Act IX. of 1872 applied, and when the case was first argued before us no question was raised as to the application of that Act; but, subsequently, when we were about to give our judgment upon the question which have been stated in the case, it was submitted to us that the Act did not apply in the Small Cause Court to a case of this kind between Hindoos; that the law, as it was before the Act was passed, continued applicable, and the case was governed by Hindoo law. Although the question was not raised in the case, we thought it desirable to have it argued, and I propose first to give our opinion upon it.

Section 37 of Act IX. of 1850, by which the Small Cause Court, Calcutta, was regulated, provides that the Judges of the Court shall be empowered to determine all questions, as well of fact as of law and equity as administered in the Supreme Court, in all cases which they have authority to try.

The words "as administered in the Supreme Court" must be construed as referring not to the law or equity which might at the time when the Act was passed be administered in the Supreme Court, but to the law or equity administered at the time of the suit. The intention of the Legislature was that the Small Cause Court having given to it a jurisdiction to entertain suits which were not allowed to be brought in the Supreme Court, there should be a uniformity of law or equity in the two Courts. If the law or equity administered in the Supreme Court was either by legislation or the decisions of the Judges in any way altered, I think it was the duty of the Small Cause Court to adopt such alteration, and from time to time to decide the questions which came before it in the same way as they would be decided in the Supreme Court. Then Act XXVI. of 1864 was passed for the purpose of extending the jurisdiction of the Small Cause Court. And by section 16 it is provided that it and the Act IX. of 1850 shall be read and construed as one Act, as if the several provisions contained in Act IX. of 1850, not inconsistent with the provisions of the later Act, were repealed and re-enacted in it. The effect of that appears to be that from the time when Act XXVI. of 1864 was passed, the Small Cause Court was regulated by a new Act, consisting of such of the provisions of Act IX. of 1850 as were not inconsistent with Act XXVI. of 1864, and also of the provisions contained in that Act. If you incorporate, as you must, section 37 of Act IX. of 1850 with the Act of 1864, it would literally read that the law to be administered in the Small Cause

Court is the law which was administered in the Supreme Court; but it is clear that this could not have been the intention, because the Supreme Court had ceased to exist, and the High Court had been substituted for it. And the first section of Act XXVI. of 1864 says that the words "Local Government" and "High Court," as used in that Act, were to bear the same meaning as the words "Governor in Council" and "Supreme Court," as used in Act IX. of 1850.

The result is that by virtue of Act XXVI. of 1864, suits in the Small Cause Court were to be decided according to the law or equity administered in the High Court. Then the question is what is the law which is administered in this Court? The Charter of 1865 in the 19th clause provides for that. It is: "We do further ordain that, with respect "to the law or equity to be applied to each "case coming before the said High Court of "Judicature at Fort William in Bengal in "the exercise of its ordinary original civil "jurisdiction, such law or equity shall be the "law or equity which would have been "applied by the said High Court to such case, "if these Letters Patent had not issued."

This renders it necessary to see what was the provision in the Charter of 1862. Clause 18 of that Charter is: "We do "further ordain that, with respect to the law "or equity to be applied to each case coming "before the said High Court of Judicature "at Fort William in Bengal in the exercise "of its ordinary original civil jurisdiction, "such law or equity shall (until otherwise "provided) be the law or equity which "would have been applied by the said "Supreme Court at Calcutta to such case, if "these Letters Patent had not issued."

It is to be the law or equity which would have been applied by the Supreme Court of Calcutta if the Letters Patent had not issued; but the law or equity to be administered in the High Court does not depend upon any previous Act of Parliament. The 21 Geo. III., c. 70, which gave to Mahomedans and Hindoos the right to have matters of contract and dealing between party and party, inheritance, and succession, determined by their laws and usages, was an Act which was applicable to the Supreme Court. If the provision has effect in the High Court, it is not by virtue of the Act, but by virtue of the Charter, which by its terms introduces into it the directions contained in the Act. The right or privilege before the Contract Act was passed (subject to what I shall say as to that Act) no longer depended on the Act of George III., but upon the Charter itself. Her Majesty had power by the Act which authorized the establishment of the High Courts to give to them such jurisdiction as she thought fit, and to make the provisions which are contained in the Charter; and all that is done is to provide that the law or equity to be applied to each case shall, until otherwise provided, be the law and equity which would have been applied by the Supreme Court. "Until otherwise provided" shows that there was an intention to give to the Government here in its legislative capacity a power to make alterations which would affect this provision. There are not only those words, but there is the 44th clause of the Charter of 1865, where it is expressly declared that the provisions in it are subject to the legislative powers of the Governor-General in Council. Therefore we have to see whether Act IX. of 1872 governs cases between Mahomedans or Hindoos brought before the High Court in the exercise of its original civil jurisdiction. If it does, it will certainly also govern cases which have to be decided by the Small Cause Court. The 1st section says in the most general terms that the Act is to extend to the whole of British India. These words would certainly include the limits of the original jurisdiction of this Court, and all persons living within those limits who sue or are sued in it. Unless we find in the Act something to limit the meaning, we ought to come to the conclusion that this was the intention of the Legislature. There are several illustrations in the Act which show that it was the intention of the Legislature to apply it to Hindoos. It was replied to this by Mr. Bonnerjee that these illustrations may be accounted for by the Act being applicable to Hindoos in the mofussil, and that it does not follow from them that it was the intention to apply it within the limits of the original jurisdiction of this Court. Still the circumstance that it was evidently the intention of the Legisture that it should apply to Hindoos beyond the limits of the original jurisdiction, makes it more incumbent on a person seeking to establish an exception in respect of the original jurisdiction to show that the exception is apparent in the Act. There are no words showing that it was intended that there should be such an exception. The only provision which might raise a doubt about it is that which follows in the 1st section, where it is said: "The enactments

to the extent specified in the third column thereof; but nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act."

The grammatical construction of this is that the words "not inconsistent with the provisions of this Act" apply to "any usage or custom of trade," or "any incident of any contract." This excludes any repeal by implication, because the Legislature has said that unless the enactment is mentioned in the schedule, it is not to be affected by the Act. This Act of George III. is not mentioned in the schedule, and therefore it cannot be considered to be repealed. This would be important if it had been necessary to repeal the Act of George III., and there would have been great difficulty in deciding the question before us. But for the reasons I have stated it was not necessary to do so. The Act of George III. had ceased to have operation as an Act. The Court to which it applied has ceased to exist. The substance of it no doubt continued to be the law till the Contract Act came into force, but it was the law by virtue of the Charter, which was subject to alteration by the legislative power. For these reasons I think that the Contract Act must be considered to apply to the present case.

The question which remains for us to determine is whether, by section 27 of the Act, this agreement is rendered void. We must take it that there was a contract, for the learned Judge of the Small Cause Court has found that the parties had come to that agreement. The words of section 27 are: "Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent, void." I cannot agree in what the learned First Judge says as to the meaning of this agreement being that it was only to prevent the plaintiff from carrying on business in that particular house, and that he might have carried it on in the house immediately adjoining. It is obvious that the intention was to restrain him from carrying on business in that locality. The object of entering into the agreement could only be attained by preventing him from carrying on business in the locality. The words "restrained from exercising a lawful profession, trade or business" do not mean an absolute restriction, and are intended to apply to a some particular place. Otherwise the first exception would have been unnecessary. It says: "One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable."

If the section did not apply to cases of carrying on business within specified local limits, this would be unnecessary, because it would have been made unlawful for persons to make such an agreement. In the following section (section 28) the legislative authority, when it intends to speak of an absolute restraint and not a partial one, has introduced the word "absolutely." It says: "Every agreement by which any party thereto is restricted absolutely from enforcing his rights under, or in respect of, any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The use of this word in section 28 supports the view that in section 27 it was intended to prevent, not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act and put upon them the meaning which they appear plainly to bear. In my opinion they must be held to apply to such a case as the present, and the agreement on the part of the plaintiff not to carry on his business in that locality is to that extent void. The First Judge of the Small Cause Court seems to have thought that, although the agreement on the part of the plaintiff might be void, he might enforce the agreement for the payment of the money to himself. There is no foundation for such an opinion. If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money, and the whole contract must be treated as one which cannot be enforced. Therefore we must reply to the question which has been referred to us that the agreement is a void contract, and that the plaintiff has no right to recover the money which he has claimed.

We direct judgment to be entered for the defendants with the costs of suit, including the costs of reserving and arguing this case.

Present:

The Hon'ble F. B. Kemp and W. F. McDonell, *Judges.*

Act VIII. (B. C.) of 1869, s. 52—Ejectment—Talookdars.

Case No. 2723 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 27th August 1873, affirming a decision of the Moonsiff of Satkanea, dated the 5th July 1873.

Mumtaz Bibee (Defendant), *Appellant,*

versus

Grish Chunder Chowdhry (Plaintiff), *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Mr. C. Gregory for Respondent.

Act VIII. (B.C.) of 1869, s. 52, does not apply to the case of a talookdar who has power to transfer his land, and is liable, under the terms of his kubooleut, to immediate ejectment in the event of default.

The question whether a talookdar is liable to ejectment must be determined by the provisions of his lease.

Kemp, J.—The defendant is the special appellant. The plaintiff sues to eject the defendant from his talook under the terms of a kubooleut. The defendant's main plea was that he was entitled, under section 52, Act VIII. of 1869, to get fifteen days' grace, [illegible] decree specified him to be in arrears for, within fifteen days from the date of the decree.

Both Courts have given the plaintiff a decree, holding that the defendant was not a ryot but a talookdar; that the provisions of section 52 are not applicable to his case; and that under the terms of the kubooleut, which is admitted by the defendant, he is liable to ejectment.

The grounds of special appeal which have been taken before us are, that the plaintiff is not entitled under the conditions of the kubooleut to sue for khas possession; *2ndly*, that the Courts always grant the option to a defendant to pay the rent due within fifteen days from the date of the decree, or to quit the land; and, *3rdly*, that the Courts below were wrong in entertaining this suit under Act VIII. of 1859, when it is a suit coming properly under Act VIII. (B.C.) of 1869. This last ground was not pressed before us, the pleader for the appellant admitting that the Courts below had jurisdiction in the case.

On the first ground, turning to the kubooleut of the 29th of Kartick 1232, we find that the defendant is a talookdar; that he has the power to transfer his lands by sale or gift; and that, according to the terms of the kubooleut which is admitted, any default in the payment of his rents is to be visited by immediate ejectment without the assistance of the Court. Section 52 does not apply to the cases of talookdars of the description of the defendant, and therefore the Full Bench ruling, which has been quoted by the pleader for the appellant, to be found in Volume X., Weekly Reporter, p. 12, is not applicable to this case; that decision applies to the cases of ryots alone. A decision to be found in Volume XIX., Weekly Reporter, p. 349, rules that the question whether a holder of a mokurruree istemraree ijara is liable to ejectment from his holding must be determined by the provisions of the lease. The same principle will apply to talookdars such as the defendant in this case. It having been proved by the decree of the Judge of Chittagong, filed by the plaintiff, that the defendant defaulted in the payment of his rent, and that the plaintiff obtained a decree against him for the rent of 1234; therefore, under the terms of the kubooleut, the defendant is liable to ejectment. The decision of the Court below being correct in law, the special appeal is dismissed with costs.

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The Hon'ble F. B. Kemp and W. F. McDonell, *Judges.*

Plaintiff—Written Statement—Act VIII. of 1859, s. 122.

Case No. 2777 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Rungpore, dated the 9th September 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 29th July 1872.

Lall Mahomed and another (Defendants), *Appellants,*

versus

Dhoolee Ram Doss (Plaintiffs), *Respondents.*

Baboo Bhugobutty Churn Ghose for Appellants.

Baboo Doorga Mohun Doss for Respondents.

Where a written statement subsequently put in by a plaintiff was found to be only an explanation of his plaint, and the defendants were in no way prejudiced by its admission, and the evidence of both parties was taken, the Court considered that there was no objection to the admission of the written statement.

Kemp, J.—The ground of special appeal is that the Courts below were wrong in admitting the plaintiff's written statement, and section 122 of the Code of Civil Procedure has been quoted in support of this argument. The Subordinate Judge says that the defendants were in no way prejudiced by the admission of the written statement in question on behalf of the plaintiff; and that, after the filing of the written statement, the lower Court framed issues, and the defendants had every opportunity to produce any evidence they chose in disproof of the kobala, which was set forth in the written statement.

Both Courts have found that the kobala of the plaintiff has been proved.

We think, after considering this case carefully, that the written statement put in by the plaintiff subsequent to the plaint was more in explanation of the plaint than for the purpose of starting a new case altogether. The plaintiff has got a decree for five beeghas, and that is the quantity of land which he originally claimed. He claimed it under an amicable arrangement subsequent to this kobala, arrangement, to the lands in dispute, saying that he was a mere lessee for a term of years whose lease had expired; and it was after this that the plaintiff, in explanation of his plaint, put in the written statement objected to, with the kobala executed prior to the amicable arrangement under which he claimed the five beeghas of land in suit.

As both Courts have found that the plaintiff's kobala has been proved, and that the defendants have not been in any way prejudiced by the admission of this written statement, which is only in explanation of the plaint, and as the evidence of both parties has been taken, the special appeal must be dismissed with costs.

The 24th July 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Construction of a Will—Residence in a Boitakana.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Ganendro Mohun Tagore

versus

Rajah Juttendro Mohun Tagore and others.

A testator, having declared that his son should take nothing under his will, devised his property to four trustees, who were directed, as soon as certain legacies and annuities were paid and had fallen in, to convey the real estate to the persons entitled to the beneficial interest therein. The will was contested, and the final decision was that, upon the expiration of the first life-interest, which was vested in J, the testator's son was entitled as heir to the estate. The son subsequently brought this suit to have it declared that the interest of J had ceased by reason of his non-compliance with a clause relating to residence in the testator's boitakana, and that the son, as heir, was entitled to the estate. J pleaded that there had been no breach of the condition:

HELD that J's delay in commencing residence was justified by his inability to get possession of the entire house from the trustees, whom he had to sue; and by the unfit state of the house for residence owing to want of repairs:

HELD that, having regard to the nature of a boitakana house, and to Hindoo usages, the following acts amounted to the use of the house as a residence, *viz.*, J's going frequently, if not daily, to the house, and usually spending several hours there, transacting all affairs of business there, and, on some occasions, receiving visitors

* From the judgment of Macpherson and Pontifex, JJ., sitting in the Ordinary Original Civil Jurisdiction of the High Court.

house constantly open, adding new furniture, taking care of the library, and causing durwans and menial servants to live there.

THE questions in this appeal arise upon a clause in the will of the late Honorable Prosono Coomar Tagore, making provision for the cesser of the estate of the persons entitled under the limitations of the will in the event of non-residence in his boitakana house.

The will, by which the testator devised his estates, after the determination of the life-estate given to Juttendro Mohun Tagore (the first respondent), to Juttendro's sons successively in tail male, with subsequent limitations over, according to English forms of limitations, underwent much consideration in the Courts in India and in this Tribunal.

The final decision, speaking generally, was that the limitations in tail and subsequent limitations were contrary to Hindoo Law, and void, and that, upon the expiration of the first life-interest, the appellant, the testator's only son, was entitled, as heir, to the estate.

It will be necessary, before considering the questions arising upon the clause of residence, to refer shortly to the scheme of the will and to some of its provisions.

The testator expressly declared that his son, the appellant, should take nothing under his will.

He devised all his real and personal property to four trustees (of whom Juttendro was one) in trust to get in *the personally*, with an exception thus expressed: "Save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farm-yard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use." Upon trust, after paying debts and legacies, to invest the residue, and pay out of the income divers annuities and the unexpended surplus of such income to the person who, for the time being, should be entitled to the beneficial enjoyment of his real property, or the profits of it. And as to the *realty* upon trust until his debts, legacies and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities, if the thereto, to pay the residue to the person for the time being to whom he had devised his real estate under the limitations thereinafter contained "for the absolute use of such person;" and he further directed that the trustees should hold the estate generally for the use and benefit of such person, so far as was consistent with the trusts and provisions of the will.

The testator directed that out of the income, after paying the necessary costs of managing his estate, "including the expense of the establishments in the mofussil and Calcutta," the person for the time being entitled to the beneficial enjoyment or surplus income of his real property should receive Rs. 2,500 a month, or Rs. 30,000 a year.

As soon as the legacies and annuities were paid, and had fallen in, the trustees were directed to convey the real estate unto and to the use of the persons who should be entitled to the beneficial interest therein.

The will, after mentioning numerous legacies and annuities, contains the specific limitations of the realty which are introduced by a preamble, stating, amongst other things, that the testator was possessed of a talook in Zillah Rungpore, subject to a jumma of Rs. 40,555, and of the boitakana house, land, and premises where he usually resided. He then devises (subject to the devise to the trustees) his "real property," and "also library, horses, carriages, farm-yard, furniture of the boitakana, jewels, gold and silver plate," &c., unto and to the use of Juttendro (the respondent) for his natural life, with the limitations over which have been already referred to.

The clause in question as to residence is as follows:—

"Provided always, and I hereby declare that, if any devisee or tenant for life or entail or otherwise, or any person entitled to take as heir by descent or adoption or otherwise, or in any manner under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use, as his residence in Calcutta, the said boitakana houses and premises where I now reside, and make use of and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, &c., in my use and possession, then and imme-

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wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person, so permitting or suffering the said property, or any portion thereof, to be sold for arrears of Government revenue, or so ceasing to keep up in a state of repairs, and to use as his residence, my said boitakana house, had then died."

It was contended in the former suit by the appellant that Juttendro's life-estate was void, owing to the uncertainty of the period at which it was to commence. But it was held by this Tribunal that there was no uncertainty, for his interest was to begin at once. It is said in the judgment:—

"Their Lordships read this will, alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs. 2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid."

The testator died on the 30th August 1868. This suit was brought by the appellant, on the 18th November 1872, to have it declared that the interest of Juttendro had ceased by reason of his non-compliance with the clause relating to residence, and that the appellant, as heir, was entitled to the estate, subject to the legacies and annuities.

Three distinct grounds of answer were argued at the Bar: (1) That the limitations to take effect on the determination of Juttendro's interest having been declared to be void, the condition was not binding, and the heir could take no advantage of a breach of it; (2) That the condition would not attach until Juttendro became entitled to a conveyance from the trustee on the death of the last annuitant; and (3) That, if this were not so, there had been, in fact, no breach of the condition.

On the first point their Lordships, as they intimated during the argument, find no difficulty in holding that, as the clause provides for the cesser and determination of the life-interest of the respondent in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over have been declared void, would cease when that event happened, and the appellant would be entitled to succeed as heir.

On the second point, it was contended for the respondent that, having regard to the other causes of forfeiture, and especially that payment of the Rs. 30,000, to which alone he was entitled before there was a surplus income, the testator could not have intended that the clause should come into operation until the trusts were at an end, and the donee's estate was perfected by a conveyance.

It was urged, on the other hand, by the appellant's Counsel that the clause should be read distributively. They contended also that Juttendro, according to the language and substance of the decision of this Tribunal, had a present life-interest, subject only to the charge for payment of legacies and annuities. It was pointed out that the testator, in requiring the library and furniture to be used with the house, contemplated an immediate residence in it. And it was observed that Juttendro had actually recovered the possession of the boitakana house in a suit against the trustees, so that, if the respondent's contention were correct, he might, it was said, hold the house, and be in the enjoyment of all the rents and profits of the estate, except what might be required to pay the last annuitant, without being subject to the condition of residence until that annuitant died. Their Lordships would be reluctant to put a construction on the clause which would have the effect of virtually defeating it; nor is it necessary for them to do so, since they agree with the judgment of the High Court in favour of the respondent on the third point, *viz.*, that there has been no breach, in fact, of the condition.

Boitakana appears to mean a house, or the part of a house, used for sitting or reception-rooms, where entertainments are usually given, and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the zenana, are usually the outer rooms.

The manner in which the testator himself used the boitakana house is thus found by the High Court:—

"It appears from the evidence that the testator possessed a family dwelling-house as well as the boitakana, the two houses being completely distinct, and, indeed, situated on different sides of the same street; that, some time before his wife's death, he ceased to sleep in the family dwelling-house after having complained of defective ventilation in his sleeping chamber there; that, thenceforth, he slept at the boitakana; that subsequently, during his wife's life, he took his mid-day or principal meal in the family dwelling-house,

that, after his wife's death, he took both meals in the boitakana, but the mid-day meal was taken in native fashion, and was cooked at the family dwelling-house, and the evening meal was taken in European fashion, and was cooked at the boitakana; that he gave his native, or strictly Hindoo, entertainments in his family dwelling-house, and his European entertainments at the boitakana; that the testator's family-idols were always lodged and worshipped at his family dwelling-house and never at the boitakana; and that, at the boitakana, all the affairs of his estate were conducted, and the necessary establishment kept up and lodged."

The opinion of the High Court on the nature of the residence imposed by the condition is thus expressed:—

"We think it is to be gathered from the will that the testator never intended the boitakana to be occupied as a dwelling-house in the ordinary sense of a Hindoo dwelling-house." And again: "We are of opinion that the residence intended by him was an occupation for the purposes of transacting business, and of receiving male friends and visitors, and if the occupant of the house for the time being so desired (but not otherwise) for entertaining male friends with hospitality: and we are further of opinion that such an occupation does not require that either the occupant or the ladies of his family should sleep in the house."

Their Lordships think that, in the main, the High Court have properly construed the clause; and they understood the appellant's Counsel not to dispute this construction, but to contend that the evidence showed that the clause, so construed, had not been complied with.

Several English decisions were cited during the argument as to the meaning of the word "residence." The principle, if any, can be said to result from them seems to be that, where, in a condition of residence no manner or period of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition.

In one case Lord Eldon seemed to think a condition imposing residence generally was so vague that it was doubtful whether it could be enforced; and he held that, at all events, slight and rare instances of actual was kept open by servants living in it, sufficient to satisfy so general a direction (Fellingham *vs.* Bromley, T. & R. 530).

In a case (Rex *vs.* Sargent, 5 T. R. 466) where residence was a necessary qualification for the office of Bailiff of a Borough, Lord Kenyon said:—

"It never can be contended that, in order to constitute a residence in any place, it is necessary to reside any given number of days, or even any great part of the year. It happens perpetually that persons have different places of abode, in some of which they reside more or less, as suits their convenience."

The words of the present clause are "*cease to use* as his residence in Calcutta." It was not disputed that a reasonable time must be allowed to the donee after the testator's death for the commencement of the residence, before it could be imputed to him that he had ceased to reside. The testator died on the 28th August 1868, and the respondent did not, it would appear, use the boitakana in any sense as a residence, until some large repairs were completed in October 1872. During this interval of time, he visited the house, and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it.

The first question is whether, in the interval referred to, the respondent could reasonably be required to commence using the house as a residence. The circumstances relied on by his Counsel to justify the delay are: (1) The pendency of the great suit brought by the appellant to defeat his title altogether, which was begun in August 1868, and finally disposed of on appeal to Her Majesty in July 1872. (2) His inability to get possession of the entire house from the trustees, which he only succeeded in obtaining by a suit commenced in May 1870, and ended in March 1872; and (3) The unfit state of the house for residence, owing to the want of repairs.

With regard to the first ground, it is certainly little in accordance with reason that the appellant, who disputed, in the suit referred to, the respondent's right to possession, and would, if his suit had been successful, have ejected the respondent from the house with the loss of any money he might have expended on it, and with the liability to account for mesne-profits, should now be heard to claim the estate on the ground that the respondent did not take possession during the time covered by this litigation.

But, without saying that the appellant is estopped by his own conduct from taking advantage of the condition, their Lordships think that the delay is justified by the other two grounds referred to.

It seems that in the testator's lifetime the lower part of the house was used for the transaction of the business of the estate, and a small room on the upper and principal floor of the house was also used as an office. The respondent, whilst willing to allow the lower part of the house to be used as before, objected to the retention of the upper room by the trustees. The result of the suit he brought against the trustees was that he was declared to be entitled to the possession of the whole house. Their Lordships cannot but think he might reasonably object to use it as a residence until this question was settled. The testator might have found no inconvenience in having the room occupied as an office when the manager was his own servant, but the inconvenience to the respondent might be great when a clerk appointed by the trustees was installed within the precincts of the residential part of the house.

But a stronger ground to justify the delay existed in the state of the house and its want of repair.

Mr. Allan, the surveyor, who saw the house two or three months before the testator died, says it was much in want of repairs at that time. Soon after his death, it was necessary to take down and re-build a portion of the east wall at a cost of Rs. 6,200. But further extensive repairs were required. The trustees having hesitated to do them, the respondent requested Mackintosh and Co. to survey the house, who made a report to him that "the building throughout is urgently in need of repair." This report he sent to the trustees, with a request that the repairs should be executed. The trustees declined to do them on the ground that the obligation lay upon the respondent, who, upon this refusal, commenced in December 1871 a suit against them, and in March 1872 obtained a decree ordering the trustees to repair. The repairs so ordered were commenced in July, and completed in November 1872, at a cost of Rs. 14,000. Mr. Allan, the surveyor, says: "The Rs. 14,000 was necessary to make the house safe. The house was entirely out of repair, and some portion of it very dangerous."

The respondent entered into possession in October 1872, before the repairs were entirely completed, and their Lordships agree with the High Court in finding that up to this time there had been no unreasonable delay on the part of the respondent in commencing to reside, and that no breach of the condition had then occurred.

The conclusion at which, on this point, their Lordships have arrived, is sufficient to dispose of this suit, which was brought on the 18th November 1872, immediately after the completion of the repairs, in favour of the respondent; but, as evidence was given of the subsequent use of the house, and the High Court expressed an opinion upon it, their Lordships, to prevent future litigation, desire to state that on this point also they think the view of the High Court is correct.

The respondent, who appears to adhere more strictly than the testator to Hindoo usages, has no doubt continued to take his meals and sleep in the family-house where the other members of his family live; but this mode of living is not of itself inconsistent with such a residence in the boitakana house, as the testator, in imposing the condition on his Hindoo descendants, must be supposed to have contemplated. It appears upon the evidence that, since the respondent entered upon possession, the house has been constantly kept open, new furniture has been added to the old, the library taken care of, and not only durwans, but menial servants, have lived in the house. The respondent himself frequently, if not daily, went to the house, and usually spent several hours there. It appears also that he transacted all affairs of business there, and, on some occasions, received visitors in rooms properly furnished for their reception.

These acts appear to their Lordships, having regard to the nature of a boitakana house and to Hindoo usages, to amount to a use of it as a residence.

It was strongly urged by the appellant's Counsel that any entertainments the respondent might give ought to take place in the boitakana, and it was said he had always given them at his family dwelling-house.

The omission, however, to use the boitakana for this purpose may be accounted for and excused by the condition of the house up to the bringing of this suit. With regard to future entertainments, their Lordships cannot hold that the respondent is in any way obliged to give them, although, in case he thinks fit to do so, he would best comply with the testator's will by using the boitakana house on some, at least, of these occasions.

Some stress was laid on the fact that a part of the furniture and jewels had been

dwelling-house. But it seems this was done during the repair of the house, and the furniture was brought back or replaced, and afterwards used in it. The jewels were always kept at the family-house, and were so kept there for greater safety; but the language of the condition in no way confined the use of the jewels to the residence in the boitakana.

Their Lordships observe with satisfaction that this suit has been brought to a conclusion with commendable expedition. It was commenced in November 1872, and within twenty months from that date their Lordships are able to report upon this appeal to Her Majesty. This instance shows that appeals from India, if prosecuted with vigor, may now be speedily determined.

In the result, their Lordships will advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, with costs.

The 27th July 1874.

Present:

The Hon'ble F. B. Kemp and W. F. McDonell, *Judges.*

Jotedars—Execution-sale—Recorded Proprietor's Rights and Interests.

Case No. 2547 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 16th June 1873, reversing a decision of the Moonsiff of Budeakhally, dated the 21st March 1872.

Surbanund Doss Sirdar and others] (Defendants), *Appellants,*

versus

Bistoo Prea Dossee (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondent.

A jote, which was in the joint possession of several members of a Hindoo family, had been recorded in the zemindar's sherista in the name of one of them, B B. After the death of B B, the zemindars brought a suit for arrears of rent and for ejectment against his heir, B C, alone, and obtained an *ex-parte* decree, under which he took khas possession of the jote, and made a fresh settlement with B C. B C's rights and interests were sold in execution of a decree, and the purchasers claimed the whole of the jote; the only party entitled to the jote, and was also found to have received rent from one of the others, he could only have settled with B C the rights and interests of B B, which alone, therefore, had been sold to the auction-purchasers.

Kemp, J.—This was a suit for possession of one-third share of certain jotes. Now the defendant's title with reference to the jotes Nos. 1, 2, and 3 depended upon the finding which the Court might arrive at with reference to the hebanama. Both Courts have found that hebanama to be a forgery, and that portion of the decisions of the Courts below has not been questioned in special appeal.

This special appeal, therefore, relates entirely to jote No. 4. The plaintiff's history of jote No. 4 is that there were three brothers, her husband, Koonjo Mohun Shah, being one; Dookhee Ram Shah, the eldest, and Kinoo Ram Shah, the youngest, brother; that these brothers were joint in estate, and owned this jote No. 4 with Bungshee Buddun Shah, also a connection of the family; that the jote No. 4 was recorded in the name of Bungshee Buddun in the sherista of the zemindar; and that the zemindar had been in the receipt of rent from the plaintiff's husband's vendor, as also from the plaintiff's husband.

Both Courts have found, the second Court, the Subordinate Judge (on the admission of the defendants Khirodhur Doss Byragee and Anund Mohun Doss, who have purchased the rights and interests of Bungshee Buddun in jote No. 4), that the plaintiff's husband owned a portion of this jote, and the Court below has also found that there can be no doubt from the proofs adduced by the plaintiff that her husband was a sharer in the said jote, and that the zemindar received rent from him. The special appellants before us have purchased the rights and interests of Buddun Chunder, the heir of Bungshee Buddun, in this jote No. 4. Now the zemindar brought a suit for arrears of rent and for ejectment against Buddun Chunder alone. Buddun Chunder did not appear in that suit, although he had ten days' time given him for that purpose, and a decree was passed *ex parte.* The zemindar, upon this, took khas possession of this jote, and made a fresh settlement with Buddun Chunder. Buddun Chunder's rights and interests were sold in execution of a decree, and were purchased by the present special appellant's vendor. It is contended by the special appellants that, inasmuch as the jote No 4 was in arrear, and the zemindar obtained a decree against Buddun Chunder, the heir of Bungshee Buddun Shah, the

J.

rights and interests of the plaintiff in jote No. 4 were extinguished, and the special appellants, who have purchased, as they say, for valuable consideration without notice, are entitled to the whole of the jote.

We think they are only entitled under their deed of sale, and in equity, to the rights and interests of Buddun Chunder. The zemindar evidently knew that Buddun Chunder was not the only party entitled to this jote, and that the plaintiff's husband and his brothers were entitled to certain shares therein; and it is also proved, and found as a fact by the Court below, that the zemindar received rent from the plaintiff's husband. The zemindar, therefore, if he made a fresh settlement with Buddun Chunder, could only have settled with him the rights and interests of Bungshee Buddun Shah in jote No. 4, and the special appellants have purchased only those rights and interests.

We therefore confirm the decision of the Court below, and dismiss this appeal with costs.

The 28th July 1874.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Talooks—Enhancement of Rent—Act VIII. (B. C.) of 1869, ss. 16 & 17—Regulation VIII. of 1793, s. 51.

Case No. 2511 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Chittagong, dated the 29th July 1873, affirming a decision of the Moonsiff of Hathazaree, dated the 28th April 1873.

Sustee Churn Dey (Plaintiff), *Appellant,*

versus

Ishan Chunder and others (Defendants), *Respondents.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Debendro Narain Bose for Respondents.

In a suit for arrears of rent of a talook at an enhanced rate, where it was shown that defendant was not entitled to set up, as against any case for enhancement made out by the plaintiff, that he was protected by proof or presumption of holding from the permanent settlement:

Ainslie, J.—This was a suit for arrears of rent at an enhanced rate of a talook held by the defendant under the plaintiff. The suit was dismissed by the Moonsiff and that judgment has been affirmed by the Lower Appellate Court. The Subordinate Judge in his judgment records that the mowrosee shikmee talook of the defendants has existed for a long time past, and that for a period of more than twenty years a jumma of Rs. 31-4 has been paid for the same without any variation. "Hence the talook held by the defendants is not liable to enhancement of rent on any ground." For these and other reasons he concurred in dismissing the plaintiff's suit.

The principal ground of special appeal is directed to that part of the judgment of the Court below to which we have referred, and the special appellant relies upon several decisions between the parties from 1866 to 1871 as showing that the question whether the talook was protected from enhancement had been already determined by the decision of a competent Court. The judgment of 1866 is not material, because it appears to us that the Appellate Court in that case set aside the judgment of the first Court on the ground that neither the first Court nor the Appellate Court had jurisdiction in the matter; and the subsequent suit for enhancement of rent, in which the plaintiff succeeded in getting a decree for Rs. 2-13-9, is also of no importance, because it appears that the decree was altogether set aside. But, in the judgment of the 15th of April 1871, there appears to have been a distinct declaration that the talook of the defendant is not protected from enhancement, either under section 16 or under section 17 of Act VIII. of 1869, and this has been entirely overlooked by the Subordinate Judge; but although we must take it that that declaration is conclusive so far as it goes, yet it is not enough in itself to support the present suit. It was merely a declaration to the effect that the defendant was not entitled to set up, as against any case for enhancement made out by the plaintiff, a plea that he was protected either by proof or presumption of a holding dating back from the permanent settlement; but that does not relieve the plaintiff from the necessity of proving a case under section 51, Regulation VIII. of 1793, under which alone he can maintain his suit; and he must prove either the special custom of the district

on which he relies, and which he has failed to prove, or that the conditions under which the talook was created justify his demand, or that the talookdar, by receiving abatements from his jumma, has subjected himself to the payment of the increase demanded; and so far as his attempt to make out a case under this section goes, it is admitted that he has completely failed.

The suit to enhance has, therefore, been rightly dismissed, and this appeal must be dismissed with costs.

The 28th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rent-suit—Intervention—Act VIII. of 1859, s. 73.

Case No. 503 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 6th February 1874, affirming a decision of the Moonsiff of Khoolneah, dated the 17th September 1873.

Mudhoo Soodun Bose and others (Plaintiffs), *Appellants,*

versus

Bidhoo Bhoosun Haldar and others (Defendants), *Respondents.*

Mr. T. N. Palit for Appellants.

Baboo Mohendro Lall Mitter for Respondents.

In a suit for arrears of rent of a holding at a certain rate, one B intervened, stating that he had acquired the rights of the tenants, and had paid to plaintiff a smaller rent. The Moonsiff, finding these allegations true, made B a third party in the case; but, as the right person had not been sued, he dismissed the case:

HELD that B's application and the order on it came within the purview of Act VIII. of 1859, s. 73, and that the object of making a party (as B was made) a defendant was that a decision might be come to between plaintiff and the right defendant, and relief given where due.

Jackson, J.—THERE has been some confusion in the procedure in this case, chiefly arising, we think, from the use of inexact phraseology. The plaintiff brought a suit against Imamdi Mollah and others for the rent of a certain holding on account of the years 1275, 1276, and 1277 at the rate of Rs. 39-11-8¼. A certain Bidhoo Bhoosun Haldar, after the suit had commenced, presented a petition stating that he had several years before acquired the rights of the tenants against whom the suit had been brought; that he had been recognized by the plaintiff as a tenant, and had paid him rent. He also alleged that the rent was less by about 1 rupee 1 anna than the plaint alleged. This person appears to have been kept on the record in the uncomfortable and anomalous position of a "third party," and in that capacity he was allowed to give some evidence. The result of the evidence was that the Moonsiff found that he had been admitted as tenant, and also that he had made some payment of rent. There was an appeal, and, on appeal, the Subordinate Judge found that this Bidhoo Bhoosun, not being on the record as a defendant, ought not to have been allowed to offer evidence. He seems also to have intimated an opinion that he could not properly be made a defendant. He accordingly remanded the case to the Moonsiff with certain instructions. The Moonsiff, not acting quite in accordance with the instructions given to him, made Bidhoo Bhoosun a defendant in the suit, and having done so, recorded some further evidence given by him, and "reading," as he says, "the evidence adduced by him by the further light of the defendant's evidence," he finally came to the same conclusion at which he first arrived, and he found that the rent was properly Rs. 38, not Rs. 39; and, although he formally makes the intervening Bidhoo Bhoosun a defendant in the case, he goes on to say: "I can have no doubt whatever of the "plaintiff's having sued a wrong party. "Unless the correct tenant be sued, the case "cannot proceed. This case shall be dis-"missed with costs and legal interest;" so that, although, with great pains and trouble, he gets the right person brought before the Court as defendant, he goes on to declare that the right person not having been sued there could be no decree for rent, and therefore he dismissed the suit. The case came on further appeal before the Subordinate Judge, and he substantially affirmed the judgment.

It has been argued before us, and with great ingenuity, by Mr. Palit, that Bidhoo Bhoosun was never before the Court properly as a defendant, and he could not be made a defendant in this case; consequently all the evidence given on his side was improperly received, and ought not to be taken into consideration, and as without that the evidence is all on the side of the plaintiff, and as, moreover, the order of remand was *ultra*

vires and illegal, the judgment of the Court below must be set aside, and a judgment given for the plaintiff. Now it seems to us that the application of Bidhoo Bhoosun in the Court of first instance was an application under section 73 of the Civil Procedure Code to be made a defendant, and that substantially the Moonsiff did make him a defendant. We think his application and the order upon it came within the purview of section 73, and that he could be, and rightly or wrongly was, made a defendant. We think further that the object of making a party under such circumstances a defendant is that a decision may be come to between the plaintiff and the right defendant, and relief given where it is due. Bidhoo Bhoosun being before the Court as a defendant, it was the business of the Court to ascertain if any rent, and what rent, was due from him. As the Court below has omitted to do that, the case must go down to the Subordinate Judge in order that he may try, it being now settled that Bidhoo Bhoosun is the tenant, what is the amount of rent payable by him, and what amount, if any, remains due. After he finds that, he is to make a proper decree as to costs. The appeal as against the other defendants will be dismissed, but without costs. We make no order as to the costs of this appeal.

The 28th July 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Enhancement of Rent of Undivided Share—Land lord's Right of Suit—Co-Sharer's Right of Suit.

Case No. 2561 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Tipperah, dated the 19th July 1873, reversing a decision of the Moonsiff of Begumgunge, dated the 29th June 1872.

Raj Chunder Mojoomdar and others (Plaintiffs), *Appellants,*

versus

Rajaram Gope (Defendant), *Respondent.*

Baboos Kalee Mohun Doss and *Bykunt Nath Doss* for Appellants.

Baboos Nil Madhub Bose and *Jadub Chunder Seal* for Respondent.

A suit will not lie to enhance the rent of an undivided fractional share of a tenure of which plaintiff alleges himself to be landlord.

Quære.—Is the owner of a fractional share of a superior tenure competent to maintain a suit for enhancement of rent of a fractional share of an under-tenure subordinate to the former?

In this case the facts found and admitted by the parties appear to be these: There is a mouzah called Torga Ghaseepore within the zemindaree of Tuppeh Joynuggur. A 7-anna share of this zemindaree constituted a talook called Rambullub Roy, and 9 annas belonged to the zemindaree Bhoolooa. The defendant in this case is the holder of a tenure in the aforesaid Mouzah Torga, for which he used to pay rent in proportion to 7 annas and 9 annas respectively to the owners of the two different zemindarees. It appears that, some time previous to 1265, the whole right of this 7-anna shareholder was granted by a permanent lease to the plaintiff and the defendant in this case in equal shares. Since that time, that is to say, 1265, the defendant has not paid any rent on account of this tenure to the plaintiff who represented a moiety of that 7-anna share. About thirteen years after 1265, that is, in the year 1278, this suit was brought by the plaintiff, alleging that the defendant is in possession of three kanees and odd gundas of land as appertaining to this tenure within his 8-anna share for which he is liable, for the grounds mentioned in the plaint, to pay an enhanced rent of Rs. 27-10 and odd. The plaintiff further alleges that a notice has been served upon the defendant specifying the grounds of enhancement and also the rent payable by the defendant, and as the latter has not taken a fresh pottah, this suit has been brought to recover arrears of rent at the enhanced rate. The defendant states that his tenure is indivisible; that for the whole tenure he used to pay Rs. 11 as rent; that, since the plaintiff's pottah, there has been no relationship of landlord and tenant between him and the plaintiff, and that therefore the plaintiff is not entitled to maintain this action against him. The Court of first instance decreed the plaintiff's claim. On appeal the Lower Appellate Court has dismissed the suit, holding that there was no relationship of landlord and tenant between the plaintiff and the defendant; and that the present suit will not lie.

This special appeal has been preferred upon the ground that, upon the admitted facts in the case, the Lower Appellate Court is wrong in holding that there was no relationship of landlord and tenant between the special appellant and the defendant, and also that the Court is not right in holding that the

that the Lower Appellate Court is not correct in saying that the two parties, that is to say, the plaintiff and the defendant, previous to their taking the talookdaree settlement, used to pay rent to the zemindar. This observation appears to me to have proceeded wholly upon the misapprehension of the admitted facts in the case, namely, that the tenure in question was and is still the sole property of the defendant. The plaintiff for this tenure never paid any rent to the zemindar. From this passage, and also from the following passage in the judgment in which the Subordinate Judge says that there was no partition between the parties, it is evident that he was under this error in apprehending rightly the facts of the case, namely, that he supposed that the plaintiff and defendant were co-parceners in the under-tenure. But, notwithstanding this error, I am of opinion that the conclusion at which the Subordinate Judge has arrived is a right conclusion.

The point which arises upon the facts admitted and found seems to be this, namely, whether the plaintiff, who is the owner of a fractional share of the superior tenure, is competent to maintain this suit for enhancement of rent of a fractional share of an under-tenure subordinate to it. Even if this was a simple suit for rent, upon the authorities it is very doubtful whether this suit could have been maintained. The Subordinate Judge quotes two cases in support of the conclusion at which he has arrived. One of these cases is to be found in page 168 of the 19th Weekly Reporter, and the facts in that case appear to be precisely similar to the present. It was held in that case that an undivided co-sharer, there being no evidence to show that the rents due to such co-sharer had been separately collected or that there was any agreement to pay them separately, is not entitled to maintain a suit for his share of the rent. This decision followed two other decisions referred to in the judgment; and this question seems also to have been raised in a Full Bench case reported in page 46 of the 21st Weekly Reporter. Although, in the Full Bench decision, the Chief Justice doubted the correctness of the principle of law upon which the decision in the 19th Weekly Reporter is founded, yet I find that the majority of the Judges reserved their opinion upon it. In fact, the question was not authoritatively settled by that Full Bench decision. It is not necessary for me, for the purposes of this case, to express any decided opinion upon this question, decision will turn upon a quite different ground. If there is any doubt with reference to this question in a simple suit for rent, that doubt is considerably enhanced where the suit is altered into a suit for enhancement of rent; for, in a suit for enhancement of rent, the plaintiff, who is a co-sharer of a fractional share, seeks, against the consent of his co-sharer, to raise the rent of an under-tenure. There may be cases in which a co-sharer may have good grounds for complaining against his other shareholders on the ground that they are colluding with the tenant, and thus preventing him from raising the rent of an under-tenure, he being justly entitled to that enhanced rent. In a case like that, it may be equitable to allow a suit seeking to enhance the rent of the whole tenure, and making the other colluding co-sharers as well as the tenant defendants in the case, and after raising the rent of the whole tenure then to allow the plaintiff to recover his own share of the enhanced rent. But the present suit is not even of that nature. It seeks to divide an under-tenure against the will and consent of the tenant. It is not a suit to enhance the rent of the whole tenure, but to enhance the rent of an undivided fractional share of the tenure of which, according to the plaintiff's allegation, he himself is the landlord. A suit of this nature, it appears to me, will not lie. The plaintiff will not be allowed to split up the tenure of the defendant in this way. For these reasons I think that the plaintiff's suit ought to fail.

There is also another ground upon which it appears to me that the plaintiff has been held rightly not entitled to a decree in this case. The plaintiff obtained the talookdaree settlement, as I have already observed, in the year 1265; but he never obtained any rent from the defendant on account of his share for a period of thirteen years. It may be that, by a special arrangement between the parties, when they jointly took the talookdaree settlement in the year 1265, it was tacitly understood that the plaintiff would not be entitled to recover any rent on account of his share of this tenure from the defendant. With reference to that part of the case, I think the Lower Appellate Court has come to a conclusion that, regard being had to the fact that from 1265 no rent has been realized by the plaintiff from the defendant, the relation of landlord and tenant does not at present exist between the parties. In this view of the finding of the Lower Appel-

The result is that the special appeal is dismissed with costs. It is admitted by the pleaders on both sides that this judgment will govern Special Appeal No. 2554 of 1873. That appeal is also accordingly dismissed with costs.

The 28th July 1874.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Oaths Act (X. of 1873), ss. 8 & 11—Examination of Defendant.

Case No. 2805 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 8th September 1873, affirming a decision of the Moonsiff of Deang, dated the 14th July 1873.

Sreemunt Ram Totadar (Plaintiff), *Appellant,*

versus

Ram Kishen Sen (Defendant), *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Grija Sunker Mojoomdar for Respondent.

Section 11 of the Oaths Act (X. of 1873) is not applicable to the evidence of a defendant who has been examined under the usual form of oath, and not under any oath or form of affirmation under s. 8.

Kemp, J.—The issue in this case was: "Is it true that the defendant agreed to grant a dyemee kyemee pottah to the plaintiff, and that he received any salamee or bonus from him?" The first Court, alluding to a petition of the 26th of May 1873 filed by the plaintiff, in which he said that he would rely upon the evidence of the defendant in respect of all the points mentioned in the plaint, says that the defendant personally appeared and gave his deposition to the effect that he did not agree to give any pottah to the plaintiff, nor did he receive any bonus from him for that purpose. Subsequently the plaintiff applied stating that some of his witnesses had returned from the country, and praying that their evidence might be taken. The Moonsiff says that, although the petition of the plaintiff was not admissible, yet, in order to set at rest all objections in future, he has examined "ing to section 11, Act X. of 1873, the "evidence of the defendant must be held "conclusive as against the plaintiff; conse-"quently the decision of the issue fixed by "me is not likely to be favourable to the "plaintiff." For these reasons the Moonsiff dismissed the suit. This decision has been confirmed on appeal by the Subordinate Judge of Chittagong.

On referring to the petition of the 26th of May, we find that the plaintiff states that his witnesses had left the country for a time, and that he was unable to say when they would return; that on that account he had applied to withdraw his case, but, as he had been informed that a late decision of the Privy Council had ruled that no suit could be withdrawn after the issues had been framed, that, acting on that information, he thought it advisable to rely on the evidence of the defendant. Subsequently, however, the plaintiff informed the Court that his witnesses had returned from the country, and of his wish that they should be examined. They were examined accordingly. But it appears that neither the Moonsiff nor the Subordinate Judge has passed any opinion upon the evidence of the witnesses examined in this case. The section which the Moonsiff has referred to, namely, section 11, Act X. of 1873, must be read with section 8 of the same Act. Section 11 says: "That the evidence so taken," that is, the evidence taken under section 8, "shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated." And section 8 says: "If any "party to, or witness in, any judicial "proceeding offers to give evidence on oath "or solemn affirmation in any form common "amongst, or held binding by, persons of "the race or persuasion to which he belongs, "and not repugnant to justice or decency, "and not purporting to affect any third "person, the Court may, if it thinks fit, not-"withstanding anything hereinbefore con-"tained, tender such oath or affirmation to "him." Now, without going into the question what description of oath or affirmation this section refers to, for there may be various kinds of oaths or forms of affirmation common amongst persons of the race or persuasion of the defendant which may not be repugnant to justice or decency, it appears to us that the section in question was not in the contemplation of the plaintiff when he cited the defendant as a witness. The

adjudication that there is between the parties - the relation of landlord and tenant, and is important evidence on that point in any subsequent suit against the same defendant.

Couch, C.J.—The Moonsiff had framed two issues,—one on the Law of Limitation, and the other whether the instrument of sale to the plaintiff was genuine, or the instrument of sale to the defendant. And he seems to us to have given a very sensible judgment upon both those questions. It is true that his decision on the issue as to the merits is first in order, but we do not see that this can in any way vitiate his judgment. We cannot suppose that the order in which he decided the two issues would make any difference in the conclusion he came to upon them. He would have to consider the matters before he delivered his judgment.

One material piece of evidence which the Moonsiff has used is the decree of the 21st of September 1863. It is a decree in a suit which was brought by Dewan Bibee against, as it was said, Futteh Ali, and must have been made upon the ground that the Court had determined that the defendant in that suit was the tenant of the plaintiff. It directed that a kubooleut should be given by him at a certain rent. Such a decree amounted to an adjudication by the Court that there was between the parties the relation of landlord and tenant. And if there was that relation, the possession of the defendant, whoever he was, would be the possession of Dewan Bibee, the plaintiff, and at that time there could be no case to which the Law of Limitation, under clause 12, section 1 of Act XIV. of 1859, would apply. So that this decree was an important piece of evidence. Futteh Ali appears to have denied in his written statement that he was the person against whom the decree had been obtained. The Moonsiff thought (and he gives what would seem to be good reasons for it) that he was the person, and that his denial was false.

The case then came before the Subordinate Judge on appeal. He appears to have examined Futteh Ali, who stated that he did not know of this suit until the decree was passed. No reason is recorded for the Subordinate Judge's examining him, and it does not appear that an opportunity was given to the plaintiff of meeting what he said by proving, as we are told is the fact, that he made a deposition in the suit. If he did, although there may be some ambiguity about the names, his statement, that he was not aware of the decree cannot be believed. Probably, if the Subordinate Judge had inquired properly into the matter, he would have come to the same conclusion as the Moonsiff came to, namely, that he was the person who was the defendant in that case, and against whom the decree was made. That ought to have been properly inquired into, if the Subordinate Judge thought fit to take evidence on the subject, and the plaintiff ought not to have been taken by surprise by allowing this man to make his statement, and then acting upon it as if there could be no doubt of its truth.

If it should appear that he was the defendant in that suit, and that the decree was against him, what is said in the judgment of the Subordinate Judge, that it would have the same effect on plaintiff's case as if it were not passed at all, is altogether wrong. It would be a very important piece of evidence. The case ought to be re-considered with reference to this question, and if it be necessary to receive any evidence on the part of the plaintiff to contradict the statement of Futteh Ali, it ought to be received.

The suit must be remanded to the Lower Appellate Court in order that the appeal may be re-heard, the Judge who re-hears it exercising his discretion as to whether he will allow the plaintiff to show, by the proceedings in the suit or by any other evidence, that the decree was really made against Futteh Ali, and it is not true, as he alleges, that he did not know anything of the suit.

The costs will follow the result.

The 29th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Title—Possession—Form of Plaint.

Case No. 551 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 9th December 1873, reversing a decision of the Additional Sudder Moonsiff of that District, dated the 7th April 1873.

Kylash Kaminee Dossia (Plaintiff) and another (Defendant), *Appellants,*

versus

Judoo Bashinee Dossia and others (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Respondents.

Where a plaintiff, who fails to prove a specific title which he sets up, yet causes it to appear that he has had a clear *bonâ-fide* possession from which the Court can infer a good title, the Court will not shut him out in consequence of the mere form of his plaint.

Jackson, J.—We have had some little doubt as to this case, which certainly has been argued with more obstinacy than would appear to be suggested by the ostensible value of the suit. The plaintiff is one Kylash Kaminee, the wife of Ram Lall Dutt, and her plaint recites that a certain Konuck Ram Bose died possessed of immoveable property, leaving behind him six sonless widowed daughters-in-law, one of whom was named Menoka, and that, on the death of Konuck Ram, Menoka took possession of all his property, and singly and solely inhabited his ancestral dwelling-house to the exclusion of her sisters-in-law, and remained in possession thereof up to the time of her death; that, whilst she was in such possession, the land in dispute, which seems to have been brohmutter land, was resumed by Government, and a settlement made with her under which she held the land for a considerable time, and then made it over to her daughter Brohmo Moyee, who, on her death, succeeded her, and took possession of the property. Brohmo Moyee, it is said, died only in the month of Jeyt 1278, and on her death it is said that Ooma Churn Mojoomdar, a cousin of her husband, who was the nearest heir, succeeded to the property, and was for a short time, that is to say, down to Aughran 1278, in actual possession of this disputed property, but that he was then dispossessed; that he commenced a suit under section 15, Act XIV. of 1859, for the recovery of this property; that he afterwards sold this and the other properties which he had acquired to the plaintiff, and discontinued the suit under section 15; that plaintiff thereupon going to take possession of the property was obstructed and resisted by the defendants, who are described as dispossessing defendants, and thereupon she brings this suit. The plaintiff alleges that she is in possession of all the other properties acquired by purchase from Ooma Churn by payment of rent to the landlord.

The defendants denied that the plaintiff's vendor Ooma Churn was the heir of Brohmo Menoka; they set up an entirely different account of the devolution of Konuck Ram's estate, and wholly disputed the plaintiff's right to the disputed property.

On the whole case, the Moonsiff, Baboo Kalee Churn Ghossal, found in favour of the plaintiff, and gave her a decree against most of the defendants with some slight deduction. On appeal, the case went before the Subordinate Judge of Jessore, and he agreeing with the Moonsiff as to the falsity of the defence set up by the principal defendants, but differing from him as to the mowrosee on which the plaintiff's claim was founded, and being also of opinion that the right of Ooma Churn to succeed Brohmo Moyee was not made out, dismissed the plaintiff's suit.

The main contention before us has been that on the plaintiff's side a good title by possession has been made out so as to entitle her to a decree against the defendants, who, on the findings of both the Courts, were wrong-doers; that the weakness, if any, of the plaintiff's case has been amply made up by the consent and acquiescence of the landlord, who swore that he received rent from the plaintiff, and who in fact joined plaintiff in this special appeal. It is also objected that the Lower Appellate Court has not found, with that distinctness which the law requires, a very important issue as to Ooma Churn's heirship to Brohmo Moyee. Now, in the first place as to possession, it is clear to us that the plaintiff never came into Court on a case of possession. She set out very clearly a title—and a very good title, if proved, it certainly was—on which she intended to succeed. But doubtless if plaintiff set up a specific title, and failing to prove that, yet caused it to appear that she had a clear *bonâ-fide* possession from which the Court could infer a good title of some kind, and that the defendants were mere trespassers and wrong-doers, the Court would not be inclined to shut her out in consequence of the mere form of her plaint; and if that had been so, it might be necessary to send the case down to the Lower Appellate Court in order to find distinctly whether, after the death of Brohmo Moyee, Ooma Churn had ever been in possession, but it appears to us that the facts of the case relieve us from the necessity of so doing.

In the first place, as we have said, possession is not relied upon. In the next place, that which took place after the death of Brohmo Moyee, *viz.*, the commencement

of a possessory suit by Ooma Churn and the abandonment of that suit at the time of the sale to the plaintiff, shows clearly that in the opinion neither of Ooma Churn himself nor of plaintiff could that suit, under Act XIV. of 1859. have been maintained. Considering, therefore, the very short interval which even on plaintiff's own statement elapsed between the death of Brohmo Moyee and the plaintiff's vendor being put out of possession, it appears to us that we ought not to send the case back in order to a trial of the issue whether, during those few months, Ooma Churn was in possession. Then how does the case stand? We have the plaintiff claiming under a title derived through Ooma Churn and Brohmo Moyee from Menoka. Menoka, it is said, inherited, or, at any rate, enjoyed all this property, created the talook, first held it herself, and then transmitted it to her daughter Brohmo Moyee; but, upon these facts, the Lower Appellate Court held most unhesitatingly against the plaintiff. The Subordinate Judge finds that there was no talook; he also finds that Brohmo Moyee was not represented by Ooma Churn, and we then find that the continuance of possession from Brohmo Moyee to Ooma Churn is broken. In that state of things we are at a loss to see how the plaintiff can possibly rely on any claim arising out of possession. Therefore, her title being gone, and she having no possession, it appears to us her suit is hopeless.

The finding as to Ooma Churn's right to inherit from Brohmo Moyee has been objected to on the ground of indistinctness. It is said that the Court below ought to have found specifically what relationship Ooma Churn bore to Brohmo Moyee; and if there was any relationship, whether Ooma Churn was debarred from succeeding by reason of there being any other preferable heir. We do not see that as a matter of law the Lower Appellate Court was bound to give its decision in that particular shape. There was an issue raised on the point, *viz.*, whether Ooma Churn was the legal heir of Brohmo Moyee Dossee. Evidence was adduced by plaintiff to prove that he was, but the Court disbelieved the evidence, and found against the plaintiff. That is all, we think, that the Court was bound to do. We have therefore a series of findings against the plaintiff and patent defects in her case which, in our judgment, amply support the decision of the Court below. We think, therefore, that this special appeal is without foundation, and must be dismissed with costs.

The 29th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Attached Property—Co-defendant—Act VIII. of 1859, s. 246—Evidence—Jurisdiction.

Case No. 32 of 1874.

Miscellaneous Appeal from orders passed by the Subordinate Judge of Rajshahye, dated the 3rd and 22nd December 1873.

Binode Lall Pakrashee (Judgment-debtor), *Appellant,*

versus

Gireedhur Chuckerbutty and others (Decreeholders), *Respondents.*

Baboos Rash Beharee Ghose and *Bykunt Nath Doss* for Appellant.

Baboos Sreenath Doss, Mohinee Mohun Roy, and *Issur Chunder Chuckerbutty* for Respondents.

Where a suit resulted in two distinct orders for the payment of costs, one against the first set of defendants and another against the second, and the property of one of the former set was taken in execution of the order against the latter: HELD that the application of the aggrieved defendant for the release of his property fell within the provisions of Act VIII. of 1859, s. 246:

HELD also that the applicant had a right to establish what the law required by any evidence sufficient for the purpose, and that the Court had no power to require from him any particular kind of evidence.

Markby, J.—We think that we must treat the order now before us, so far as it

refuses to release this property from attachment, as an order made under section 246 of the Civil Procedure Code. It has been contended that that section does not apply where the party who makes the application under it is himself a defendant in the suit. But in this case, although the party who made the application was a defendant in the original suit, yet that suit resulted in two perfectly independent and distinct orders for the payment of costs; one order was against this defendant and certain other persons who were called the first set of defendants, and another order was against certain persons who were called the second set of defendants; and the question which is to be determined is whether certain property claimed by one of the first set of defendants can be taken in execution of the order against the second set of defendants; and under these circumstances we do not think that we ought to exclude the present applicant from the benefit of section 246, this being clearly a case to which the provisions of that section would be applicable, if there is nothing in that section expressly to exclude it. Therefore the order complained of, being in substance an order under section 246, no appeal will lie against it. But there may be possibly another application under that section, and therefore we think it right to point out that if it was the intention of the Subordinate Judge under the order of the 3rd December 1873 to limit the applicant as to the particular kind of evidence which he was to produce in support of his application under that section, the Court had no power so to do. The applicant has a right under the law to establish what section 246 requires him to establish in order that his property may be released, by any evidence which is sufficient for that purpose. The Subordinate Judge could not prospectively lay down any particular kind of evidence which the applicant should be required to produce in order to establish his claim under section 246. As to the money which has been paid into Court by the present special appellant in excess of the amount which the Court has decided that he is liable for under the order for restitution which is now being executed, we think he is now clearly entitled to have that sum to be paid back to him, but of course without any prejudice to the right of any of the parties in any further proceedings in execution.

We think under the circumstances that each party should bear his own costs of this appeal.

The 29th July 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Hindoo Law—Succession of Females—Reversioner.

Case No. 1990 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 2nd July 1873, affirming a decision of the Moonsiff of Lushkerpore, dated the 12th March 1873.

Gunga Pershad Kur (one of the Defendants), *Appellant,*

versus

Shumbhoonath Burmun and others (Plaintiffs), *Respondents.*

Baboos Grish Chunder Ghose and *Gopal Lall Mitter* for Appellant.

Baboo Sreenath Doss for Respondents.

The succession of females according to Hindoo law is not regular succession, and is not based upon the ordinary theory of spiritual benefit. Therefore, if they relinquish their rights in favour of the reversioner, the case is again brought back to the normal state of succession, the effect being to vest in him a complete title.

THE facts out of which this special appeal arises are briefly these. One Abi Ram was admittedly the former owner of the properties which form the subject-matter of this litigation. He died some time before 1235, leaving him surviving Jusoda, his widow, Dullabha, his daughter, and Ramnath and Shumbhoonath, sons of his daughter Dullabha. That after his death Jusoda, with the consent of Dullabha, made a gift of these properties to her grandsons Shumbhoonath and Ramnath. That on the 27th Bysack 1235 a 14-anna share in them was sold to the defendant's ancestor by Ramnath and Shumbhoonath. That subsequently, on the 9th of Magh 1249, the remaining 2-anna share was similarly sold to the defendant's ancestor by Shumbhoonath and the widow of Ramnath, who had died in the meantime. That subsequent to this, the remaining son of Dullabha, *viz.*, Shumbhoonath, also died, and last of all Dullabha herself dying in Assin 1274, the plaintiffs have become entitled to the properties in dispute by right of inheritance as heirs of the original owner Abi Ram. Upon these facts, both the Courts below have decreed the plaintiffs' claim, with the exception of a small portion of a certain talook which has been held to have been

lost to the plaintiffs by the provisions of section 2 of Act VIII. of 1859.

The defendants have preferred this special appeal, and the following grounds have been urged:—

1st.—That the lower Courts should have dismissed the plaintiffs' claim as barred by limitation.

2nd.—That upon the facts found the lower Courts should have held that the gift by Jusoda with the consent of Dullabha created an absolute right in the disputed properties in her grandsons Ramnath and Shumbhoonath.

3rd.—The sale by the daughter Dullabha conjointly with the reversionary heirs transferred the whole proprietary right, and the purchaser by such transfer acquired an absolute interest in the disputed properties.

The contention of the special appellant raised in the second ground of special appeal, which I shall consider first, seems to me to be valid. The arrangement by which the property in dispute was made over to Ramnath and Shumbhoonath appears to me legally to amount to cession and relinquishment of their rights on the part of Jusoda and Dullabha in favour of the reversionary heirs. The lower Courts speak of it as a gift of the life-estate of Jusoda, as if there was vested in some one else the remainder of that estate. I need hardly point out that this proceeds from an erroneous assumption that the widow's is a mere life-estate. Therefore the question to be determined is whether, according to Hindoo law, such cession and relinquishment of the widow's rights in favour of the reversioner operates to vest in the latter a complete title. Upon the authorities it is clear that it should be decided in favour of the reversioner. All the earlier cases upon the subject are collected in the decision of Juda Monee Debia *vs.* Jusoda Pershad Mookerjee (Boulnois' Reports, p. 121). Although from an examination of them there might be some ground for contending that there was a slight conflict, yet an examination of the modern cases makes it quite clear that upon the authorities the question should be answered in the affirmative (*vide* p. 627, Norton's Leading Cases, Part 11, where these cases are quoted). It seems to me also that this view is quite in accordance with the spirit and the principles of Hindoo law. The succession of females according to Hindoo law is quite exceptional, and is not founded upon the ordinary rule, *viz.*, that of spiritual benefit. It is true that in the case of the widow, she confers some spiritual benefit, but if that were the sole test, she would have ranked much lower than what she does now. Daughters confer no benefit, but they succeed because their sons do. Thus it is evident that succession of females according to Hindoos is not regular succession, and is not based upon the ordinary theory of spiritual benefit. Therefore, if they relinquish their rights in favour of the reversioner, the case is again brought back to the normal rule of succession. For these reasons I am of opinion that the effect of the arrangement by which Jusoda and Dullabha relinquished their right in favour of Ramnath and Shumbhoonath was to vest in them at once a complete title as if they had taken the inheritance direct from Abi Ram. This being so, the plaintiffs' claim must fail upon this ground of law.

In this view of the case, it is not necessary to express any opinion upon the other grounds of appeal. Therefore the result is that the special appeal will be decreed, and the plaintiffs' suit dismissed with costs in all the Courts.

The 30th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Kubooleut—Holding Over—Suit by Co-sharers for Rent—Act VIII. of 1859, s. 73.

Case No. 1935 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 30th June 1873, affirming a decision of the Moonsiff of Putneetollah, dated the 27th February 1873.

Tara Chunder Banerjee (Plaintiff), *Appellant*,

versus

Ameer Mundul and others (Defendants), *Respondents*.

Baboo Rash Beharee Ghose for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondents.

A tenant holding over after the term of his kubooleut has expired continues to hold in the same manner as before; and if he was bound under it to pay his rent to the sharers jointly, he is not liable to be sued for the rent in parts.

.b

If a co-sharer, desiring to bring a suit for rent due, cannot join the others as plaintiffs with their consent, he may claim the whole of the rent which is due, and ask the Court, under Act VIII. of 1859, s. 73, to make the other co-sharers plaintiffs with him.

Couch, C.J.—It is stated by the Judge that the defendant was bound by the kubooleut to pay his rent to the sharers jointly. We have been told that this is not literally correct, as the term of that kubooleut has expired, and the defendant does not now hold under any kubooleut, but has simply continued to hold the land. But this would make no difference, for he would continue to hold in the same manner as he did under the kubooleut, and be liable to pay his rent to the sharers jointly. The rent when due constitutes a debt from him to them jointly, and no one of them has a right to treat a part of it as a separate debt to him. The persons to whom the rent is payable ought to bring a suit for the whole rent. The tenant is not bound to pay, nor is liable to be sued, for the rent in parts.

The present suit is brought for the plaintiff's share of the rent. It is true that he has made the other co-sharers defendants, but he does not ask that the tenant defendant shall be made to pay the whole of the rent. Nor does he suggest that he has already paid all the rent except what would be receivable by the plaintiff as his share. Such a case might occur, and then it would probably be open to the co-sharer who had not been paid to sue, asking to have the balance which remained unpaid, and to the whole of which he would be entitled, paid to him. That is not the case here. This is a case in which no part of the rent appearing to have been paid, one of the co-sharers asks to have a decree for his share only. We think that cannot be done. The rent ought to be sued for in one suit, and the persons jointly entitled to receive the rent ought to be the plaintiffs. If the co-sharer desiring to bring the suit cannot join the others as plaintiffs with their consent, he may state that to the Court. He might, we think, claim the whole of the rent which was due, and ask the Court, under section 73 of Act VIII. of 1859, to make the other co-sharers plaintiffs with him, in order that the suit may be complete and in a proper form. Possibly, as Mr. Justice Phear says,* he might make his co-sharers defendants, but the suit would be for the whole of the rent, and the Court would have to provide that when it was recovered each of the persons entitled should be paid his share. It appears to us that the simpler and better plan in cases of this kind would be that the co-sharer who wished to bring the suit should do so and ask the Court to oblige the other co-sharers to join him as plaintiffs. Then the suit would be complete, and a decree might be made for payment of the rent.

The present appears to us to be a case in which the object of the suit is not so much the recovery of the rent as that the plaintiff should get a decision of the Court against his co-sharers, and in some way establish against them the right to have a separate share of the rent. It is not a suit in which the tenant ought to be made a defendant. The cause of action against the tenant is the non-payment of the rent due to all the sharers jointly, and upon such a cause of action all ought to join in suing. If for some reason they will not, provision should be made by the Court for having them all before it, so that the tenant may not be subject to further suit on account of payment of rent.

In this case the lower Courts have come to a proper decision, the first in dismissing the suit, and the second in confirming that decision and dismissing the appeal. This appeal must be dismissed with costs.

* See case at p. 229, *ante*.

The 30th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Small Cause Courts—Damages—Jurisdiction.

Case No. 2933 of 1873.

Special Appeal from a decision passed by the Deputy Commissioner of Nowgong, dated the 21st July 1873, affirming a decision of the Extra Assistant Commissioner of that District, dated the 23rd June 1873.

Mansing Lalung and another (Plaintiffs), *Appellants*,

versus

Theram Doloye and others (Defendants), *Respondents*.

Baboo Anund Gopal Palit for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

A person claiming damages for personal injury, where actual pecuniary damage has resulted, has a right to

sue in a Small Cause Court, and he may join in the suit another part of the claim to damages which may not be cognizable by a Small Cause Court. There is no special appeal in such a case if the amount sued for does not exceed Rs. 500.

Couch, C.J.—We think a special appeal does not lie in this case. Section 6 of Act XI. of 1865 gives to the Small Cause Court jurisdiction when the suit is for damages and the damage or demand does not exceed Rs. 500, subject to certain exceptions which are stated. One of them is that no action will lie in the Small Cause Court for the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury. This takes out of the jurisdiction of the Small Cause Court a suit for the recovery of damages on account of an alleged personal injury where an actual pecuniary damage has not resulted; but, if such damage has resulted, it is not a case within the exception, and not being within the exception it falls within the general provision. The test is whether actual pecuniary damage has resulted. It is not that the plaintiff claims such damage to have resulted, but it has resulted. If a person were to bring a suit for damages on account of a personal injury, alleging that actual pecuniary damage had resulted, and failed to prove it, there would be no power to make a decree, for it would then appear that it was not a suit that could be brought in the Small Cause Court. But we must take it that this was a case in which there was actual pecuniary damage resulting from the injury. Therefore it was one in which the Small Cause Court had jurisdiction. And having jurisdiction to try it, we think the other part of the claim might be joined in the suit. Certainly it could not have been intended that a person having a right to sue in the Small Cause Court must abandon a part of his claim to damages, or bring another suit in another Court for that part. This question has been decided in the case quoted, Gunga Narain Moitro *vs.* Gudadhur Chowdhry, 13 Weekly Reporter, p. 435. We think we ought to follow that decision. The appeal will be dismissed with costs.

The 30th July 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Act VIII. of 1859, s. 354—Arbitration.

Case No. 2927 of 1873.

Special Appeal from a decision passed by the Deputy Commissioner of Luckimpore, dated the 20th September 1873, modifying a decision of the Extra Assistant Commissioner of Debrooghur, dated the 28th February 1873.

Puna Bibee (Defendant), *Appellant,*

versus

Khoda Buksh Beparee (Plaintiff), *Respondent.*

Baboo Lall Mohun Doss for Appellant.

Baboo Sreenath Banerjee for Respondent.

An Appellate Court, in referring a case under Act VIII. of 1859, s. 354, has no power to order the first Court to call upon the parties to the suit to agree to arbitration, or, on their failing to do so, to appoint arbitrators.

Where this is done and the parties waive the irregularity, and consent to the matter being tried by arbitrators, they cannot afterwards on special appeal object to the proceedings.

Couch, C.J.—In this case the suit having come by appeal before the Deputy Commissioner and Subordinate Judge of Luckimpore, he made an order by which he referred it to the first Court to call upon the parties to the suit to agree to arbitration to try what property was in the possession of the deceased Ala Buksh, or, failing their doing so, the Court itself was to appoint arbitrators. What property was in possession of Ala Buksh was a question which the Subordinate Judge thought it necessary to have tried. And he had power, under section 354 of Act VIII. of 1859, to direct the first Court to try it, but he could exercise the power only in the manner prescribed by the procedure of the Courts. He had not power to direct the Court to try it in this way. That could only be done by the parties to the suit consenting to it. They were competent, when the case came down to the first Court to have the question tried, to agree that it should be tried by arbitrators. They were also competent, if they thought fit, to waive this irregularity in the order of the Subordinate Judge, and to assent to the inquiry being made in that way. And it appears that when the case came back to the

first Court the defendant, who is now the appellant, and who objects that what was done was without jurisdiction, presented a petition to the Court giving a list of persons from which the Court might select the arbitrators. It recited, it is true, the order of the Subordinate Judge, but it concluded by consenting to the question being determined by arbitrators to be appointed, and undoubtedly raised no objection to the irregular order which had been made by the Subordinate Judge. And it would appear that the plaintiff also submitted a list, and from the two lists three persons were selected by the Judge of the first Court, whose names appear in both lists, which was a very fair and proper way of making the selection. It is said in the judgment of the Extra Assistant Commissioner that this was done though the defendant objected; and the case was presented to us at first as if the defendant objected altogether to the proceeding by arbitration. But that does not appear to be the case; the defendant appears to have objected to the selection of the arbitrators. We cannot suppose that the defendant wanted what the pleader for the appellant suggested, namely, that all the seventeen persons named by him should be amongst the arbitrators. It is too absurd for him to have done so, although it has been suggested to us by his pleader.

So far then it appears that the defendant who is now appealing assented to the order of the Subordinate Judge being carried out, and waived any irregularity that there was in it. It further appears that the inquiry was proceeded with by the arbitrators who were named, and the defendant produced witnesses before them, and they came to a finding upon the question referred to them and laid it before the first Court with the evidence. This was dealt with by the first Court, and from the decision come to by it there was an appeal. It appears to us, looking at what has taken place, that the defendant cannot now object to the irregularity in the order of the Subordinate Judge. It is too late now to object that the order was irregular because, instead of leaving it to the first Court to try the question in the ordinary way, it gave the direction for the appointment of arbitrators. It is not an order made entirely without jurisdiction; it was an irregular proceeding which, if objected to in the proper way and at the proper time, might have been set aside. That was not done. Certainly, there is no reason that this objection should be allowed to prevail in special appeal.

The appeal must be dismissed with costs.

The 30th July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

"Bhabak Mehals"—Local Custom—Hindoo Law.

Case No. 943 of 1874.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 31st December 1873, reversing a decision of the Moonsiff of Doobrajpore, dated the 31st May 1873.

Nil Madhub Gossamee (Plaintiff), *Appellant,*

versus

Chunder Mookhee Gossamee (Defendant), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Gopal Lall Mitter for Respondent.

Where a custom, according to which the Rajahs of Beerbhoom had granted a right to a share of property described as "Bhabak Mehals," appeared to have been always recognized by the Courts, it was maintained, notwithstanding that it is in contravention of the ordinary Hindoo law.

Markby, J.—THE plaintiff in this case claims a right to an eight-annas share of what he describes as "Bhabak Mehals." He says "that agreeably to the long-established custom, the properties of the Vaisnabs and Vaisnabis in the aforesaid mehals dying without heir have been divided among us according to our respective shares," and he specifies the locality in which he says this custom prevails, namely, 22 mouzahs of Doobrajpore and the neighbourhood. The defendant claims a similar right not under a custom, but under a grant from the Rajahs of Beerbhoom. The first Court raised the proper issue, whether the "Bhabak Mehal" in dispute belongs to the plaintiff or to the defendant? But instead of trying that issue the Moonsiff expressed an opinion that no such right as is claimed by the defendant could be granted by the Rajahs of Beerbhoom, and he gave the plaintiff a decree, not upon the ground that he proved the custom which he alleged, but upon the ground that he is the gooroo of the deceased person. The Lower Appellate Court, we think, quite rightly says that that was not the question between the parties. The question was to whom this right belongs, and the Judge finds that it belongs to the defendant. The plaintiff,

special appellant, again seeks to raise the question that this right is a right which the Rajahs of Beerbhoom could not grant to the defendant as that would be in contravention of the Hindoo law. We think he cannot raise that question now. It was admitted by both parties at the outset of the case that there was such a custom in this district, and although no doubt the custom is of a peculiar character, yet it appears that it has been always recognized by the Courts, notwithstanding that it is in contravention of the ordinary Hindoo law. If it had been necessary for us to consider the validity of this custom, we should probably have presumed that that custom had a legal origin. But it is sufficient in this case to say that upon the case made by both the parties, there is such a custom in this district; and that the Court below has found that the right belongs, not to the plaintiff, but to the defendant.

The special appeal is dismissed with costs.

The 30th July 1874.

Present:

The Hon'ble W. Markby, and Romesh Chunder Mitter, *Judges.*

Projah—Tenant.

Case No. 806 of 1874.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Beerbhoom, dated the 13th January 1874, reversing a decision of the Moonsiff of Ramporehaut, dated the 5th July 1873.

Kedarnath Mitter (one of the Defendants), *Appellant,*

versus

Sookoomaree Debia (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

The word *projah* does not define the status of a tenant.

Markby, J.—We think that the judgment of the Lower Appellate Court must be set aside, and the appeal remanded for re-trial upon this ground that the Subordinate Judge has said in respect of three sets of documents to which he refers that the plaintiff is designated as a ryot. We find on referring to those documents that the word used is the Bengalee word *projah.* Now, in a great many cases which have been before us lately, in which a question has arisen whether the person who is called *projah* is a ryot or not, it has been uniformly held, and we may say without any objection on the part of any one, that the word *projah* is not a word which defines accurately in any way the status of a tenant. Therefore those documents to which the Subordinate Judge refers ought not, as it appears to us, to be used either as confirming or contradicting the allegations of the parties. They are consistent with the case as well of the plaintiff as of the defendant. Upon these grounds, therefore, we think that, as so much stress has been laid upon these documents, the judgment of the Lower Appellate Court cannot be supported, and, as we have said before, the case must be remanded for re-trial. Costs will abide the ultimate result.

The 31st July 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Principal and Agent—Zemindar and Gómashta—Fraud.

Case No. 2117 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 20th June 1873, affirming a decision of the Moonsiff of Maldah, dated the 24th February 1873.

Koonjo Lall Mundul (Defendant), *Appellant,*

versus

Dabee Pershad Tewaree (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Sreenath Doss for Respondent.

In a suit by a zemindar against a gomashta where fraud is not alleged, the Court cannot assume it merely on the ground that the accounts were not filed till the close of the year of the determination of the agency.

Markby, J.—It is not denied in this case that if the plaintiff cannot bring himself within the proviso of section 30, Act VIII. (B.C.) of 1869, the suit is barred. It is said that the District Judge has found that he comes within that proviso, because the zemindar has by means of fraud been kept from the knowledge of the receipt of the

money now claimed. Now, it is to be observed that in the plaint there is no allegation of fraud whatsoever. The zemindar himself says that he charges the gomashta with this amount upon the account which the gomashta himself filed. The Judge, however, has said that it must be assumed to be a fraud for a gomashta to neglect to file his accounts. Now, we by no means say that under some circumstances the delay by a gomashta in filing his accounts may not be evidence of fraud. But where no fraud is alleged, and where the only evidence is that the accounts were not filed till the close of the year of the determination of the agency, we think the Court was wrong in saying that fraud must be assumed against the gomashta. It appears to us therefore that the decision of the Lower Appellate Court extending the period of limitation is wrong and must be reversed; and that on the ground of limitation the suit must be dismissed with costs.

The 31st July 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Review—Objection.

Case No. 2949 of 1873.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 18th August 1873, reversing a decision of the Moonsiff of Nasirnuggur, dated the 22nd November 1870.

Ram Joy Goopto (Defendant), *Appellant,*

versus

Sreemutty Jugodessuree (Plaintiff), *Respondent.*

Baboos Sreenath Banerjee and *Bharut Chunder Dutt* for Appellant.

Baboo Aukhil Chunder Sen for Respondent.

Where, owing to the conduct of the opposite party, who, though served with notice, made no objection, an applicant for review had no opportunity of showing that a new piece of evidence which he adduced was not within his knowledge, and could not be adduced by him when the decree was passed, such opposite party cannot afterwards be allowed to object on the ground of the Full Bench Ruling in 20 W. R., p. 84.

THE Full Bench in Volume XX., Weekly Reporter, page 84, laid down that "an order "granting a review on the ground of dis-"covery of new evidence can be questioned "in special appeal, on the ground that, if a "review is granted without its being shown "that the new evidence was not within the "knowledge of the applicant, or could not be "adduced by him, when the decree was "passed, it is an error in procedure, and "therefore open to special appeal."

Now, in this case both the Additional Moonsiff and the Judge on review have admitted the plaintiff's title. At first, the Moonsiff, with considerable hesitation, found that she had not been able to prove possession within twelve years prior to suit, and the Additional Judge also, after saying that the plaintiff's title was good but for the lapse of time, upheld that decision. The plaintiff then put in a fresh piece of evidence stating in her grounds of review that it was not within her knowledge when the decree was passed.

A day was fixed for the hearing of the review, the opposite party had notice, and made no objection whatever to the receipt of that document. The plaintiff, therefore, had no opportunity of showing to the Courts below that that piece of evidence was not within her knowledge, and could not be adduced by her when the decree was passed. That is owing entirely to the conduct of the opposite party, and yet the opposite party now wishes to rely on the ruling of the Full Bench as shutting out the plaintiff from redress under the review. I, therefore, overrule that first objection.

Then the next objection is that the onus has been thrown on the wrong party. The Judge does start, it is true, by saying that the onus is on the defendant, but then he says also that, independent of the document produced on review, the other evidence on the record is sufficient to dispose of the plea of limitation. Then, with reference to the document filed on review, it appears that the zemindar sued to resume, making the sons of the plaintiff in this case and some of the defendants parties in that case, and the defendant, special appellant, stated in his written statement that he and his other co-sharers were in possession of the land. Now, looking to the fact that the sons of the plaintiff were parties to that suit, I think that this admission, although by no means conclusive, taken with the finding of the Judge that the plaintiff has proved possession up to 1267, is sufficient to save the case of the plaintiff from the statute of limitations, and it is also clear that her title is a good one.

The special appeal must be dismissed with costs.

The 1st August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Suit by Heirs—Plea of Possession under a Will —Onus Probandi—Mahomedan Law.

Case No. 2178 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 24th June 1873, reversing a decision of the Moonsiff of Sasseeram, dated the 28th February 1873.

Sukoomut Bibee and others (Plaintiffs), *Appellants,*

versus

Shaikh Warris Ali and others (some of the Defendants), *Respondents.*

Moonshee Abdool Baree for Appellants.

Moonshee Mahomed Yusoof for Respondents.

In a suit for an undivided share of property claimed by plaintiffs as heirs of the deceased owner, where defendants pleaded possession under a wuseeutnamah or will:

HELD that the Court could not tell how far the will was valid or invalid under the Mahomedan law, which allows a testator to give away from his heirs only one-third of his property, and therefore the onus was on the defendant to furnish a complete statement of the testator's property at the time of his death; failing which, plaintiffs' claim must prevail.

Phear, J.—IN this case the plaintiffs say that on the death of one Saadut Ali, they became heirs of a certain undivided share, which they specify, of the property left by him; and so also on the death of Koodrut Ali and Keramut Bibee respectively, they became heirs of an undivided share in the property of these persons, which was an ijmalee portion of the same property as that which belonged to Saadut Ali; that in the result they, the plaintiffs, so became entitled to an undivided 4-anna 8-pie share of each of two mouzahs, namely, Mouzah Purseah and Mouzah Abdulpore, and of a 1-anna 5-krant share of a third mouzah, Mouzah Baboora. And they allege that the defendants under colour of two pretended instruments of title obtained from Saadut Ali during his life, namely, an ikrarnamah of 1859, which they say is void and inoperative, and a hibanamah of 1862, and also by means of various sub-conveyances and deeds of charge as between themselves, have all wrongfully got possession of the plaintiffs' share in the property as well as possession of such shares in the same property as they themselves, or some of them, are entitled to; and that they are in this way wrongfully keeping the plaintiffs out of the shares which have just been named.

The answer of the defendants is, first, that the suit is barred by limitation;

2ndly.—That the suit is multifarious;

3rdly.—That the plaintiffs have acquiesced in the dealings with the property by virtue of which the defendants have become holders of it;

4thly.—That the ikrarnamah and hibanamah are valid to the extent of one-third of Saadut Ali's share;

5thly.—That the defendants have not got possession of the plaintiffs' share of the property at all; and

Lastly.—That the plaintiffs have not got the title upon which they bring their suit.

It is obvious upon this state of the case that it was incumbent upon the plaintiffs in the first place to prove the material allegations of fact which they made in their plaint.

And if they succeeded in establishing these allegations, then it would lie upon the defendants to show that they had a better title than the title of heirship set up by the plaintiffs to this property.

The Court of first instance gave a decree in favour of the plaintiffs to the extent of a portion of their claim. The Moonsiff was of opinion that the plaintiffs' case had been established by the evidence; but he also thought that the so-called ikrarnamah of 1859 was valid and operative to pass to the defendants a portion of the property. So that the plaintiffs were only entitled to recover a portion of that to which they laid claim in their plaint.

On appeal from this decision to the Judge, the decree of the Moonsiff was entirely reversed. The Judge says:—"The first point "to notice in this case is the exceedingly "confused and complicated form which it "has assumed from the attempt on plaintiff's "part to confine two altogether different "matters in one suit, and from the Moonsiff "not clearly apprehending and fixing his "attention upon the real demand, and after "he found the ground pass away from under "plaintiff's feet, instead of dismissing his "suit, attempting to define the plaintiff's "rights on a different basis, though all "materials for enabling him to do so correctly "were absent. The plaintiffs sue for a "certain share—4 annas 8 pie—in two Mouzahs Purseah and Abdulpore, and 1 anna 5 "krants in Baboora, alleging that they are

"entitled to a 4-anna 8-krant share in the "estate left by Saadut Ali. Now, it may be "perfectly true that plaintiffs are entitled "to that portion of the property left by "Saadut Ali, and yet that such right entitles "them to an altogether different share in "their specific mouzahs."

The Judge goes on to explain what he means by this, which otherwise would not be very clear. He proceeds to say: "Till we "know what property Saadut Ali left at death, "we cannot say what are plaintiff's rights in "any particular mouzahs. It is evident "these three mouzahs situated in Shahabad "do not comprise all his estate, for already "another heir has brought a suit and "obtained a decree for 2 annas 9 pie of his "property in the district of Ghazeepore. "Suppose Saadut Ali besides these mouzahs "left a number of others heavily encumbered, "mortgaged beyond their value, a 4-anna "share of these mouzahs now in litigation "might represent a much larger share of his "available assets. The plaintiffs would get "the flesh and leave the bones to others."

It seems that the Judge has here fallen somewhat into a misapprehension. If the plaintiffs' title, as alleged in the plaint, is made out, then they have a right to an undivided share of every portion of Saadut Ali's property, that is, that share of the encumbered mouzahs would belong to them just as much as the same share of the unencumbered mouzahs. Although they may confine their present suit to the object of recovering from the defendants their, the plaintiffs', share of the unencumbered mouzahs, this would not relieve them from the necessity of contributing to the discharge of the encumbrances on the other mouzahs, if they ever seek to get their share in those also. This result only would happen that they would recover less than the full amount of the property to which they were entitled by confining their suit to the unencumbered mouzahs. It may well enough be the case that it is not worth their while to attempt to recover the property which was burdened beyond its value; but that is no reason why they should not seek to recover their own share in the property which was not encumbered. The argument to which the Judge seems to have attached some importance is not in truth of any value for the solution of this case. But he goes on to say: "But "this objection becomes overwhelming when "we have to consider the effect of the deed "which the Moonsiff holds to be a wuseeut-"namah or will. Accepting the Moonsiff's "view as correct, and it is the view already "taken of the document by the Judge of "Ghazeepore, no effect can be given to that "view without a detailed account of the "property left by Saadut Ali." This may be so, but the question is, "no effect" in favour of whom? It is the defendant who relies upon this portion of the wuseeutnamah. If the wuseeutnamah is put out of the way, then the plaintiff on the facts stated in his plaint is entitled to the full share which he claims. It is the defendant who says: "You are not entitled to that share, because I have got a portion of that property conveyed to me by the wuseeutnamah." If this be so, it is the defendant who is bound to show that the wuseeutnamah is operative in his favour. The Judge proceeds: "This deed only "deals with two of the Mouzahs Purseah and "Abdulpore, and though the Mussulman law "allows a testator to give away from his "heirs only one-third of his property, who "shall say that Saadut Ali had no power to "give away the entire of these mouzahs. If "the income derived from them be less than "one-third of his entire property he clearly "had the right, and the wuseeutnamah "would be valid to its fullest extent, and "plaintiffs' present claim inadmissible so far "as they ask for a portion of those mouzahs. "The Moonsiff has not considered this "difficulty, but, while quite in ignorance as "to the property actually left by Saadut Ali, "has held the wuseeutnamah valid for "one-third of the two mouzahs disposed of "under it, and invalid for the remaining "two-thirds. Even on the facts before him, "this was indefensible; for whatever other "property Saadut Ali may have left, in this "case three mouzahs are mentioned, and it "is one-third of the sum of the three "mouzahs the Moonsiff should have held "the bequest valid for, and what proportion "of the two mouzahs, Abdulpore and "Purseah, disposed of, this would have been "equivalent to, no one can say, until an "accurate account be taken, so that with-"out an account no Court can say what "plaintiffs' interest in those two mouzahs "would be, or what proportion of the land "or rental, supposing their position as heirs "undisputed of those mouzahs, plaintiffs "would be entitled to the enjoyment of."

It should be put the other way: until an inquiry of this kind has been made, or facts of this kind have been established, no one can tell what the defendants have obtained under this wuseeutnamah. The Judge has, in the view which he has taken of this case, placed the burden of proof upon

the wrong party. And it is somewhat strange that he should have fallen into this error, because he says afterwards: "The "whole of the calculations of the Moonsiff "as to the share plaintiffs are entitled to are "incorrect and rendered worthless from not "attending to this point. Holding, as he "does, the deed impugned to be a wuseeut-"namah, he could not possibly tell how far "it excluded plaintiffs' claim, unless he had "before him a complete statement of Saadut "Ali's property with incumbrances, &c., at "the time of death, for until then he could "not tell how far the wuseeutnamah was "valid, or how far invalid for contravening "the restriction Mussulman law imposes on "the testamentary power."

This is a right statement of the case: until sufficient facts to elucidate this point were established, it could not be said how far the wuseeutnamah excluded the plaintiff's claim. And if these facts have not been established by the defendant, the plaintiff's claim ought to prevail to its fullest extent.

The Judge has finally dismissed the suit on the ground that the plaintiff has not proved that which substantially it was the duty of the defendant to prove. There has not, we think, been a right trial of this case in the Court below, and therefore we reverse the decision of the Lower Appellate Court and remand the case to that Court for re-trial.

Costs must abide the event.

The 3rd August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Mala Fides—Benamee Sale.

Case No. 2441 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tipperah, dated the 23rd December 1872, reversing a decision of the Moonsiff of Ameergong, dated the 24th February 1871.

Mussamut Meher Banoo (Plaintiff),

Appellant,

versus

Keramut Ali and others (Defendants),

Respondents.

Baboo Nullit Chunder Sen for Appellant.

Mr. C. Gregory for Respondents.

In a suit to establish plaintiff's right under a kobala to land attached in execution of a decree against her husband, the question arose whether she was the real purchaser or only a benamee for her husband. The Lower Appellate Court, supposing that the sale to plaintiff had been made just before the decree was passed, found that the transaction, though *primâ facie* a sale to the wife and supported by possession, was one in which there was much suspicion of *mala fides,* and dismissed the suit:

HELD that the Judge committed an error of law in resting its decision upon circumstances of this kind.

Couch, C.J.—THE suit was brought by the plaintiff to establish her right to 8 kanees of land which appears to have been attached under a decree against her husband, Asgur Ali, and the question was whether the plaintiff was the real purchaser of the land, or it had been bought by Asgur Ali in her name.

The Moonsiff found that the land was the plaintiff's, and that the purchase was really made by her. He accordingly made a decree in her favour, declaring that she had a right to the possession. He says in his judgment that it had been clearly proved that the plaintiff was and is now in possession under a genuine purchase, and at the end he says that the defendant could not prove that Abdool Ali had entered into the land, or was in possession thereof, which, we think, shows that, in the Moonsiff's opinion at least, and we must take it he was competent to form an opinion upon that matter, the evidence which Mr. Gregory has alluded to as proving possession had not satisfied him. He also says that the decree in the enforcement of which the land was attached and sold was recorded against Asgur Ali long after the purchase, as the defendant's pleaders admit. It may be that there would be a difficulty in showing from these proceedings that it was so; but we cannot suppose that the Moonsiff would write this in his judgment unless the defendant's pleaders did make an admission of this kind. So, there was, apparently, sufficient to justify the Moonsiff in coming to the decision which he did in favour of the plaintiff.

There was an appeal from his decision which was heard by the Additional Judge, who says that "in this suit the plaintiff's "case would be complete, if the *bona fides* of "the transaction, supported by documentary "and oral evidence, was believed in; but "upon going into them we find that the "sale to Meher Banoo, supported by its "registered kobala of many years' standing, "was made just before the decree was passed "of which the other's auction-sale was the "consequence, and when the suit itself must "have been pending. This must raise suspi-"cion. The proofs of sale to Meher Banoo, "and papers and transactions relating thereto,

"are perfectly compatible with the sale "having been really to her; but at the same "time, if the purchase had really been made "with her husband's money with intent to "deceive, and if that intent had been borne "in mind, the proceedings in connection "with Meher Banoo's nominal purchase of "the land would have been such as they "appear to have been."

Here he does not allude to any circumstance other than the dates of the decree and the purchase, which would throw suspicion upon the reality of the plaintiff's purchase. He says that all the circumstances and all the evidence were consistent with either the one view of the case or the other; and the only thing that he fixes upon as causing a suspicion in his mind is that the kobala was made just before the decree was passed. This, according to the admission of the defendant's pleader, stated by the Moonsiff, was not the case; and the suspicion of the Judge is founded upon what appears to be a mistake. How the mistake occurred it is impossible to say. But assuming that the Judge was not mistaken in supposing that the purchase was made not long before the decree was passed, and even pending the suit, it is not a circumstance to create any particular suspicion. It was not a conveying away of property which Asgur Ali had or a pretended sale of it to his wife or a gift to her, but a purchase from a third person. It is possible that notwithstanding the husband was being sued, the wife might have some property, and they might wish that it should be invested in this way. Allowing the case to be as the Judge states, it does not appear to us to be a circumstance which would justify him in finding that the transaction, which is *primâ facie* a purchase by the wife, and which, according to the Moonsiff, was supported by possession which was consistent with that, was one in which there was much suspicion of possible *mala fides* in the purchase, and in therefore deciding that the decree of the Moonsiff in the plaintiff's favour should be reversed. The way in which he expresses himself shows that he had not that before him which could justify him in point of law in reversing this decree. He only says "too much suspicion of possible *mala fides*." But it is not enough that there should be a possible *mala fides*. He ought to find that the transaction was not what it appeared to be; that instead of being a purchase by the wife, it was a purchase by the husband in the wife's name. He has, to my mind, committed an error in law in resting his decision upon circumstances of this kind and saying that on that account he thought the plaintiff had failed to establish her claim. At the same time it appears to be a case in which it is fit that the evidence should be submitted again to the lower Court, and that it would not be right for us, by merely reversing the decree of the Additional Judge, to allow the decision of the Moonsiff in the plaintiff's favour to stand: and we understand that this gentleman is no longer there; and the case will, if we remand it, be submitted to another Judge. We shall, therefore, reverse the decree of the Lower Appellate Court and remand the case to that Court for re-trial. The costs will follow the result.

The 3rd August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Breach of Contract of Marriage—Damages—Mahomedan Customs.

Case No. 1852 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 29th May 1873, affirming a decision of the Moonsiff of that District, dated the 25th March 1873.

Asgur Ali Chowdhry (one of the Defendants), *Appellant,*

versus

Muhubbut Ali (Plaintiff), *Respondent.*

Baboo Taruck Nath Sen for Appellant.

Baboo Gopal Lall Mitter for Respondent.

The father of a Mahomedan girl, alleging her to be under age, gave her in marriage to plaintiff, who, suing for establishment of conjugal rights, failed, on the ground that the girl was of age, and had not consented to the contract. He then sued the father to recover as damages the value of presents made:

HELD that as the expense was not incurred in consequence of the breach of contract, but voluntarily, it could not be recovered as damages; and that plaintiff could only claim compensation for the loss of the girl as his wife:

HELD, however, that if fraud were established, and plaintiff could show that the presents were a natural consequence of the negotiations, and in conformity with general custom, he might recover damages to be determined by the circumstances.

Markby, J.—IN this case the father of a Mahomedan girl, alleging her to be a minor, had given her in marriage to the plaintiff. After the marriage, the plaintiff instituted a

suit for the purpose of compelling the girl to live with him as his wife, but failed by reason of its being established that the girl was of full age, and that she had not given her consent. The plaintiff now sues the father, alleging that he was induced to contract the marriage with the father by the fraudulent misrepresentation of the father that the girl was under age, and that he was therefore competent to give her in marriage; and the plaintiff seeks to recover as damages the value of certain presents which, he says, he had made, but whether to the father or to the girl is not very distinctly stated.

The only substantial issue raised in the first Court was whether the proper marriage ceremonies had been performed. The Moonsiff upon finding that these ceremonies had been performed, held that the plaintiff was entitled to recover, and proceeded to inquire which of the presents had been made as alleged by the plaintiff. The only presents which were found to have been made were ornaments, clothes, and sweetmeats to the value of Rs. 180 or thereabouts, and Rs. 80 in cash; and for this sum the Moonsiff gave the plaintiff a decree with costs.

The Lower Appellate Court affirmed this decision and dismissed the appeal.

It seems to have been considered in the Courts below unnecessary to inquire into the question of fraud; and no doubt the suit for breach of contract to give the daughter in marriage might lie against the father without fraud; but nothing could be claimed in such a suit for presents made to any member of the family. This expense was not incurred by the plaintiff in consequence of the breach of contract, but was voluntarily incurred by the plaintiff in consequence of his entering into negotiations for the marriage. Even if any portion of the above presents were made to the father himself, they must be treated as purely voluntary. The law would not recognize any liability or undertaking on the part of the husband to pay any thing to the father in consideration of his giving his daughter in marriage; and the husband being under no legal obligation to give any thing to the father of the girl, or the girl herself, or to any member of her family, the value of any presents which he might choose to make could not be recovered against the father as damages simply for his breach of contract. All that the plaintiff could be entitled to recover for a simple breach of contract was compensation for the loss of the girl as his wife. Upon this head he has claimed nothing whatever.

But upon the allegations in the plaint the claim is unquestionably capable of being treated as founded upon fraud; and the rule as to damages in suits founded upon fraud is wider than the rule as to damages in suits founded upon simple breach of contract without fraud. If fraud were established, I think the plaintiff might then show that he entered upon the negotiations for the marriage in consequence of the defendant's representation that his daughter was under age, and that he had power to dispose of her in marriage, and that it was a natural and probable consequence of those negotiations that he should, in conformity with the general custom of the country to that effect, make presents to the girl herself and to the various members of the family. It would by no means follow even then that the plaintiff should recover the whole value of such presents. But the fact that he had made such presents might, I think, be given in evidence to assist the Court in estimating what damage is justly and immediately referable to the falsehood of the statement made by the defendant. This would not in all cases equal the amount of presents actually given; it would be necessary to consider all the circumstances of the case—amongst others, the rank in life and the situation of the parties, and what, having regard to the social customs of the class to which the parties belong, it would be considered reasonable and proper for an intending husband to give.

The suit is one of a novel character, and we are by no means disposed to encourage the prosecution of such claims as these in Courts of justice; but we are not prepared to say that the plaintiff is not entitled to have the question of fraud tried.

The case, therefore, will be remanded to the Moonsiff to try the issue whether the defendant Asgur Ali made a fraudulent representation to the plaintiff that his daughter was under age; and if he finds that issue in favour of the plaintiff he will then assess the damages to which the plaintiff is entitled on the evidence already given. Upon the issue of fraud the parties will be at liberty to give fresh evidence. If the issue of fraud is found against the plaintiff, the suit must be dismissed, as in that case there is, in our opinion, no proof of any damage for which a suit would lie.

Mitter, J.—I entirely concur in this order of remand. It is clear from the judgment of the Courts below that none of the items of losses proved in this case are damages flowing from the breach of the contract of marriage. The plaintiff is not therefore entitled to

recover them simply upon the ground that there has been a breach of contract on the part of the defendant. But these losses are of such a nature as may be shown to have been the probable result of a fraudulent misrepresentation by the defendant of his daughter's age which induced the plaintiff to enter into negotiations for marriage. This charge of fraud is distinctly made in the plaint, but no issue seems to have been raised upon it in the Courts below.

Under the circumstances of this case, the plaintiff is entitled to have that issue tried, and if it be found in his favour he is entitled to be reimbursed the reasonable expenses which he incurred for making presents to the bride's family, according to the social custom of the community to which both parties belong. How much of these expenses is reasonable, and how far they are the probable result of the defendant's fraudulent representation, are questions of fact which will have to be determined by the Courts below upon the evidence in the cause.

The 3rd August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Acts of Ownership—Waste Land—Presumption of Law.

Case No. 2938 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Tipperah, dated the 3rd September 1873, affirming a decision of the Moonsiff of Noornuggur, dated the 3rd July 1872.

Dole Gobind Goopto and another (Defendants), *Appellants,*

versus

Batoo *alias* Kisto Chunder Chuckerbutty and others (Plaintiffs), *Respondents.*

Baboos Bharut Chunder Dutt and *Juggut Chunder Banerjee* for Appellants.

Baboo Bhoobun Mohun Doss for Respondents.

Where the question as to possession was doubtful, a Civil Court was held to have committed no error of law in presuming ownership from the fact of enjoyment of the fruits of trees growing on the disputed land.

This suit was instituted by the plaintiffs, who claimed the disputed lands as belonging to two talooks Kashee Nath Chuckerbutty and Kristo Kant Deb, alleging that the defendants had dispossessed them. The defendants pleaded limitation, and alleged that the lands in dispute belonged to their ancestral talook Rajendro Goopto. The land in dispute is a portion of the banks of a tank, the tank being called Radha Kant Surmah. The plaintiff's dwelling-house lies immediately to the north of the tank; it appears that the tank is called after a member of plaintiffs' family. Three of the banks of the tank are admittedly in plaintiffs' possession, and with reference to the fourth bank now in dispute it appears that the defendants have already attempted to get possession of a portion of that bank in another suit, and were unsuccessful.

The Moonsiff went to the spot and came to the conclusion that the plaintiffs had been in possession and enjoyment of the disputed bank of the tank by enjoying the fruits of the trees growing on the bank of the tank, and he also found on the evidence that the plaintiffs had proved their ouster.

The Judge of Tipperah has confirmed that decision without giving any particular reasons for so doing beyond that he concurs in the finding of the Moonsiff, which he says is entitled to great weight as the Moonsiff visited the spot, and there were no grounds for interfering with his decision.

In special appeal it is contended that the Judge ought to have reversed the decision of the Moonsiff, as the question of possession has been tried on an erroneous presumption, and not upon the direct evidence in the case; and a decision in Volume XI., Weekly Reporter, p. 268, has been referred to. That decision rules that there may be such a possession of waste lands as to protect a suit from being barred by limitation, and where the question as to possession is doubtful, a presumption may arise in favour of the party who proves his right. No doubt, acts of ownership may be proved over waste lands as well as over any other lands, and in this case the Moonsiff has found it proved that the plaintiffs have enjoyed the fruits of the trees growing on the disputed bank of the tank. I can see no erroneous presumption of law in this finding, and the special appeal must be dismissed with costs.

The 4th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII. of 1859, ss. 230 & 264—Possession.

Case No. 594 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 23rd December 1873, affirming a decision of the Moonsiff of Baghat, dated the 24th January 1873.

Obhoya Churn Dey (Plaintiff), *Appellant,*

versus

Rajendro Coomar Ghose (Defendant), *Respondent.*

Baboo Bungshee Dhur Sen for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Act VIII. of 1859, s. 230, does not limit the applicant to any particular manner of obtaining possession; and s. 264 contains nothing to prevent the purchaser at an execution-sale from obtaining possession, if he can, without the assistance of the Court.

Jackson, J.—THE decision of the Judge in this case cannot be supported. The special appellant applied under section 230 of the Code of Civil Procedure, alleging that he was in possession of the property in suit on his own account, and was dispossessed of it by the defendant Rajendro Coomar Ghose in execution of a decree obtained by him. The Moonsiff inquired into the case, and found that the plaintiff's allegations were not made out. On appeal the Judge refused to go into the case, because he thought that as the origin of the plaintiff's title and possession was assailed in execution of decree, and as section 264 of the Code of Civil Procedure points out the manner in which possession is to be obtained under such sale, and as plaintiff in fact admits that he did not take possession in that manner, no further proof of possession, such as receipt of rent, could be recognized. Now section 230 does not limit the applicant to any such way, and it is clear that although section 264 provides for the assistance of the party who is purchaser at the execution-sale, there is nothing whatever to prevent his obtaining possession, if he can, without the intervention of the Court. The case must go back to the Judge, his decision being set aside, in order that he may ascertain whether the plaintiff had possession of the property in dispute as he alleged.

The 5th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble G. G. Morris, *Judge.*

Possessory Suit—Irrelevant Issues—Mesne-Profits.

Case No. 2544 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 11th June 1873, modifying a decision of the Moonsiff of Hathazaree, dated the 16th April 1873.

Kaleenath Doss (Plaintiff), *Appellant,*

versus

Rajah Meah and another (Defendants), *Respondents.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Rajendronath Bose for Respondents.

In a suit by an auction-purchaser for possession of certain rights and interests in joint property, where a part of the plaintiff's claim was disallowed in appeal, the Lower Appellate Court was held to have done wrong in raising the question whether plaintiff's predecessor was in separate possession, seeing that the parties who had a right to contest it were not before the Court.

Where an auction-purchaser, who prayed for possession as well as mesne-profits, obtained a decree for possession which said nothing about mesne-profits, and no reason appeared why mesne-profits should be refused, the High Court allowed mesne-profits in execution.

Couch, C. J.—THE plaintiff claimed as the purchaser at a sale by auction of the right, title, and interest of Vilayut Ali, deceased, in certain lands. The defence was

that before the purchase by the plaintiff, the interest of Vilayut Ali in the land in suit had been sold to Alfa Bibee, the mother of the two defendants, and that at the time of the sale by auction at which the plaintiff purchased no interest remained in Vilayut Ali.

The Moonsiff found that the kobala to Alfa Bibee was proved, and accordingly he dismissed the plaintiff's suit, finding that the kobala was executed long before any sale was contemplated.

In an appeal which was heard by the Subordinate Judge, he found that the defendants had failed to prove the kobala to Alfa Bibee, and, consequently, that ground for dismissing the suit did not exist. It would have followed from this that the plaintiff was entitled to succeed; but the Subordinate Judge raised another question. He said that the sale certificate recited that 10 kanees 13 gundahs and 1 cowrie of land, bearing a jumma of 8 rupees 5 annas and 6 pies, being a 3-anna share of the whole mehal consisting of 2 drones 14 kanees and 3 gundahs of land, bearing a jumma of 49 rupees 4 annas and 9 pies, was the right of the judgment-debtor, Vilayut Ali, and was purchased at the auction-sale; but he said that it had not been satisfactorily proved that the said land was included within the daghs mentioned in the plaint, and that Vilayut Ali had obtained separately the lands included in these daghs from the entire mehal in partition, and therefore we gave to the plaintiff a decree for possession of only 1 kanee 6 gundahs and 1 cowrie of land out of the land claimed.

The plaint had annexed to it two schedules describing the land which was claimed. We have nothing to do now with the second schedule. The first mentioned distinct daghs of the measurement chittah, and the plaint asked for possession of the land mentioned in that schedule.

The defendants in their written statement do not set up that, if the plaintiff was entitled to recover, he would not be entitled to recover the lands as described in this schedule. They do not allege that there had been no partition and that there was no separate possession by Vilayut Ali of the lands which the plaintiff sought to recover; but, as we have already stated, they rested their case upon a previous conveyance of Vilayut Ali's interest in the lands described to Alfa Bibee. The question which is raised by the Subordinate Judge, and upon which he has disallowed a part of the plaintiff's claim, does not appear to have been raised in the first Court. The third issue in the first Court does not raise it. That issue means only that if the second issue is found against the defendant, namely, that the lands in schedule I. had not become the sole property of Alfa Bibee, then it was not necessary to find whether there had been a sale to the plaintiff or not. This is what we think the third issue meant; and the question which is raised by the Subordinate Judge, and upon which he has given a decree adverse to the plaintiff, was not, we think, raised by the first Court, and was not intended to be raised. The parties who had a right to contest whether Vilayut Ali was in separate possession of the land, or whether it was still joint property and still to be made the subject of partition, were not before the Court. They would not be affected by any decree that might be made in this suit. We think, therefore, that the Subordinate Judge was wrong in that part of his judgment, and from the other part of his judgment it follows that the plaintiff is entitled to recover according to the claim.

Then the plaint not only asked for possession of the lands, but to have mesne-profits awarded to the plaintiff from the time of the purchase, namely, the 6th of June 1870, which the plaintiff was entitled to ask. He was entitled to join the claim for mesne-profits in the same suit with the claim for the land, and the Court was bound to adjudicate upon that. The Moonsiff gave no opinion upon it, as he dismissed the suit. The Subordinate Judge, although he gave a decree in favour of the plaintiff, said nothing about the mesne-profits. Upon the application to him for review this was taken notice of, and again in his order dismissing the application for review he does not notice this objection. We think we ought not to assume that he refused to allow the plaintiff mesne-profits. There is no reason apparent if the plaintiff was entitled to recover possession of any part of the land that he should not also have the mesne-profits of it. Nothing appears in the case which would be a ground for refusing to give them. Slight delay in bringing a suit would not in this country be sufficient reason for not allowing mesne-profits. We think, therefore, that we ought to direct that the mesne-profits shall be allowed in the execution of the decree from the 6th of June 1870, when the plaintiff became entitled to the land. The decree of the Subordinate Judge will be amended accordingly, and the appellant will have the costs of the appeal.

The 5th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Execution-sale—Sale-certificate—Irregularity—Bona-fide Purchaser.

Case No. 2444 of 1873.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of Tipperah, dated the 9th August 1873, affirming a decision of the Moonsiff of Noornuggur, dated the 30th September 1871.

Gowree Kumul Bhuttacharjee (Plaintiff), *Appellant*,

versus

Surut Chunder Doss Biswas (Defendant), *Respondent*.

Baboo Nullit Chunder Sen for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondent.

Where a decree-holder obtains an order for the sale of his judgment-debtor's interest in certain property, and, becoming purchaser at the sale which follows, receives a sale certificate going beyond the order, he cannot avail himself of anything in the certificate beyond the order.

If, however, he obtains possession according to the certificate and sells to a *bond-fide* purchaser without notice of the difference between the certificate and the order of sale, the latter has a good title.

Couch, C.J.—THE order of the 18th of December 1857 was made in consequence of a claim having been preferred that the share which Bholanath had obtained originally had been disposed of by him by way of gift, and all that remained in him at the time of the attachment. and was liable to be sold in execution of the decree against him, was what he had derived from Kasheenath. That order authorized, according to the fair construction of it, the sale of his interest in what had come to him from Kasheenath, and when we look at the judgment which preceded the order, it is clear that this was the intention of the Court which made it. Whether the sale was in conformity with the order does not appear; but, we think, in the absence of any evidence to the contrary, we ought to presume that the order was followed. The maxim *Omnia præsumuntur rite esse acta* applies. But it appears that on the 26th of March 1859, a sale certificate was granted which purports to transfer the right, title, and interest of Bholanath in an 8-anna share—going beyond what was authorized by the order to be sold. Apparently an objection might have been taken to this sale certificate, and an application made by the party injured by it to have it amended and made in conformity with the order.

The decree-holder, who had obtained the order, was the purchaser at the sale and the person to whom the certificate was given; and if the present suit were between him and the defendant, he would certainly be affected by notice of the order, and could not avail himself of anything in the sale certificate beyond the order. But it is not. The plaintiff in this suit, and the appellant before us, is a person who is said to have bought from him in June 1859, shortly after the sale certificate was given, and a considerable time after the sale took place.

If, at the time of the sale to the present appellant, the purchaser at the sale by auction, namely, the decree-holder, was in possession of the 8-anna share, and had also an instrument of title which purported to transfer to him the right to an 8-anna share, and the plaintiff, the now appellant, bought from him *bond fide*, without any notice of the irregularity in the proceedings and the difference between the order for sale and the certificate, the plaintiff would have a good title. Unfortunately, the question whether the seller was in possession at the time it was sold to the plaintiff has not been determined by either of the lower Courts. It is clear that they were not aware of the importance of it. They looked upon the possession as a matter which was only important with reference to the law of limitation. We have no power ourselves, in the way in which the case comes before us, to find whether there was a possession at the time we have mentioned. We shall say nothing as to whether the Lower Appellate Court should take more evidence or not. We leave it open to it to exercise its discretion in the matter. The case will be remanded to the Lower Appellate Court to find whether, at the time of the sale to the plaintiff, the person who sold to him, and who bought at the sale in execution of the decree, was in possession, and if in possession, of what he was in possession, and the finding will be returned to this Court.

The 15th July 1874.

Present:

Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Sale by Hindoo Widow—Suit by Reversioner—Mortgage—Liability of Reversioner.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Moulvie Mohamed Shumsool Hooda and others

versus

Shewukram *alias* Roy Doorga Pershad.

A Hindoo widow (a Ranee) having conveyed to a *bonâ-fide* purchaser for full value an ancestral estate beyond her own life, a reversioner brought a suit for a declaration that she had only the power to grant a life-estate, and that, after her death, he was entitled to an estate in remainder. The Courts below in India were of opinion that he should only be entitled to recover the property after the Ranee's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property which was existing at the time of the conveyance:

HELD that a Hindoo widow might sell such an estate absolutely if it could be shown that the conveyance was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. There was no proof of such being the state of things in this case:

HELD that the judgment of the High Court was right, and that the mortgage having been paid by the purchaser, it was equitable that, when the plaintiff re-claimed the estate, credit should be given to the purchaser for such payment, which otherwise the plaintiff himself would have to meet.

IN this case a Hindoo widow lady, of the name of Ranee Dhun Kowur, in the year 1854, sold an estate to the defendant by a conveyance, in which she purported to give him an absolute title, what we should call in this country an estate in fee simple. Her grandson, on coming of age a great many years after, brings a suit for the purpose of having it declared in his favour that this lady had only the power to grant a life-estate, and that, after her death, he was entitled to an estate in remainder.

The question depends upon the construction of a petition presented by Roy Hurnarain to the Collector in the year 1830, which has been treated by both sides in this litigation, and by both Courts, as in the nature of a testamentary instrument. The state of the family of Roy Hurnarain, at the time of his presenting this petition, was this. There were living only the before-mentioned Ranee Dhun Kowur, the widow of his son Roy Kalika Pershad, and her two daughters by that son, Bebee Shitaboo and Bebee Dularee, who at that time (1830) appear to have been unmarried. That being the state of the family, Hurnarain makes this, which must be now considered as a testamentary instrument. He first recites that the property of which he is about to dispose was ancestral property; he recites the death of his son Roy Kalika Pershad, and the death of his own wife, and he recites that the widow of his son, Ranee Dhun Kowur, was alive; that she has no heirs except her two daughters, Mussamut Bebee Shitaboo and Bebee Dularee, her daughters by his son, who would be her heirs. He then uses expressions which, if they stood alone, would, in their Lordships' opinion, show that he intended to make an absolute gift to Ranee Dhun Kowur. The expressions are these: "And my wife too died before, only Mussa-"mut Ranee Dhun Kowur, widow of Roy "Kalika Pershad, my deceased son above "mentioned, who too, excepting her two "daughters born of her womb, Mussamut "Bebee Shitaboo and Bebee Dularee, has no "other heirs, is my heir." And then he further goes on to say: "Except Mussamut "Ranee Dhun Kowur aforesaid, none other "is, nor shall be, my heir and malik." He proceeds, however, to again refer to the daughters of Ranee Dhun Kowur, whom he had before mentioned, it can scarcely be assumed without some purpose, for he goes on to say: "Furthermore, to the said Mussa-"mut Ranee, too, these very two daughters "named above, together with their children, "who, after their marriage, may be given in "blessing to them by God Almighty, are "and shall be heir and malik." There is, indeed, another translation of this document which has been referred to in another case,

* From the judgment of Couch, C.J., and Mitter, J. (Bayley, J., having dissented), in Regular Appeal No. 53 of 1870, decided on the 13th September 1870; see 14 W. R. 315.

but, inasmuch as this translation appears to have been agreed to by the parties, their Lordships think they must adopt it.

It has been contended that these latter expressions qualify the generality of the former expressions, and that the will, taken as a whole, must be construed as intimating the intention of the testator that Mussamut Ranee Dhun Kowur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindoo widow. In construing the will of a Hindoo, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindoos with respect to the devolution of property. It may be assumed that a Hindoo generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindoo knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate; whether succeeding her as heirs of herself, or succeeding her as heirs of the original testator, is immaterial. It would appear that the testator uses the word "heir" as signifying the person who is to take immediately in succession to another; that he applies it to the Ranee as the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the Ranee; and their Lordships think that, viewing the will as a whole, when he uses the expression "except "Mussamut Ranee Dhun Kowur aforesaid, "none other is nor shall be my heir and "malik," it may be fairly construed as meaning that she shall take a life-interest immediately succeeding him, without that interest being shared by her daughters or by any other person.

On the whole, therefore, although undoubtedly there is some difficulty in construing this testamentary document, their Lordships are of opinion that the Indian Courts have been right in construing it as not giving an estate of inheritance to the Ranee which she was able absolutely to alienate. If that be so, her daughters under this will take after her, and the question has been raised whether they take as joint tenants or tenants in common. The High Court appear to suppose that they would take as joint tenants, but, inasmuch as one of these daughters died before the testator, this question becomes immaterial, because in either case the plaintiff would be the heir, and would be entitled to institute this action.

It follows that the Ranee could not convey to the defendant, who must be taken to have been a *bond-fide* purchaser, having paid the full value (although he does not appear to have made any inquiries as to whether or not the Ranee did possess a power, unusual in Hindoo ladies, of making a conveyance of an estate in fee simple), an estate beyond her own life, and that the plaintiff is entitled to a decree to the effect that after her death the property belongs to him.

But then comes the question as to what terms this decree in his favour shall be subject to. The Courts below in India were of opinion that he should only be entitled to recover the property after the Ranee's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property for Rs. 14,000, which appears to have been an existing mortgage at the time of the conveyance in 1854. A further question, however, has been raised on the part of the appellants. The appellants say, that assuming this mortgage to have existed, and that there were some debts due at the time of the conveyance on the part of the testator, that then the widow would be enabled to convey an absolute estate. Their Lordships cannot subscribe to the proposition as so stated. They apprehend the law to be this: That Ranee Dhun Kowur, who may be considered as very much in the position of a Hindoo widow, might have sold the estate absolutely if it could have been shown (and the burden of showing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. In their Lordships' opinion there is no such proof whatever in this case. It appears that the testator

possessed an income of somewhere about a lakh of rupees, minus the Government revenue of Rs. 20,000, leaving him an income in round numbers of about 8,000*l.* per annum. He is shown, at the time of his death, to have owed a certain debt of Rs. 9,000, which was subsequently increased to Rs. 22,000, and was paid off in another way; therefore we have nothing to do with that. He is also shown to have owed a debt of Rs. 10,000 at the time of his death, that is, 1,000*l.* A man with an income of 8,000*l.* a year is shown, on his death, to have owed a sum of 1,000*l.*, and it is pretended that 16 years afterwards a necessity arises for selling a considerable portion of his real estate to pay this debt of 1,000*l*, plus some 400*l.*, which had been subsequently contracted by the Ranee. The mere statement of these facts appears altogether to dispose of the contention that this estate could have been sold for the necessary purpose of paying the testator's debts, and when we add that both Courts have found that the fact was not so, their Lordships think it unnecessary further to dwell upon this point.

The only question that remains, then, is whether the plaintiff is entitled to the decree of the High Court as it stands, or whether he is entitled to it without the burden of paying off the Rs. 14,000. On the whole, their Lordships are of opinion that the judgment of the High Court was right; that this mortgage of Rs. 14,000 subsisting upon the estate at the time of the sale, and having been paid by the purchaser, it is equitable that, when the plaintiff re-claims the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the plaintiff himself would have to meet.

For these reasons their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty that both appeals should be dismissed, and that there should be no costs. But, in order to render the intention of the Court more clear, their Lordships will recommend that the following words be added to the declaration: "And to be put in "possession of the said property after the "decease of Mussamut Ranee Dhun Kowur "on payment to the said defendant of the "sum of Rs. 14,000."

The appellant will have his costs of the application for leave to enter his cross-appeal paid out of the deposit; the remainder will be repaid to the appellant's agent.

The 3rd August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Government Revenue—Payment by one Sharer for another.

Case No. 2010 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 23rd June 1873, reversing a decision of the Moonsiff of Maldah, dated the 24th February 1873.

Syud Enayet Hossain *alias* Dhunnoo Meah (Plaintiff), *Appellant,*

versus

Muddun Mooree Shahoon (Defendant), *Respondent.*

Baboo Kalee Kishen Sen for Appellant.

Baboo Kalee Mohun Doss for Respondent.

Where a co-sharer of a talook is compelled to pay a quota of the Government revenue due on account of a share not his own, in order to save the whole estate from being sold, he is entitled to a charge upon such share of the estate.

Mitter, J.—The plaintiff in this case is the owner of a fractional share of a mehal No. 50 of the Collector's towjee. The remaining share, which formerly belonged to the defendant No. 2, is now the property of defendant No. 1. It appears that defendant No. 2 had hypothecated her share of the mehal in a bond executed in favour of the defendant No. 1, who obtained a decree upon it declaring his lien. In execution of this decree, the share in question was attached, and, while it was under attachment, the defendant No. 2 withheld the payment of her quota of the Government revenue. The plaintiff, being a co-sharer, was compelled to pay that amount to save the whole estate. Subsequently, the share was sold in execution of the decree of defendant No. 1, and purchased by the decree-holder. Under these circumstances, the plaintiff has brought this action to recover the amount paid by him from both the defendants Nos. 1 and 2, and for a declaration that it is a charge upon the share of the

mehal No. 50 now in the possession of defendant No. 1.

The Moonsiff held that the plaintiff acquired no lien upon the property by his advancing this money to pay off the Government revenue. But at the same time he was of opinion that the defendant No. 1 should not be wholly exonerated from the claim. Accordingly, he decreed the claim against the defendant No. 2, with this proviso that, in case it could not be recovered from the defendant No. 2, then the plaintiff would be at liberty to recover it from the defendant No. 1.

The defendant No. 1 appealed against that decree, and the District Judge has allowed his appeal. The plaintiff has preferred this special appeal against that judgment.

The principal contention in this special appeal has been that the Lower Appellate Court is in error of law in wholly absolving the defendant No. 1 from any liability. We agree with the District Judge that the defendant No. 1 should not be made personally liable in this case. Although, no doubt, the defendant No. 1 has been ultimately benefited by this payment, we do not think that that ground alone is sufficient to fix any personal liability upon the defendant No. 1. If that were so, all the under-tenants whose tenures might have been cancelled by the auction-sale would be equally liable. It appears to us that the defendant No. 1, though benefited, is not personally liable, because it was not his debt that has been paid off. At the time of the payment he simply occupied the position of an attaching creditor, in whose decree a lien has been declared. The arrear of the Government revenue of that period was therefore not his debt, but that of defendant No. 2, who was then the proprietor of the mehal. Although we are of opinion that defendant No. 1 is not personally liable, yet we do not think that it would be equitable to hold that the advance by the plaintiff should not be considered as a charge upon the share of the mehal No. 50 on account of which the revenue was due. If such payment be not considered as a charge upon the property saved from auction-sale, in many cases it would positively result in injustice. For example, where the mortgagor is really insolvent, and the mortgaged property passes absolutely into the ownership of the mortgagee before the person advancing the money is reimbursed his loss. On general principles of equity, therefore, we think we ought to hold that the plaintiff is entitled to a declaration that the money which he advanced is a charge upon the share of the mehal No. 50 now in the possession of the defendant No. 1.

In the case Nogendro Chunder Ghose *vs.* Sreemutty Dossee,* reported in p. 241 of Moore's Indian Appeals, Volume XI., there is a clear expression of opinion of the Judicial Committee in support of this view of the law. Although it is a mere expression of opinion, for the case was decided quite upon a different ground, yet it is entitled to great weight. In that case a mortgagee paid the Government revenue of an estate whilst it was in the possession of a Hindoo widow. At the time of this payment, Act I. of 1845 was in force, and the section 9 of that Act did not contain a provision to the effect (as the corresponding section of Act XI. of 1859 does) that the amount so paid should be added to the amount of the original mortgage. The mortgagee, after that payment, brought a suit against the widow, and obtained a personal decree against her. The widow having died, and the property devolved upon her husband's heirs, and the mortgagee attempting to execute the decree by the sale of the estate saved was successfully opposed by the heirs in possession. Whereupon a regular suit was brought for declaration that the money advanced should be declared a charge upon the property. In p. 258 of 11 Moore's Indian Appeals,† their Lordships of the Judicial Committee make the following observation: "Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person, who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook, as against all persons interested therein, for the amount of the money so paid." Although we do not find any distinct authority directly laying down this principle, yet the case of Manick Mollah Chowdhry *vs.* Parbutty Churn (S. D., 1859, p. 515) seems to lend great support to this view of the law.

The result is that the judgment of the Lower Appellate Court, wholly dismissing the suit against defendant No. 1, should be set aside, and, as against defendant

* 8 W. R. (P. C.) 17.
† *Idem*, p. 18.

d

No. 1, the plaintiff should have simply a declaration that the amount advanced by him is a charge upon the share of the mehal No. 50 which has passed to him by auction-sale. Under the circumstances of the case, we think that each party should bear his own costs in this Court and the Lower Appellate Court.

Markby, J.—I concur.

The 5th August 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Rent-free Tenancy—Incumbrance—Act VIII. (B.C.) of 1865, s. 16.

Case No. 2874 of 1873.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of Tipperah, dated the 12th September 1873, modifying a decision of the Moonsiff of Ameergaon, dated the 28th December 1871.

Mahomed Askur (one of the Defendants), *Appellant,*

versus

Mahomed Wasuck (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondent.

If the holder of an under-tenure allows his tenant to occupy the land rent-free for more than twelve years, the interest thus created in the latter is an incumbrance upon the under-tenure as much within the reason of Act VIII. (B.C.) of 1865, s. 16, as if the holder had made a rent-free grant, or given a nominal lease.

Couch, C.J.—It is said here that the suit is barred by the Law of Limitation, because the holder of the under-tenure before the plaintiff's purchase had not received rent from his tenant, and that rent has not been paid for more than twelve years before the suit was brought. If the effect of the holder of the under-tenure not receiving rent from his tenant is to create an interest in the defendant by which he would be entitled to continue in possession without payment of rent, that would be an incumbrance upon the under-tenure, and accruing from what may be called the act of the holder of it in not compelling the payment of his rent and in allowing the occupier to hold rent-free. And then it comes as much within the reason of section 16 of Act VIII. (B.C.) of 1865 as if the holder of the tenure had made a grant or a lease to his tenant, to hold without paying any rent or at a merely nominal rent. We think that in such a case as this the Law of Limitation does not apply against the purchaser of the under-tenure.

The appeal must be dismissed, but without costs, as no one has appeared for the respondent.

The 5th August 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Bond—Plea of Benamee.

Case No. 654 of 1874.

Special Appeal from a decision passed by the Judge of Jessore, dated the 29th December 1873, affirming a decision of the Subordinate Judge of that District, dated the 30th June 1873.

Bhoobunessur Roy Chowdhry (Defendant), *Appellant,*

versus

Juggessuree Chowdhrain (Plaintiff), *Respondent.*

Mr. C. Piffard and *Baboos Bungshee Dhur Sen* and *Ashootosh Dhur* for Appellant.

Baboos Doorga Mohun Doss and *Sreenath Doss* for Respondent.

Where a woman sues to recover money advanced on a bond executed in her name, it is open to the obligee to plead that the money was not lent by the woman,

but that the bond was merely an acknowledgment of indebtedness from him to her husband.

Jackson, J.—It is not our duty in this case to say what our conclusion might have been if the evidence had been before us on a first appeal. We have only to consider whether there is any material error of law in the decision of the Court below. The plaintiff Juggessuree Chowdhrain having sought to recover money upon a bond executed in her name by her father-in-law, the defendant answered that no money was lent by Juggessuree; that the bond was merely an acknowledgment of indebtedness from father to son, Juggessuree's husband; and that this and other transactions of a similar kind had been referred to arbitration, and settled by the arbitrators before the date of suit. The Subordinate Judge addressed himself to this defence, and he considered not merely that the defendant failed to prove it, but that the defendant's allegations were totally false, and he came to this conclusion both upon the evidence of the plaintiff and the defendant himself.

On appeal, the Judge very concisely, it is true, but still emphatically, declares his belief that the evidence proved the plaintiff having advanced the money to her father-in-law from her own funds. He goes on to say that, if it had been otherwise, under the circumstances of the case it would not be open to the defendant to raise the objection that he did, and he refers to 17 Weekly Reporter, p. 192. That is a case which came before Mr. Justice Macpherson and myself, and is distinguishable from the present. It was a case of mortgage in which A advanced money, and took the bond in the name of B. In a suit afterwards brought, the name of B was used. It was clear that A was the person who sought to enforce the mortgage, and we said that, as the defendant received the money from A, and chose to contract with B, it did not lie in his mouth to object to the suit being brought in the same form. That is quite a different case from the present, and we do not agree with the Judge in the view of law taken by him; but that error is immaterial, because the Judge has found, in concurrence with the first Court, that the defendant's plea is untrue, and that the money was advanced by Juggessuree herself from her own funds. Whether that decision is right upon the facts is a matter which we are not called upon to determine. We think under the circumstances this special appeal should be dismissed, but without costs.

The 5th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Act XI. of 1865—Act X. of 1859, s. 108—Sale-certificate.

Case No. 2664 of 1873.

Special Appeal from a decision passed by the Third Subordinate Judge of the 24-Pergunnahs, dated the 29th July 1873, affirming a decision of the Third Moonsiff of Diamond Harbour, dated the 10th August 1872.

Aukhil Chunder Mookerjee and another (Plaintiffs), *Appellants,*

versus

Chunder Coomar Mitter and another (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Bhowanee Churn Dutt and *Mohinee Mohun Roy* for Respondents.

Where a suit for rent, and the balances due under the decree, were on account of a 7-anna *rukkum* of a tenure, and the sale-certificate passed the right and interest of the defaulting under-tenant, it was held that Act X. of 1859, s. 108, was applicable to the case, and that such right and interest only, and not the whole tenure, became vested in the auction-purchaser.

The plaintiffs are the special appellants in this suit.

The suit was for possession of 2 beeghas 6 cottahs 6 chittacks of land in Mouzah Kussali. The plaintiffs alleged that they purchased the disputed land in execution of a decree for arrears of rent; that they obtained possession; that they had let the lands out to a tenant; that their tenant was ousted by the defendant; and that the defendant then brought a suit under section 15 of Act XIV. of 1859, and was successful. This suit was, therefore, brought for possession.

The defendant pleaded that he purchased the land in dispute in execution of a decree against Roop Chand Ghose, the holder of the tenure, and that the plaintiff's subsequent purchase ought not to prevail against his previous purchase.

Both Courts have dismissed the plaintiffs' suit. The Subordinate Judge, relying upon a ruling to be found in Volume X., Weekly Reporter, p. 484, was of opinion that a landlord has no authority to bring an under-tenure to sale after the right and interest of

ecover them simply upon the ground that ere has been a breach of contract on the art of the defendant. But these losses are of ch a nature as may be shown to have been e probable result of a fraudulent misre-resentation by the defendant of his aughter's age which induced the plaintiff enter into negotiations for marriage. This arge of fraud is distinctly made in the aint, but no issue seems to have been raised on it in the Courts below.

Under the circumstances of this case, the aintiff is entitled to have that issue tried, d if it be found in his favour he is entitled be reimbursed the reasonable expenses ich he incurred for making presents to bride's family, according to the social stom of the community to which both rties belong. How much of these expenses reasonable, and how far they are the bable result of the defendant's fraudulent presentation, are questions of fact which have to be determined by the Courts ow upon the evidence in the cause.

The 3rd August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

of Ownership—Waste Land—Presumption of Law.

Case No. 2938 of 1873.

ecial Appeal from a decision passed by the Officiating Judge of Tipperah, dated the 3rd September 1873, affirming a decision of the Moonsiff of Noornuggur, dated the 3rd July 1872.

le Gobind Goopto and another (Defendants), *Appellants,*

versus

too *alias* Kisto Chunder Chuckerbutty and others (Plaintiffs), *Respondents.*

aboos Bharut Chunder Dutt and *Juggut Chunder Banerjee* for Appellants.

Baboo Bhoobun Mohun Doss for Respondents.

Where the question as to possession was doubtful, a il Court was held to have committed no error of law in presuming ownership from the fact of enjoyment of the fruits of trees growing on the disputed land.

THIS suit was instituted by the plaintiffs, who claimed the disputed lands as belonging to two talooks Kashee Nath Chuckerbutty and Kristo Kant Deb, alleging that the defendants had dispossessed them. The defendants pleaded limitation, and alleged that the lands in dispute belonged to their ancestral talook Rajendro Goopto. The land in dispute is a portion of the banks of a tank, the tank being called Radha Kant Surmah. The plaintiff's dwelling-house lies immediately to the north of the tank; it appears that the tank is called after a member of plaintiffs' family. Three of the banks of the tank are admittedly in plaintiffs' possession, and with reference to the fourth bank now in dispute it appears that the defendants have already attempted to get possession of a portion of that bank in another suit, and were unsuccessful.

The Moonsiff went to the spot and came to the conclusion that the plaintiffs had been in possession and enjoyment of the disputed bank of the tank by enjoying the fruits of the trees growing on the bank of the tank, and he also found on the evidence that the plaintiffs had proved their ouster.

The Judge of Tipperah has confirmed that decision without giving any particular reasons for so doing beyond that he concurs in the finding of the Moonsiff, which he says is entitled to great weight as the Moonsiff visited the spot, and there were no grounds for interfering with his decision.

In special appeal it is contended that the Judge ought to have reversed the decision of the Moonsiff, as the question of possession has been tried on an erroneous presumption, and not upon the direct evidence in the case; and a decision in Volume XI., Weekly Reporter, p. 268, has been referred to. That decision rules that there may be such a possession of waste lands as to protect a suit from being barred by limitation, and where the question as to possession is doubtful, a presumption may arise in favour of the party who proves his right. No doubt, acts of ownership may be proved over waste lands as well as over any other lands, and in this case the Moonsiff has found it proved that the plaintiffs have enjoyed the fruits of the trees growing on the disputed bank of the tank. I can see no erroneous presumption of law in this finding, and the special appeal must be dismissed with costs.

shows what passed under the sale, namely, not the whole tenure, but a *rukkum* of 7 annas in the tenure. Therefore it is clear that section 108 of Act X. of 1859 is applicable to this case, and that only the right and interest of the judgment-debtor has been purchased by the plaintiff.

Taking this view of the case, I dismiss the special appeal with costs. Pleader's fees, one gold mohur.

The 6th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble G. G. Morris, *Judge*.

Probate—Jurisdiction.

Case No. 2111 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sylhet, dated the 17th July 1873, reversing a decision of the Subordinate Judge of that District, dated the 23rd September 1872.

Buldeb Surmah and another (Plaintiffs), *Appellants*,

versus

Taranath Surmah and others (Defendants), *Respondents*.

Baboo Kumla Kant Sen for Appellants.

Baboo Bama Churn Banerjee for Respondents.

A Subordinate Judge has no jurisdiction to try a suit brought to set aside a probate.

Couch, C.J.—We think the Judge was right in holding, as he did, that the Subordinate Judge had no jurisdiction to try the case on the cause of action alleged by the plaintiff.

The plaint begins by stating that it is a suit to be confirmed in possession after declaration of title to the property, moveable and immoveable, mentioned in the schedule, situated in the jurisdiction of the Moonsiff, upon reversal of the summary order of the Civil Court bearing date the 22nd of September 1871 granting probate. It then states the right which the plaintiff alleges he has, and that the defendant, with the intention of defrauding the plaintiff, set up a false will, and made an application for probate of it, which was first rejected, and afterwards a summary order was made for the granting of probate; and it concludes with these words:- "This, therefore, is injurious to us. The order for granting probate is the cause of action, which arose on the 22nd of September 1871."

It is clear, therefore, that the suit is brought to set aside the probate, and that the Subordinate Judge had not jurisdiction to try it.

The appeal must be dismissed with costs.

The 6th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble G. G. Morris, *Judge*.

Act VIII. (B.C.) of 1869, s. 14—Act X. of 1859, s. 13—Enhancement of Rent—Notice.

Case No. 2704 of 1873.

Special Appeal from a decision passed by the Officiating Second Subordinate Judge of Mymensingh, dated the 8th September 1873, reversing a decision of the Moonsiff of Sherepore, dated the 19th May 1873.

Kalee Kant Chowdhry (Plaintiff), *Appellant*,

versus

Bhoobunessuree Chowdhrain and others (Defendants), *Respondents*.

Baboo Chunder Madhub Ghose for Appellant.

Baboo Ashootosh Mookerjee for Respondents.

An under-tenant or ryot, with a right of occupancy, whose rent is not fixed, is not liable to enhancement unless there is a ground for it, and he is informed of the same by a notice, so as to have an opportunity of contesting the matter.

Couch, C.J.—The Subordinate Judge has found that the defendants were clearly proved to be intermediate talookdars. As such they were entitled, by section 14 of Act VIII. (B.C.) of 1869, and, if that is not applicable to this case, then by section 13 of Act X. of 1859, to a notice specifying the rent to which they were to be subject for the ensuing year and the ground on which the enhancement of rent was claimed.

The notice claims an enhanced rent, and specifies what the rent should be, but it does not state the ground upon which the enhancement was claimed. It only alleges that the land is capable of yielding a higher rent, and refers to another suit in which a

co-sharer had been successful in obtaining a higher rent. But that is not stating any ground upon which the enhancement is claimed. It does not give the defendants any intimation of why the plaintiff was to get a higher rent, or how it was that the land was capable of yielding it. It was intended by these provisions of the law that an under-tenant or ryot who had a right to continue to hold the land, but whose rent was not fixed, should not have the rent enhanced unless there was a ground for so doing, and he was informed of it by a notice so that he would have an opportunity of contesting the matter and of satisfying the Court when the enhanced rent was sued for that the ground for the enhancement did not exist.

In this case we think the notice was not such as the law requires, and that the Subordinate Judge was right in dismissing the suit. It is not necessary for us to decide what ground of enhancement there would be in such a case as the present, assuming that the intermediate talookdaree estate is one to which the Regulation of 1793 does not apply. The appeal will be dismissed with costs.

The 6th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Possession—Jote Tenancy—Onus Probandi.

Case No. 703 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 20th December 1873, affirming a decision of the Moonsiff of Goalundo, dated the 30th November 1872.

Juree Mohun Poddar and others (Plaintiffs), *Appellants,*

versus

Gureeboollah Mullick and others (Defendants), *Respondents.*

Baboo Doorga Mohun Doss for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondents.

In a suit to recover possession of certain land described as khas khamar, of which plaintiffs had been forcibly dispossessed, defendants claimed to hold the land by way of permanent jote for 40 years, and contended that plaintiffs had no right except to receive rents:

HELD that, as defendants admitted the ownership to be with the plaintiffs, and prayed to be allowed to hold possession under the jote-tenancy, the burden of proof lay with the defendants.

Jackson, J.—WE cannot approve of the decision of the Courts below in this case.

The plaintiffs alleged that the land was theirs, and they described it as their khas khamar. They stated that they let it to certain of the defendants while they were in possession, and that the principal defendants dispossessed them by forcibly cutting and carrying away the paddy crop. They therefore sued to recover possession from those defendants as trespassers. The principal defendants, Gureeboollah and others, did not deny that the land belonged to the plaintiffs, but they said that they held this land by way of permanent jote from the time of Gureeboollah's father, Harroo Mullick, for a period of 40 years at a rent of Rs. 6, and they claimed to be in possession of the land on payment of rent to the proprietors and their ijaradar. They said that the plaintiffs had no right except to receive rents of the land, and urged that the suit ought to be dismissed. Now this being a case in which the defendants admitted the ownership of the land to be with the plaintiffs, and prayed to be allowed to hold possession of it under the jote-tenancy, the burthen of proof clearly lay upon the defendants. The Subordinate Judge may, on this point, be referred to the several decisions of this Court to be found in 19 Weekly Reporter, p. 188; 20 Weekly Reporter, p. 374, and others. They show that in such cases the defendants must prove the plea that they set up. In addition to that we find the Subordinate Judge remarks that the defendants have made out their case by certain decisions of the Criminal Court and the Small Cause Court. It is difficult to understand how the decision of a Criminal Court could make out the defendant's case, and as to the judgment of the Small Cause Court we do not see how that could be brought in. That was a judgment in a suit for damages, which was dismissed. The judgment of the Court below must be reversed, and the case must go back to the Lower Appellate Court in order to determine whether the defendants have made out the particular title they set up. The costs will abide the result.

The 6th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Arbitrators — Misconduct — Act VIII. of 1859, s. 324.

Case No. 2627 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of the 24-Pergunnahs, dated the 29th August 1873, reversing a decision of the Moonsiff of Barasel, dated the 2nd December 1872.

Ram Guttee Mundul and others (Defendants), *Appellants,*

versus

Thakoor Doss Mundul (Plaintiff), *Respondent.*

Baboo Becharam Mookerjee for Appellants.

Baboo Bama Churn Banerjee for Respondent.

In a case referred to arbitration, where one of the arbitrators was never present during the course of the arbitration, and never took any interest in the matter, simply signing the award after completion, the Moonsiff found that there had been misconduct on the part of the said arbitrator, and set aside the award as illegal:

HELD that the Moonsiff was justified in so doing under Act VIII. of 1859, s. 324, and the ruling of the High Court at 8 W. R., p. 171.

THE defendants are the special appellants in this case. The suit was brought by the plaintiff for possession of a 4-anna share in a tank and for the price of a maund of fish, namely, Rs. 3. The case of the plaintiff was this—that in Assin 1278, the defendants caught four maunds of fish in this tank; that they gave the plaintiff his share of the fish in proportion to 1 anna 10 gundas, the purchased share of the plaintiff in this tank, but that they did not give the plaintiff his share in the fish in proportion to a 4-anna share in the tank, which 4-anna share the plaintiff says he inherited. The defendants admit that the plaintiff has purchased a 1-anna 10-gunda share in the tank; they allege that the ancestors of both the plaintiff and defendant originally held this tank and some homestead land in its immediate vicinity; that the ancestors of both parties, many years ago, deserted their homestead; that the superior landlord resumed the tank as well as the ancestral jummaee lands, and settled them with other parties; that the ancestors of both parties returned to their original homestead after some years; that Muddun and Shib Ram, the ancestors of the defendants, took the whole of the tank in jumma from the landlord, and also the homestead land; that the plaintiff's ancestor on his return took only a jumma of the homestead, and not of the tank; that subsequently the plaintiff purchased a 1-anna 10-gunda share of the tank from Muddun, one of the ancestors of the defendants; that the plaintiff is in possession of that 1-anna 10-gundas as admitted by him; and that the 4-anna share in suit is in possession of the defendants; and that the plaintiff is not entitled thereto, and has never been in possession thereof, within 12 years before suit.

Both parties agreed to refer their differences to arbitration. The arbitrators found for the defendants, and against the plaintiff. The arbitration-award was submitted, apparently, on the 19th of August 1872. Subsequently, or on the 21st of August, the plaintiff applied to the Moonsiff, who had ordered the arbitration to set aside the award on the ground of corruption and partiality on the part of the arbitrators. The Moonsiff held a proceeding and inquired into the matter, took the evidence of the plaintiff and defendants as well as of other parties, and came to the conclusion on the 4th of November 1872, or some time after the submission of the award, that there were not sufficient circumstances on the record to prove corruption; but that it appeared that one of the arbitrators, Jadub Chunder Dutt, was not present during the inquiry, took no part in the proceedings, and simply signed the award when presented to him; that, under such circumstances, the Moonsiff was of opinion that the award was illegal. He therefore set aside the award, and fixed a day for the trial of the suit. On trial, the Moonsiff dismissed the plaintiff's suit. He was of opinion that the defendants' evidence was more trustworthy than the evidence adduced by the plaintiff, and he ends his judgment by saying that he is inclined to think that the plaintiff has failed to make out his case, and, therefore, without entering into the other issue, namely, the issue as to the value of the fish, he dismissed the plaintiff's suit.

On appeal, the Subordinate Judge has reversed that decision, and has found for the plaintiff. He says, both parties have adduced oral evidence, and that the witnesses examined by the plaintiff prove that the ancestors of both parties were re-settled in the lands which they had relinquished; that the ancestors of the plaintiff, and the plaintiff himself after them, were in joint possession of the tank and other lands included therein; that he alludes to the improbability of the plaintiff's ancestor returning to the homestead, and not taking also a portion of the tank from the zemindar; and he also alludes to the fact that the defendants in their deposition have admitted that the plaintiff's ancestor has used the water of the tank since he re-settled in the homestead; and winds up his judgment by saying that the witnesses examined by the plaintiff clearly proved that the plaintiff had a 4-anna share in the tank in right of inheritance, and that he was all along in possession of the same, and is entitled to recover possession. As regards the quantity and value of the fish said to have been taken, the Subordinate Judge says, that there is no satisfactory evidence on that point, and that the plaintiff therefore is not entitled to recover the value of the fish as claimed.

In special appeal the grounds taken are, first, that the award of the arbitrators, which is in favour of the defendants, was not finally set aside by the Court of first instance; second, that, even assuming that the award was set aside, the order setting aside the award was altogether illegal, inasmuch as it does not appear that any application was made by the plaintiff for setting aside the said award; and further, that neither of the grounds upon which, according to law, such an award could be set aside have been made out by evidence. These were the grounds which have been taken in special appeal.

On the first point it is very clear from the order of the Moonsiff, which I have already quoted, dated the 4th of November 1872, that the award was formally set aside as illegal. Then with reference to the second point, an award under section 324 is not liable to be set aside except on the ground of corruption or misconduct of an arbitrator or of the umpire. In this case, the Subordinate Judge has found that one of the arbitrators was never present during the course of the arbitration, never took any interest in the matter, and that he contented himself with simply signing the award after its completion. Such neglect on the part of an arbitrator has been held by this Court to be misconduct within the meaning of section 324 (see the decision to be found in Volume VIII., Weekly Reporter, p. 171, by Justices Macpherson and Seton-Karr). The Moonsiff, finding that there had been misconduct on the part of one of the arbitrators, set aside the award as illegal, and I think he was justified in so doing under the provisions of secton 324 and the ruling already quoted. After the case was taken out of the hands of the arbitrators, inasmuch as their award was set aside as illegal, the Subordinate Judge has found on a pure question of fact that the plaintiff's ancestors were in possession of a 4-anna share of the tank on re-settlement with the zemindar, and that they, and after them the plaintiff, held possession of that 4-anna share until thed were ousted by the defendant in Assin 12y78.

The special appeal, therefore, must be dismissed with costs. Pleader's fees one gold mohur.

The 6th August 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Waste Land—Possession—Right.

Case No. 2301 of 1873.

Special Appeal from a decision passed by the Judge of Patna, dated the 13th August 1873, affirming a decision of the Moonsiff of Behar, dated the 15th February 1873.

Woodwant Mahtoon and another (Defendants), *Appellants,*

versus

Hunooman Pershad Singh (Plaintiff), *Respondent.*

Baboo Boodh Sen Singh for Appellants.

Baboo Chunder Madhub Ghose and *Moonshee Mahomed Yusuf* for Respondent.

Where land is waste, and there is no visible sign of occupation, the possession must be taken to go with the right, and the right is *primâ facie* in the zemindar of the estate to which the waste land belongs.

THE plaintiff in this case is the zemindar of Mouzah Hurgopalpore. The defendant has built a thatched house upon a portion of the land, which, he says, formed the ancestral abode of Rewa Lall. The plaintiff says that the house was built without his knowledge

or permission. The defendant claims the land by the gift of Rewa Lall, the former proprietor of the zemindaree, and alleges that this land upon which the house stands was occupied as part of his homestead by Rewa Lall before he himself built on it.

The finding of the first Court is very distinct. It says: "The facts of the disputed "lands lying puteet (or waste)—of Rewa "Lall's having no concern with the land "except his own dwelling-house—and of the "defendants having erected the disputed "house some two or three days before "the end of Bysack, notwithstanding "remonstrances on the part of plaintiff, the "proprietor in possession of the land, are "perfectly made out by the evidence of four "witnesses examined by the plaintiff."

It appears that when this case went up before the Lower Appellate Court on appeal, there was another suit in which Rewa Lall himself was concerned before the Court, and that the two cases were heard at the same time. Rewa Lall being in Court was examined by the Judge. As far as I am informed at present, there is no other record of that examination except what is to be found in the judgment; and it does not appear that Rewa Lall was examined upon oath, or that the present appellant had an opportunity of cross-examining him in the Court of the Judge, although he had called and examined him as a witness in the first Court. It seems to me that whatever effect Rewa Lall's statements before the Judge may have upon his own case, with which I am not at present concerned, they ought not to be used against the present appellant. But there remains the fact that there is a very clear finding in favour of the plaintiff by the first Court. And the Lower Appellate Court has affirmed the decision of the first Court, and has stated as follows: "Much less has the present appellant, defendant, proved Rewa's right to the land in dispute, which is not even comprised in these two beeghas," that is, two beeghas claimed by Rewa Lall.

It was contended that it was for the plaintiff to show a right to enter upon this land. No doubt it would have been so if the case of the defendant had been believed. But it seems to me, on the finding of the first Court, whose decision has been affirmed by the Lower Appellate Court, that the plaintiff had done all that was necessary to start his case by showing that the land had been lying waste. He being the zemindar of the estate, it may fairly be presumed that the waste land of the estate is occupied by him, if I may use the expression; where land is waste, and there is no visible sign of occupation, the possession must be taken to go with the right, and the right undoubtedly is *primâ facie* in the zemindar. Thus it was for the defendant to prove that there had been a right in Rewa Lall which had never ceased. According to the findings of both the Courts, the defendant has altogether failed to do this.

The order for the removal of the house is, I think, perfectly correct. If a person chooses to build upon land to which he has no title, he must take the consequence. In some cases circumstances have been established under which the Courts have held that the owner of the land was not entitled to insist on the removal of a building erected on his land. But in this case it has been found that there was active opposition by the plaintiff, notwithstanding which the defendant went on with his building.

Under these circumstances, the appeal must be dismissed with costs.

The 6th August 1874.

Present:

The Hon'ble W. Ainslie. *Judge.*

Arbitrators—Appeal—Jurisdiction.

Case No. 1747 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 9th July 1873, reversing a decision of the Moonsiff of that District, dated the 10th May 1872.

Ram Yad Singh and others (Plaintiffs), *Appellants,*

versus

Nirunjun Kooer and another (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellants.

Baboo Mohendro Lall Mitter for Respondents.

A District Judge is not barred from taking cognizance of an appeal from the finding of a first Court on the question of misconduct by arbitrators.

THERE seems to be no provision whatever in the Civil Procedure Code by which the Judge is barred from taking cognizance of the propriety of a finding of the first Court on the question of misconduct by arbitrators. On the contrary, section 363

clearly shows that, when the decree has been appealed against, an order setting aside an order of arbitrators, which must necessarily be an order affecting the merits of the case, is open to appeal. The Judge has declined to believe the witnesses who came forward to prove misconduct by the arbitrators; therefore the award stands.

The appeal is dismissed with costs.

The 7th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. F. McDonell, *Judge*.

Joint Estate—Under-tenure—Sale for Arrears of Rent.

Case No. 65 of 1874.

Special Appeal from a decision passed by the Officiating Second Subordinate Judge of Mymensingh, dated the 4th September 1873, reversing a decision of the Moonsiff of Jamalpore, dated the 13th December 1871.

Gobind Chunder Roy Chowdhry (Plaintiff), *Appellant*,

versus

Ram Chunder Chowdhry (Defendant), *Respondent*.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Appellant.

Baboos Rash Beharee Ghose and *Kashee Kant Sen* for Respondent.

If a decree is given in favour of a sharer in a joint undivided estate for his share of the rent of an under-tenure situate in such estate, he is not allowed by law to put up for sale a portion of the under-tenure.

Couch, C.J.—The plaintiff's case, as now stated, is that there being a talook called Ram Kant Ghose, which belongs to a zemindaree in which both the plaintiff and the defendant had shares, the former brought a suit for his share of the rent of the talook, and having obtained a decree, and caused to be put up for sale so much of the talook as bore the jumma of 18 rupees 9 annas 9 gundas 1 cowrie and 8 krants, he bought it himself, and now claims to be entitled to hold it free of rent. And the defendant having obtained a decree against him for rent, he brings this suit in order to have it declared that he is not liable to pay it.

In the plaint he did not put the case exactly in this way. The case he made there did not indicate that he claimed to have purchased only a share of the talook. He spoke of having purchased the talook, alleging, no doubt, that it bore a jumma of 18 rupees 9 annas 9 gundas 1 cowrie and 8 krants. It may be said that he left what he asserted that he had bought ambiguous.

Now the question seems to be this: Has the plaintiff a right by law, assuming that he obtained a decree for a part of the rent due in respect of the talook, to put up for sale and to buy a portion of it?

The law does not seem to authorize that. Section 105 certainly means that, where there is an arrear of rent due in respect of an under-tenure, the under-tenure is to be sold, and not a part of it. There does not seem to be any power to divide it, and to affect the rights of other persons who have a share of the rent. If a person chooses to buy part of an under-tenure, he must take his position as being jointly liable for the rent with the other under-tenants. Section 108 shows that it is the under-tenure which is to be sold, and not a part of it; for it says that, if a decree is given in favour of a sharer in a joint undivided estate, dependent talook, or other similar tenure, for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate, talook, or tenure, application for the sale of such under-tenure shall not be received, unless execution shall have first been taken out against any moveable property which the judgment-debtor may possess, and the sale of such property shall have proved insufficient to satisfy the judgment. This shows that though the under-tenure is liable to be sold, the person who gets a decree for his share of the rent is not allowed to sell the under-tenure, which might affect the right of the other co-sharers, but must, in the first instance, endeavour to satisfy his judgment out of the moveable property of the judgment-debtor.

There is no doubt, we think, that the plaintiff has sought to do what the law does not allow. Granting that his plaint is ambiguously framed and admits of the case being put forward which is now put forward, we think that the decree which has been made dismissing the suit is right, and that this appeal must be dismissed with costs.

The 7th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble G. G. Morris, *Judge.*

Stamp—Attachment—Court Fees Act, Sch. II., art. 17—Act VIII. of 1859, s. 246.

Case No. 2565 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sylhet, dated the 2nd August 1873, affirming a decision of the Subordinate Judge of that District, dated the 2nd December 1872.

Muftee Jelalooddeen Mahomed (one of the Plaintiffs), *Appellant,*

versus

Shaharoollah (one of the Defendants), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Sreenath Doss for Respondent.

A suit brought according to the provision at the end of Act VIII. of 1859, s. 246, to establish the right of the person bringing it, must bear a stamp according to the value of the property.

Couch, C.J.—In this case the plaintiff having obtained a decree had attached a property in execution of it as being that of the defendant against whom the decree had been obtained. A claim was preferred under section 246 of Act VIII. of 1859 by Shaharoollah, which was successful, and an order was made releasing the property from attachment. The plaintiff has brought this suit, describing it as a suit to set aside the summary order, *viz.*, the order releasing the property from attachment, and the plaint bears a stamp for Rs. 10 only.

The Subordinate Judge, who heard the case in the first instance, appears to have doubted whether in a suit with this stamp he ought to decide the question of title, namely, whether the claimant, who had been successful in getting the property released from attachment, or the judgment-debtor, was entitled to it. He, however, decided the question, and dismissed the suit.

Upon an appeal, the Judge did not go into the question of title, but held that the suit being brought on a stamp of only Rs. 10, it was not one in which a question of title could be determined, and said that the plaintiff was bound to bring a regular suit with a stamp according to the value of the property. The question raised in the special appeal is whether he is right in this—whether a suit brought according to the provision at the end of section 246 to establish the right of the person bringing it must not have a stamp according to the value of the property, and is not a suit within No. 17 of the 2nd Schedule of the Court Fees Act. We think that it does not come within that Schedule, and that it cannot have a stamp of Rs. 10 only. It is not a suit merely to set aside the order. It is often described as such, but, in reality, it is a suit to try the title, to establish the right of the person who brings the suit, or the right of the judgment-debtor as against the claimant who has been successful.

We were told by the appellant's pleader that such suits were frequently brought with a stamp of Rs. 10, and were asked to inquire of the Deputy Registrar whether it is so or not. On the other hand, we were told by the pleader for the respondent that such suits were always brought with a stamp according to the value of the property. It does not appear from the inquiry which we made that a suit of this description has ever been successfully brought on a stamp of Rs. 10 only. And the Deputy Registrar has furnished us with an instance of a Regular Appeal No. 238 of 1872, which was heard not long ago by myself and Mr. Justice Jackson and my lamented brother Mr. Justice Mitter, in which the suit being exactly like the present and being described as a suit to set aside the summary order, the stamp was according to the value of the property. It was objected by the defendant in the first Court that it ought to have been brought on a stamp of Rs. 10 only, the defendant having an interest in reducing the valuation. The objection was overruled, and no question was raised as to the correctness of that ruling in the appeal before us.

We think the decision of the Judge is right, and that this appeal must be dismissed with costs.

The 7th August 1874.

Present:

The Hon'ble W. Ainslie and G. G. Morris, *Judges.*

Summons—Onus Probandi—Act VIII. of 1859, s. 119.

Case No. 135 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 13th February 1874, affirming an order of the Subordinate Judge of that District, dated the 23rd August 1873.

Mussamut Jhutoo Kooer (Petitioner), *Appellant,*

versus

Lulita Kooer (Opposite Party), *Respondent.*

Baboo Romesh Chunder Bose for Appellant.

Baboo Kalee Prosunno Dutt for Respondent.

Where a party alleges that no summons has been served upon him, it is for him, under Act VIII. of 1859, s. 119, to prove his allegation. If he starts a *primâ-facie* case by his oath, the opposite party must rebut this by evidence taken in the presence of the first party and subject to cross-examination by him.

Ainslie, J.—We think we must reverse the judgment of both the Courts below, and remand the case to the first Court in order that the appellant may have an opportunity of adducing evidence in support of her allegation. She alleges that no summons was served upon her. And under section 119, the burden of proof of this is upon her. On the presentation of her petition, the Court made an order to the effect that before it would pass an order in the matter she must submit to be examined herself, and pay in the costs of issuing a commission for her examination. She complied with this order, and she was examined, and she made a certain statement upon oath which, among other matters, contains a distinct denial of the service of summons upon herself. On the receipt of the return to the commission the only order apparently made was that it should be put up with the record. The appellant, considering the nature of the previous order, might very fairly suppose that some order would be made instructing her as to what further steps the Court would require her to take. Instead of that nothing whatever was done, and some two months afterwards the petition was dismissed by the order now before us. Of course, she had it in her power to present one or more petitions in the interval, but we do not think that, looking at the terms of the order on her petition, she was in any way bound to do so. The Court seems, by requiring a preliminary examination, to have undertaken, on her compliance with this preliminary order, to make some further order for her information and guidance on receipt of her deposition. Both the Courts have said that service of summons is proved. Now it is admitted that nothing has been done to prove it since the appellant came into Court under section 119. So that this proof of the service of summons can only be that which was on the record at some earlier date. The very object of the petition under section 119 was to show that the evidence so on the record could not be used against the petitioner on the ground that it was taken behind her back, and she has at least started a *primâ-facie* case by her oath. It seems to us that the object of an application under section 119, which is to get rid of the evidence taken in the absence of the petitioner, must be defeated, if that evidence alleged to have been taken behind her back is without further inquiry assumed to be, or to be equally, binding with evidence taken in her presence. Under section 119, it is for the petitioner, in the first instance, to prove by evidence that summons was not served; this being done, the opposite party must rebut that evidence by evidence taken in the presence of the petitioner and subject to cross-examination by him, that the summons has been duly served. The Court has to arrive at a conclusion from the evidence so given on either side. The evidence taken in the absence of the petitioner ought not to be treated as material on which the order may be based.

Costs will abide the event.

The 11th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Damages—Mesne Profits—Act VIII. of 1859, s. 7.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Jessore, dated the 28th May 1874.

Saem Sirdar and others, *Plaintiffs,*

versus

Kamaluddy Sirdar and others, *Defendants.*

Plaintiffs, having been dispossessed of a tank and of land on its banks, recovered possession by a suit under Act XIV. of 1859, s. 15. Defendants then instituted a civil suit for determination of title, in which plaintiffs were successful. Plaintiffs, on 22nd Chyet 1277, instituted a suit for the recovery of the value of fishes taken by defendants on the 27th Bysack 1276, the day of dispossession; but the suit was compromised. Plaintiffs now claim mesne-profits with reference to fishes and grass appropriated by the defendants from 1st Bysack 1277 to 7th Bhadro 1278:

HELD that the present claim for the period preceding 22nd Chyet 1277 (the date of the former suit) was barred by Act VIII. of 1859, s. 7; that the previous suit, as well as the present, were really suits for damages; and that the previous suit and compromise ought to have included all claims of the plaintiffs arising out of the dispossession.

Case.—I HAVE the honor to submit the following case for the decision of the Honorable Court, under section 22, Act XI. of 1865, at the request of the pleaders for the plaintiffs.

It is a suit for mesne-profits. The plaintiffs had been dispossessed of a tank on 27th Bysack 1276. They had also, on the 10th Assar of the same year, been dispossessed of 6 beeghas of land on the banks of the tank. By a suit under section 15, Act XIV. of 1859, they recovered possession of the whole of the above premises. The defendants then instituted a regular civil suit for the determination of their title, in which again the plaintiffs were successful. The mesne-profits claimed refer to the fishes of the tank and the grass on the adjacent lands, appropriated by the defendants from 1st Bysack 1277 to 7th Bhadro 1278. The plaintiffs added that they have not claimed mesne-profits for any portion of the preceding period; their right to recover which has been barred by limitation.

The defendants, among other things, took the objection that the plaintiffs' claim for wassilat up to 22nd Choitro 1277 is barred by section 7, Act VIII. of 1859. They point out, and the plaintiffs do not deny, that the latter had, on 22nd Choitro 1277, corresponding with 4th April 1871, instituted a similar suit for the recovery of the value of fishes taken by them (the defendants) on the 27th Bysack 1276 already alluded to, and that that suit was compromised for Rs. 100. It is then urged on the part of the defendants that in that suit should have been included all the mesne-profits that had accrued due to the plaintiffs up to the date of its institution, and that the portion that was not included therein was in fact abandoned, and that no fresh suit will lie for the same.

The plaintiffs in reply contended: *1st,* That their former suit was not a suit for mesne-profits in the sense in which that word is ordinarily used. That suit was for the fishes looted by the defendants on the first day of dispossession, and it could not embrace the profits which the defendants continued to make thereafter. *2ndly,* That mesne-profits accruing in any particular year can only be sued for from the commencement of the succeeding year, and that consequently their cause of action for the mesne-profits of 1277 had not arisen when their last suit was instituted. They referred me to 10 Weekly Reporter 486, as their authority. *3rdly,* That even if their second contention were held to be of no effect, and if it were assumed that they had a right to sue for

mesne-profits for such part of 1277 as had already expired when they instituted their last suit, still they were not bound to include them in that suit, inasmuch as a fresh cause of action accrued each time the profits were received by the defendants, and as a plaintiff is not bound to sue on all his existing causes of action at once.

In my opinion, however, the plea taken by the defendants appeared to be perfectly valid. The contention of the plaintiffs that their former suit was not a suit for mesne-profits is simply a play upon words. What the defendants took on the first day they assumed wrongful possession was as much the profits of the tank as what they continued to take thereafter until the restoration of the plaintiffs by decree of Court. The taking of fishes on the first day was indeed accompanied by actual force, which, however, was not longer necessary when the plaintiffs gave up all attempts at resistance. But still what the defendants carried away after that day was equally taken by force. The distinction attempted to be drawn between the receipts of the first day and those of the subsequent period is, therefore, perfectly imaginary, and not based on any actual difference. In fact, there is no distinction between the loot of the first day and the receipts of the subsequent period. Hence the last suit of the plaintiffs was as much a suit for mesne-profits as the present.

The second part of the plaintiffs' contention is also without force. The decision they referred to was passed when Act XIV. of 1859 was in operation, which made no specific provision for cases like the present. The present Act IX. of 1871 specifically prescribes that the period of limitation in such cases is to be reckoned from the time the profits are received by the wrong-doer. Supposing, however, that the ruling quoted is still applicable to suits for mesne-profits, it can clearly apply only to cases in which such profits cannot, from their nature, be possibly ascertained until a particular year expires. In the present case, it was not at all impossible to ascertain what quantity of fishes or grass had been misappropriated by the defendants up to a given date. The ruling does not hence, in my opinion, apply to the present case.

The last contention of the plaintiffs' pleader is equally untenable. As regards mesne-profits, the real cause of action is one and the same, *viz.*, the original fact of dispossession. The law does, indeed, allow the day the profits are received by the defendants to be taken as the starting point of the period of limitation prescribed in such cases; still it is not the fact that mere reception of profits unconnected with original dispossession constitutes the real cause of action. In fact, the reception of profits by the defendants is simply a continuation of the original wrong; and the whole taken together forms one entire cause of action, which must, under section 7, Act VIII. of 1859, form the basis of one single civil suit, and not of several. I was, therefore, of opinion that the plaintiffs were bound to include in the former suit all the profits that had been received by the defendants up to the date of its institution.

Holding this opinion, I have disallowed the plaintiffs' claim for the period from 1st Bysack to 22nd Choitro 1277, and given them a decree for mesne-profits from the latter date to 7th Bhadro 1278. Not satisfied with this finding, the pleaders for plaintiffs have requested me to submit the three following points for the decision of the High Court:—

1. Whether the last suit of the plaintiffs was or was not a suit for mesne-profits?

2. Whether their cause of action with regard to the mesne-profits of the period from 1st Bysack to 22nd Choitro 1277 had or had not arisen when they instituted that suit?

3. If their cause of action with regard to such mesne-profits had then arisen, whether they were not bound to include them in that suit; and whether, not having done so, their present claim to recover the same is not barred by section 7, Act VIII. of 1859?

The judgment of the High Court was delivered as follows by—

Jackson, J.—We are of opinion that the Judge of the Small Cause Court rightly held that the present claim of the plaintiffs for the period preceding 22nd Cheyt 1277 was barred by section 7; that the previous suit as well as the present were really suits for damages; and that the previous suit and compromise ought to have included all claims of the plaintiffs arising out of the dispossession from the tank. We are also of opinion that the proceedings taken by the plaintiffs in the suit—first, to recover possession; secondly, for determination of their title; and, thirdly and fourthly, for mesne-profits or damages—were highly vexatious and oppressive.

The 11th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Suit for Enhancement of Rent—Misrepresentation of Boundaries.

Case No. 709 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 17th February 1874, reversing a decision of the Moonsiff of that District, dated the 30th September 1872.

Tarinee Churn Sannyal and others (Plaintiffs), *Appellants,*

versus

Mohima Chunder Shah and another (Defendants), *Respondents.*

Baboos Sreenath Doss and *Tarinee Kant Bhuttacharjee* for Appellants.

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Respondents.

If a plaintiff brings a suit to enhance the rent of tenants, and altogether misrepresents the area and boundaries of the holding, the misrepresentation vitiates the plaint, and renders the whole suit liable to dismissal.

Jackson, J.—We should not, we think, have called upon the vakeel for the respondents if we had not been led to suppose that there was evidence in the shape of decrees binding on the respondents that the land which is spoken of as included in their holding had been since taken out of their possession. But it appears that the decrees by which the plaintiffs recovered rent were not decrees by which the defendants are concluded. The question, therefore, as to the exclusion of the land from the defendants' holding is purely a question of fact upon which the Lower Appellate Court was authorized to come, as it did come, to its own independent conclusion. On that point, therefore, there lies no special appeal. As to whether that exclusion is a ground for dismissing the suit, we have no doubt that, if a plaintiff brings a suit to enhance the rent of tenants, and altogether misrepresents the area and the boundaries of the holding, excluding land which is in the tenants' possession, and, on the other hand, specifying land which is not shown to be occupied by defendants, it vitiates the plaint and renders the whole suit liable to dismissal. It has been contended that plaintiffs, on failure of the grounds of enhancement, were entitled to a decree for rent at the old rate. We think they are not entitled to any such decree in a suit of this nature, and that this suit for enhancement of rent was, on failure of the grounds of enhancement, properly dismissed. A suit merely to recover rent at the old admitted rate would be met and answered in quite a different way.

The special appeal is dismissed with costs.

The 11th August 1874

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Settlement of Issues—Objection.

Case No. 273 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 23rd May 1873.

Soorendro Pershad Dobey (Plaintiff), *Appellant,*

versus

Jugobundhoo Pandey and others (Defendants), *Respondents.*

Baboo Aubinash Chunder Banerjee for Appellant.

Baboo Mohesh Chunder Chowdhry and Moonshee Mahomed Yusuf for Respondents.

It is competent to a Judge to determine a case on the day when the issues are settled, if he is satisfied that the evidence then before him is decisive of the matter in dispute, unless one of the parties makes a distinct objection to the Judge proceeding to a decision, and asks for an opportunity to produce evidence in support of his case.

Phear, J.—On the day fixed for the purpose of settling the issues in this case, the first of the issues framed was: "Whether the Law of Limitation bars this suit or not?" And by the nature of the case, the determination of this issue depended entirely upon the age of the plaintiff. The Subordinate Judge at once took up the trial and decision of the preliminary issues, and held upon the evidence before him that the suit was barred by lapse of time. His words are: "I find the first issue "in bar in the affirmative, for, on a perusal "of an attested copy of plaintiff's petition, "dated 15th March 1872, and of a testi-"mony of Mussâmut Purgna Dobain,

"mother of plaintiff, dated 1st April 1872, "taken in a prior case, and exhibited by "defendants, I observe that both plaintiff and "his mother have clearly admitted the "plaintiff's date of birth to be the 3rd "Assin 1258 F. (24th September 1850). "Consequently, under sections 31, 72, 92, "and 115, such confession operates as an "estoppel against plaintiff as to his date of "birth, and he cannot be allowed in this suit "to deny the truth of that date."

And then the Subordinate Judge goes on to show that, if this be the date of the plaintiff's birth, then the suit is beyond doubt barred.

On appeal against this judgment, the only substantial ground presented to us is the third, namely: "That the learned Subor-"dinate Judge was wrong in taking up the "case for final disposal on the day fixed for "laying down the issues without giving "your petitioner time to produce evidence in "support of his case."

Now it does not appear from the record that the petitioner did, when the lower Court addressed itself to the consideration of the preliminary issues, ask the Subordinate Judge to postpone his decision in order that he, the plaintiff, might produce his evidence in support of his side of the case. Unless he did so, it was certainly competent to the Judge to determine the case on the day when the issues were settled, if he was satisfied that the evidence then before him was decisive of the matter in dispute between the parties. And undoubtedly the petition of the plaintiff, adduced by the defendants, dated 15th March 1872, in which he solemnly asserted before a Court of Justice that he was born on the 3rd Assin 1258, was entirely decisive of the plaintiff's right to sue, unless that assertion could be satisfactorily explained away in some manner. The validity of the objection now made by the plaintiff, that the case ought not to have been determined when the Subordinate Judge did hear and determine it, must depend upon whether he asked to have an opportunity to produce evidence in support of his case such as would account for and falsify his own previous statement as to the date of his birth. The learned pleader who has appeared on behalf of the plaintiff says that, even in the absence from the record of any request for postponement, we must infer that the plaintiff did not expect the case to be determined on the day which was fixed for the settlement of issues, and could not therefore be expected to be ready at that date with his evidence. Still we think that he ought to have made a distinct objection to the Judge proceeding to a decision if he was in fact prepared, on time being given to him, to produce evidence which could satisfactorily explain and do away with the effect of his own petition of March 1872. This was in its nature so very strong against him that we should have expected him at once to inform the Judge in what way he proposed to meet it. This certainly, so far as we can learn, he did not do, and he is not prepared even now on appeal before us to say whether or not he has evidence; still less, does he say what evidence he has which could adequately countervail this petition. The Subordinate Judge mentions not only the petition of the plaintiff dated 15th March 1872, but also the deposition of the plaintiff's mother, dated 1st April 1872, which was given in support of that petition. If then the plaintiff proposes to satisfy the Court that the statement in his petition as to the date of his birth was made in error, he can hardly do so without calling his mother as a witness. The deposition which the mother gave on that occasion is not primary evidence in the present case, but it serves to show that, if this lady were called in the present case as a witness, and gave her testimony in support of the plaintiff's present statement, she would necessarily thereby make a statement on oath entirely conflicting with the statement which she made on oath in April 1872, and so would subject herself to the risk of being criminally charged with the offence of perjury. Indeed, the circumstances of the case are such that we should consider the Court before which testimony of this kind should be given would not be doing its duty if it did not take measures for causing a witness to be tried for perjury who gave conflicting testimony on two occasions in this way. This being the state of the case as regards the situation of the present plaintiff, it was, we think, in the highest degree incumbent upon him to show to the Court what was the character of the evidence which he proposed to bring upon the issue of limitation. At any rate, it is incumbent upon him now, when he asks this Court to remand the case for re-trial, to explain what that evidence would be. We have already said that he could not, so far as can be seen, possibly succeed in the present suit without calling his mother as a witness, and by so doing subject her to the imminent risk of being prosecuted for perjury. What else he proposes to do if a

remand-order is made, he has left us entirely in the dark. He gives us no ground for thinking that he could make any real case.

Then, when we look back to the plaint in order to see what are the substantial merits of the suit in the form which the plaintiff himself has given it, we find he has stated his cause of action in the most shadowy manner. He has not, in the plaint even, ventured to state expressly the date upon which he was born. It is true, he says, that he came of age in the month of Srabun 1276 Fuslee; but even here he abstains from mentioning the date of the month. And it is a matter of inference and calculation, depending upon the period of majority which may be taken, to get from the month of Srabun 1276 back to the date at which the plaintiff intends by implication to say that he was born.

And this date is important, not only in its bearing on the question of limitation, but also with regard to the merits of the suit; for it is of the essence of the case put forward by the plaintiff that the alienation which he seeks to set aside should have been made by his father after the date of his, the plaintiff's, birth. And this is left, as has just been mentioned, entirely a matter of inference and calculation. Also the allegations as to the circumstances under which the alienation of the property was made, that is, the allegations intended to show that the alienation was not of a character such as could be valid against the plaintiff, are most uncertain, and may almost be said to be insufficient to constitute a cause of action. At any rate, they are not enough to constitute a case in which the plaintiff is entitled to recover the property from his father's vendees unconditionally, *i.e.*, without obligation to repay the purchase-money or some portion of it; and this he certainly does not offer to do. When we compare the plaint, as it thus appear, with the action which the plaintiff has elsewhere taken, namely, the making for his own purposes a false statement (as he now in effect says it was) of his age, and supporting that statement by a false deposition on the part of his mother, we can hardly arrive at any other conclusion than this that his whole suit is, if not of an entirely dishonest character, yet of a most speculative and uncertain complexion. It is not a case in which we ought to go in any degree out of our way to help a pauper to vex and harass the defendant, who has, by the plaintiff's own account, been in quiet possession of this property as a *bonâ fide* purchaser from plaintiff's father for a period of upwards of 21 years.

On the whole, although we do not affirm the judgment of the lower Court upon the ground by which the Subordinate Judge has supported it, that is, we do not say that the statement made by the plaintiff in his petition of 15th March 1872 is an estoppel, preventing him in the present suit from proving the real date of his birth, still, for the reasons and considerations which have been given above, we do not think it right to disturb the decision of the case which the lower Court has passed. We therefore dismiss the appeal with costs.

The 11th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Rent—Kubooleut—Monthly Kists.

Case No. 2555 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 5th July 1873, affirming a decision of the Second Moonsiff of Diamond Harbour, dated the 19th of June 1872.

Pearee Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Brojo Mohun Bose and others (Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

No one for Respondents.

In a suit for rent, where the kubooleut stipulated that payment should be made in monthly kists, the ryot was held to be bound by its terms, notwithstanding that the landlord had not strictly enforced them previously.

THE plaintiff is the special appellant in this case. He sued his tenant for rent. The tenancy is not disputed, and the kubooleut which was given to the Collector when the estate was khas mehal, stipulates that the rent is to be paid in monthly kists. The Judge was of opinion on the whole that it was not the established usage of the mehal that rent was to be paid by monthly kists and therefore that the plaintiff cannot seek to enforce the conditions of the kubooleut. In short, the Judge thinks that the kubooleut

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has been a dead-letter ever since its execution, so far as the monthly instalments were concerned.

In special appeal it is contended that as the kubooleut stipulates that the rent is to be paid in monthly instalments, the ryot is bound by its terms; that the fact of the landlord, the plaintiff, not having strictly enforced the terms of the kubooleut before, cannot prevent him from doing so now; and that the Courts below were wrong in holding otherwise. It is sufficient to refer to a case to be found in Volume XXI., Weekly Reporter, p. 36, which, I observe, is an appeal from the Judge of the same district as this appeal is. I entirely concur in that judgment, and I do not wish to add anything beyond my concurrence.

The appeal must be decreed, and the decision of the Judge reversed. The plaintiff is entitled to a decree according to the terms of the kubooleut, with costs of all the Courts including the costs of this appeal. Pleaders' fees, one gold mohur.

The 11th August 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Enhancement of Rent—Notice—Act VIII.(B.C.) of 1869, s. 18.

Case No. 1108 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 1st March 1873, modifying a decision of the Moonsiff of Mudhepoora, dated the 27th April 1872.

Hoorul Munder (Defendant), *Appellant,*

versus

Hurruck Dutt Khowas and another (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Kalee Mohun Doss for Respondents.

In notices of enhancement of rent, it is absolutely necessary that in the statement of grounds there should be some words to show that it is the intention of the landlord to proceed under some particular clause or clauses of s. 18, Act VIII. (B.C.) of 1869. It is not sufficient to leave this to be inferred from a Schedule appended to the notice.

THE two questions which have to be dealt with in this special appeal are, *first*, that the notice served by the plaintiff under section 14 of Act VIII. of 1869 is insufficient; and, *secondly*, that the finding of the Judge is insufficient, inasmuch as he has not considered the question whether the rate of rent awarded by him is the prevailing rate in the neighbourhood. The finding of the Judge is simply in these words: "He (that is, the plaintiff) also produced evidence to show that other ryots had accepted the new rates." These words show that the rates in the locality were not fixed; and therefore it was more than ever incumbent upon the Judge to state in his finding that the evidence was sufficient to show that the new rates had been accepted to such an extent as to make them the prevailing rates in the locality. However, this is practically immaterial, as it appears to me that the first ground must prevail.

The body of the notice sets out the grounds of enhancement. They are distinctly grounds under the first clause of section 18. The notice refers for detailed results to a Schedule appended to it; but in the body of the notice there is no indication whatever of any other ground on which the claim is based except that stated above. If it is necessary (and certainly it would be necessary in order to support the decree on the finding of the Court below) to make use of the third ground of enhancement, it can only be found in the notice by inferring it from the Schedule. No doubt, it may be inferred from the Schedule, and it has been argued for the respondent that it was so distinctly stated in the Schedule that it must be taken to have been set out as one of the grounds on which enhancement is claimed. But it seems to me that this is by far too obscure a mode of giving notice to a tenant. I do not insist upon great strictness in following the letter of section 18 in notices of enhancement issued by zemindars, but it appears to me absolutely necessary that in the statement of grounds there should be some words to show that it is the intention of the landlord to proceed under a particular clause or clauses. There must be something in the statement of grounds on which enhancement is sought to bring the notice within the meaning, though not necessarily within the words, of the Act. But here the plaintiff states distinctly the one ground on which he is about to enhance, making no reference to the 3rd clause of section 18, and then, as it were, smuggles this last clause into the Schedule; that is, as I said before, too obscure a way of giving notice. It is quite clear, on looking at the judgment of the Court below, that even if the first ground had been pro-

perly found, no decree could have been made for enhancement without a finding in plaintiff's favour on the third ground; and as the right to enhance on this ground is not supported by a clear statement of it in the notice, there is, in fact, no right to enhance at all.

Therefore it appears to me that the judgment of the Lower Appellate Court must be set aside, and that of the first Court restored. The special appellant will obtain his costs here and in the Lower Appellate Court.

The 13th August 1874.

Present:

The Hon'ble F. A. Glover and E. G. Birch, *Judges.*

Mortgage—Security—Co-sureties—Contribution.

Case No. 1714 of 1872.

Special Appeal from a decision passsd by the Judge of East Burdwan, dated the 1st August 1872, affirming a decision of the Moonsiff of Panigur, dated the 29th February 1872.

Jeetram Dutt (Defendant), *Appellant,*

versus

Doorga Doss Chatterjee (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Respondent.

D having obtained a decree against his debtors, J, P, and others, took out execution and attached certain property which had been pledged by them as security. He then brought part of it to sale exempting the share of P (which he purchased without notice to the other tenants), and realized his dues—J paying the amount in order to save the property from sale. J then sued P for contribution, and obtained a decree making her (P's) share liable, which he attached and put up for sale. D objected under Act VIII. of 1859, s. 246, but his objection was disallowed, and he paid up P's contribution. He now sues to recover the amount so paid:

HELD that D's claim was unjust, for, when he was paid up by J, he was bound to give up his lien on P's share which became vested in J. Accordingly in buying that share he took it burdened with his own lien, and when J paid off the entire liability, he succeeded to the right of contribution from P by buying it from her share. If, therefore, D wished to retain that share, he was bound to make good P's defalcation.

Glover, J.—THIS was a suit to recover Rs. 566-10-9 paid by the plaintiff Doorga Doss to save certain property taken in execution, and which he claimed as his own, from sale.

The circumstances are as follow: Doorga Doss lent money to Jeetram, Purush Monee, and others on the security of certain landed property, a putnee talook named Bandra, and not being repaid, sued and got a decree against his debtors. He took out execution and attached the property on which he had a lien, and, on the 4th March 1868 (Phalgoon 1274), brought part of it to sale, exempting from that sale by special petition the share of his debtor Purush Monee. In the month of Bysack (June) following he took further proceedings against his judgment-debtors (still by petition exempting Purush Monee), and recovered the balance of his decree, Jeetram paying the amount in order to save the attached property from sale.

In the meantime, however, and without giving Jeetram or the other tenants any notice, Doorga Doss bought Purush Monee's share of the mortgaged property. The purchase was in the name of one Dinonath Burral, by whom it is said to have been transferred to Doorga Doss; but it was, I may say, admitted before us that for all purposes of this suit, Doorga Doss and Dinonath were one person. The sale to Dinonath was on the 8th Chyet 1274. Jeetram having paid off the decree sought to make Purush Monee pay her share of the debt, and sued her for contribution. He got a decree on February 3rd, 1870, by which her share of the property was made liable for the money due, and in execution he attached and put up for sale that share. Thereupon Doorga Doss came in with a claim under section 246 of the Code of Civil Procedure, which was disallowed on the ground that his purchase from Purush Monee was collusive, and in order to save the property from sale under Jeetram's decree, Doorga Doss was obliged to pay the amount of Purush Monee's contribution, Rs. 566-10-9, and it is to recover this money that he now sues.

I may mention that he had already succeeded in getting the order directing the sale set aside.

The Moonsiff gave plaintiff a decree, in which decision the Judge concurred, holding that there was no proof of fraud on the part of Doorga Doss in the matter of his purchase of Purush Monee's share, and that he was justified in recovering the amount of his decree from any one of his debtors at

Jeetram's decree, the Judge considered a forced and not a voluntary one.

The defendant Jeetram appeals. It appears to me that the Judge has taken too narrow a view of this case, and has in fact omitted from his consideration the equitable side of the defendant Jeetram's case. Doorga Doss got his claim in full, and Jeetram, albeit only liable for a portion, paid the whole. Jeetram had therefore the right of contribution against all and every one of his co-sureties, and was entitled in respect of the security given for the original debt to stand in the same position as the creditor* whose claim on that security he had satisfied. And Doorga Doss, when he was paid off by Jeetram, was bound to give Jeetram the benefit of the security which he held at the time of the debts being contracted. In other words, he was bound to give up the lien he had on Purush Monee's share of the property, which lien then became vested in Jeetram. When, therefore, Doorga Doss bought Purush Monee's share, he took it burdened with his own lien upon it. And when Jeetram paid off the entire liability, he succeeded to the right of contribution from Purush Monee by levying it upon her share of the property which had passed with that lien upon it into the hands of Doorga Doss. It appears to me, therefore, that, if Doorga Doss wished to retain the share he had purchased, he was bound to make good Purush Monee's defalcation, and that he has no right to re-claim that payment in this suit.

* 1 Story's Equity Jurisp., s. 502; Addison's Law of Contracts 576-577.

The creditor could not vary the position of the surety with reference to the security given, and Jeetram had an undoubted and very strong interest in all the shares of the mortgaged property remaining security for the debt. I do not think that there is any question of Doorga Doss's fraud to be considered in this case. Supposing his purchase to have been perfectly honest, he was bound in equity to take the share of Purush Monee, subject, when his claim was satisfied, to the lien of the other co-sureties.

For these reasons I think that the decision of the Lower Appellate Court should be set aside, and the plaintiff's case dismissed, with costs in all Courts.

Birch, J.—I concur with my learned colleague in thinking that this suit should be dismissed. It was impressed upon us in the course of the argument that the plaintiff in the suit, Doorga Doss Chatterjee, was a He was perfectly well aware what he was about, and must have known the risk he ran in purchasing the share of Purush Monee, one of his debtors, after he had caused the whole property pledged to be attached. By releasing Purush Monee's share from attachment and sale, the creditor could not divest it of the lien imposed upon it, and by this wrongful act the co-debtor, Jeetram, having been compelled to pay more than was due from him, became entitled to the same equity as if the act had not been done. That is, he was entitled to proceed against Purush Monee's share, and recover what he had been compelled to pay on account thereof. He succeeded in his suit, and recovered the sum claimed from Doorga Doss. The present suit to recover the sum so paid is manifestly unjust.

The 13th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Putnee Talooks—Act VIII. (B. C.) of 1869, s. 46.

Case No. 892 of 1874.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 12th February 1874, reversing a decision of the Subordinate Judge of that District, dated the 14th August 1873.

Thakoor Doss Gossain (Defendant), *Appellant,*

versus

Pearee Mohun Mookerjee (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Appellant.

Baboos Mohinee Mohun Roy and *Chunder Nath Bose* for Respondent.

Act VIII. (B. C.) of 1869 applies to putnee talookdars; the term "under-tenant" being wide enough to include them.

Jackson, J.—This suit was brought by Pearee Mohun Mookerjee, guardian of the minor sons of Hur Mohun Mookerjee, in his capacity of putneedar under the defendant Thakoor Doss Gossain, zemindar of a certain share of Lot Hashnal in the district of Hooghly. The allegation was that the plaintiff had by his agent made on the 16th Cheyt

to the zemindar a tender of Rs. 533-5, being the rent payable on account of the putnee at the close of the year 1279; that the defendant having refused to accept the money, it was deposited under section 46 of the Bengal Act VIII. of 1869 in the Moonsiff's Court of Hooghly on the day following, *viz.*, the 17th Cheyt; that the defendant, notwithstanding, took proceedings in the commencement of Bysack under Regulation VIII. of 1819, and applied for the sale of the putnee talook on the 3rd Jeyt following; that the plaintiff represented the facts to the Collector, who thereupon put it to the defendant's mookhtear whether or not he insisted on the sale, and the mookhtear insisting the plaintiff thereupon in order to stop the sale, and indeed as the only means of stopping it under section 14, Regulation VIII. of 1819, paid in the full amount, Rs. 561-9-6, due to the zemindar, with costs. He thereupon sued to recover from the defendant the said sum of Rs. 533-5 deposited in the Moonsiff's Court, and Rs. 14-14 interest thereon, and Rs. 1,066-10 being double the amount deposited as compensation, making a total of Rs. 1,614-13.

The defendant answered, in addition to some pleas as to jurisdiction, that he had not refused the tender; that he had received no notice of the deposit made in the Moonsiff's Court; that the plaintiff had made a voluntary payment; that the interest claimed by him was justly payable; that the defendant had not drawn out the deposit from the Moonsiff's Court; and on these various grounds he contended that the suit ought to be dismissed.

The suit was tried by the Subordinate Judge of Hooghly, Baboo Doorga Pershad Ghose, and he, upon grounds which are not very clear, but apparently on the ground that the defendant had received no notice of the payment into the Moonsiff's Court, and that consequently the money deposited by the plaintiff could not be considered a payment, dismissed the suit. He also held that the amount Rs. 533 was not a legal tender, as he considered that the plaintiff failed to prove that no interest was demandable. The case went on appeal before the District Judge of Hooghly, Mr. Prinsep, and he found that interest was not claimable, inasmuch as the interest was not liable to pay his instalments as stated by the defendant. He found that the tender of Rs. 533 had been made and refused; that the deposit had been made under section 46; and that notice of the deposit was conveyed to the defendant before the date of the putnee sale. Having found these facts, the Judge proceeded to consider whether, in such circumstances, the plaintiff was entitled to claim any damages as for an exaction within the meaning of section 11, Act VIII. of 1869. He stated that the inclination of his opinion was to hold that it was an exaction, but that whether or not he considered that the plaintiff was justly entitled to claim damages from the defendant: he held that the defendant "not only insisted "on a second payment of the principal, but "he insisted on payment of interest that was "not justly due, and costs to which plaintiff "had not rendered himself liable." He then says: "He" (plaintiff) "is certainly entitled "to refund of the sum paid under Regula-"tion VIII. of 1819 with interest, and I "think that such sum would be sufficient; "provided that it does not exceed the limit "under section 11 which I think is a fair limit "whether the damages be considered as due "or an exaction under the Rent Law or as "ordinary damages enforcible under the "ordinary law of the country." It may be remarked that the sum which the Judge holds to be recoverable by plaintiff is Rs. 561, the amount paid to the Collector to stay the proceedings under Regulation VIII. of 1819, whereas the amount claimed was Rs. 533, being the deposit made in the Moonsiff's Court; but that is not material, because the plaintiff added to this latter sum Rs. 14-14 as interest, which would nearly bring up the amount to the larger sum, and also claimed Rs. 1,066 as compensation which certainly included a larger sum than the Judge has given him.

The questions raised before us in special appeal which have been argued very fully and ably on both sides were whether the Court below was right in holding that interest was not due; whether section 46 of the Rent Law applied to putnee talooks; whether section 11 applied; and whether a legal tender had been made. These we think were all the questions.

Now, as to section 11, we are, we think, spared the necessity of deciding that point, because the Judge, although he intimates what his opinion was, does not in fact decide the case under that section. Then, as to the question of interest, it appears to us that that is entirely an issue of fact dependent upon the fact, whether or not the plaintiff was liable to pay according to the instalments mentioned. The Judge has found as a fact that he was not liable, and therefore we must hold that the amount which he

found was tendered to the defendant on the 16th Cheyt was a full and valid tender of the amount payable.

The other question raised is one which has been argued at considerable length, *viz.*, whether section 46 applies to putnee talookdars. We might perhaps have refused to allow this question to be argued, because it does not appear to have been raised in the Court below, nor was it taken in the grounds of special appeal, but it certainly was noticed in the decision of the Judge. Therefore, we have allowed the matter to be argued, as no objection was taken at the time by the special appellant, and as it has an important bearing on the case, because if we should hold that section 46 has no application to the case of putnee talookdars, we should then have to say that the payment in the Moonsiff's Court of Rs. 533 was a voluntary payment, and the plaintiff would not be entitled to recover the amount, because he might have kept it in hand and paid it to the Collector, and then the question between the parties would be reduced to a very simple one of interest; and if, on the other hand, the section is applicable, and the putneedar was entitled to take action under that section, the money having been paid to the credit of the zemindar would not be available to plaintiff, at least without an order of the Court, and then it would be necessary for plaintiff to bring a suit. We therefore, as said, allowed the point to be argued, and it appears to us that section 46 does apply. It is not disputed that suits for arrears of rent of putnee talooks are in fact daily brought in Civil Courts, it being considered that zemindars are entitled either to take summary proceedings under Regulation VIII. of 1819, or bring suits under Act VIII. (B.C.) of 1869. If then, suits can be brought under Act VIII. of 1869, it is manifest that sections 48 and 49 will apply, because those sections provide that the defendant in any suit instituted under that Act may, if he has duly tendered the same to the plaintiff before the institution of the suit, pay into Court such sum of money as he may consider to be due to the plaintiff without paying in any costs incurred by plaintiff up to the time of such payment; or if no tender has been made before the suit is brought, may pay into Court such sum of money as he shall consider to be due to plaintiff together with the costs incurred by plaintiff up to the time of such payment. If these sections apply, it appears to us there is no reason why section 46 should not apply, the only difference between section 46 and the other two sections being that an under-tenant is entitled to do without a suit being brought against him, that which, by the other two sections, the defendant is entitled to do after the suit is brought. There has been some discussion as to whether the word under-tenant applies to a putneedar. I confess the term "under-tenant" has on innumerable occasions caused me great difficulty. It is a vague indefinite expression, but yet in my opinion wide enough to include a talookdar. Section 46, therefore, applying, we think the plaintiff was not only justified, but in some sense bound, having tendered his rent, to deposit it in the Moonsiff's Court in order to make himself secure in case of any question afterwards arising. He paid this money into the Moonsiff's Court, and by the proceedings taken by the zemindar he was afterwards compelled to lodge Rs. 561 in the Collectorate, and could not recover back either of these sums without the consent or intervention of the zemindar. We think, therefore, that the suit was properly brought, and the decision of the Lower Appellate Court awarding plaintiff Rs. 561 with interest must be affirmed, and this special appeal dismissed with costs.

The 13th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Stamp—Plaint—Jurisdiction—Court Fees Act, ss. 10 & 12.

Case No. 877 of 1874.

Special Appeal from a decision passed by the Officiating Third Subordinate Judge of 24-Pergunnahs, dated the 29th December 1873, reversing a decision of the Third Moonsiff of Baraset, dated the 25th January 1873.

Kala Chand Sen (Plaintiff), *Appellant,*

versus

Anund Kristo Bose and others (some of the Defendants), *Respondents.*

Baboo Gopeenath Mookerjee, for Appellant.

No one for Respondents.

Where no question of valuation for the purpose of determining the amount of institution fee payable on a

suit has been raised either in the Court of first instance or in the grounds of appeal, the Appellate Court is not competent to raise such question.

Jackson, J.—THE plaintiff brought this suit for confirmation of possession in about two beeghas of land, together with dwelling-house and trees, "by setting aside a collusive and fraudulent auction-sale" valuing his claim at Rs. 84-10. This valuation was arrived at by stating the proceeds of the land to be Rs. 3-6, 15 times of which was Rs. 50-10, and the value of the bamboos was Rs. 34, total Rs. 84-10. the amount of the claim, and the plaint was engrossed on a stamp of Rs. 6-6, corresponding to that valuation. The suit went to trial, and upon the merits the Moonsiff gave judgment for the plaintiff and ordered that "the suit be decreed, the plaintiff be maintained in possession of the "2 beeghas 5 cottahs of land as per boundaries given in the plaint, by reversal of "the auction-sale; that the defendants do pay "the plaintiff's costs with interest at 5 per "cent. per annum, and bear their own costs, "&c." The defendant appealed. He appears to have followed precisely in the steps of the plaintiff by presenting his petition of appeal on a similar stamp of Rs. 6-6. The Subordinate Judge, Baboo Munnoo Lall Chatterjee, who tried the appeal, says: "In "rising to argue this appeal, Baboo Oopendro "Chunder Deb, appellant's pleader, urged "that the plaint has been written on insuffi-"cient stamp, and the Court in appeal would "first dispose of his objection. The respond-"ent's pleader, Baboo Bipro Doss Banerjee, "also urged that if the plaint has been "drawn up on insufficient stamp, the memo-"randum of appeal has also been written on "inadequate stamp. The Court finds that "the prayer in the plaint is for a declaratory "decree without a consequential relief, and "that therefore the plaint and memorandum "of appeal should have been, under para. 17 "of Schedule II. of the Court Fees Act, "engrossed on a stamp of Rs. 10. But this "has not been done under clause 2, sec-"tion 12 of the Court Fees Act. It is "therefore ordered that the respondents do "put in the stamp for Rs. 3-10, being the "difference between that on which the plaint "has been engrossed and the requisite stamp "on which he should have written it, to "make it a valid document; that the appel-"lant also do pay in the stamp of the same "value, and both these parties will put in "within five days, after which the case will be "proceeded to judgment."

The Subordinate Judge refers to the 2nd clause of section 12 of the Court Fees Act which provides: "Whenever any such suit "comes before a Court of appeal, reference or "revision, if such Court considers that the "said question has been wrongly decided, to "the detriment of the revenue, it shall "require the party by whom such fee has been "paid to pay so much additional fee as "would have been payable had the question "been rightly decided, and the provisions of "section 10, para. II. shall apply." That is a proviso upon the 1st clause of the same section which declares: "Every question "relating to valuation for the purpose of "determining the amount of any fee charge-"able under this chapter on a plaint or "memorandum of appeal shall be decided "by the Court in which such plaint or "memorandum as the case may be is filed, "and such decision shall be final as between "the parties to the suit." The object of that proviso was no doubt to enable the Appellate Court to interfere for the protection of revenue in a case where a question of that sort might be raised and improperly decided. In the present case, even if it be assumed that the stamp originally paid was, which it really was not, insufficient, there was no question raised in the Court of first instance. It seems to us, therefore, that the Subordinate Judge ought not to have allowed to be raised on this occasion a question which neither had been raised in the first Court where, if necessary, the amount of additional stamp might have been at once paid, nor in the grounds of appeal. Indeed, the appellant had in a manner shut his own mouth by engrossing his memorandum of appeal on the very stamp objected to by him. Then the Subordinate Judge takes the extraordinary course of requiring both the appellant and the respondent to put in the deficit stamp duty, and on the failure of both to do so he ordered both the defendant's appeal and the plaintiff's suit to be dismissed. Now, if the appeal were dismissed, the decree of the lower Court would apparently stand, and if the decree of the first Court were set aside, the appeal could not be said to be dismissed. This judgment appears to have been pronounced with very little consideration, and we think it must be set aside. The case will go back to the Lower Appellate Court in order that the appeal may be considered on its merits.

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The 13th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mesne-profits—Execution-proceedings—Court's Duty.

Case No. 2223 of 1873.

Special Appeal from a decision passed by the Judge of Patna, dated the 19th June 1873, affirming a decision of the Moonsiff of Behar, dated the 15th May 1872.

Duljeet Gorain and another (Defendants), *Appellants,*

versus

Rewul Gorain and another (Plaintiffs), *Respondents.*

Mr. M. M. Ghose and *Baboo Sreenath Dass* for Appellants.

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusuf* for Respondents.

D obtained a decree for an undivided share of certain property; but the defendants having apportioned the entire property amongst themselves, and held each his own portion exclusively, D seized in execution a part of the share of one of them, P. Upon appeal the possession was ordered to be given up. P then sued to recover mesne-profits for the period of D's possession:

HELD that the damages in question ought to have been sought in the execution-proceedings when the possession itself was recovered, and not by the institution of a new suit; a Court being bound not only to place an aggrieved party back in the original position from which its erroneous action had displaced him, but also to give him compensation for such loss as he had thereby sustained.

Phear, J.—ON this appeal coming on to be heard, it was objected by the respondent that the special appeal was barred by the operation of section 27, Act XXIII. of 1861, on the ground that the suit was a suit for damages only, and, therefore, was of a nature cognizable by a Court of Small Causes. With a view to determine this question, we have had the plaint translated. And certainly it is difficult, on the language of the plaint alone, to satisfy ourselves as to what precisely is the cause of action upon which the plaintiff sues. And the view taken by the Lower Appellate Court of the object of the suit was such as to render it a very different suit from a suit merely to recover damages. But however this may be, we have been told by the learned pleader, who appeared on behalf of the respondents, some of the material facts upon which the plaintiff relied for the purpose of maintaining his suit; and these seem to be as follows: Before this suit was brought, the present defendant had obtained a decree against the present plaintiff and other persons, which entitled him to a 2-annas undivided share of an entire 16 annas of certain property. Before he took steps to execute this decree, probably before the suit itself was brought, the defendants in that suit had apportioned all the 16 annas of the property amongst themselves, and held each their own portion exclusively. Under this state of things, the present defendant, who was entitled only to a 2 annas undivided share of the entire 16 annas, by way of obtaining satisfaction of his decree, seized, in execution of it, a portion of the present plaintiff's exclusive share amounting probably in value to about 2 annas of the whole 16 annas. This obviously he was not justified in doing under his decree. He was not entitled to take exclusive possession of a 2 annas portion or of any portion of the 16 annas. He was only entitled to a 2-annas undivided share of the whole 16 annas; and upon appeal in due course of the execution-proceedings against this action of the present defendant, the possession which he had obtained was ordered to be given up. And according to the statement made in the present plaint that order seems to have been complied with: that is, the present defendant did go out of possession of that 2 annas portion of the property which he had wrongly taken exclusive possession of. This suit, it is said, is brought by the present plaintiff to recover mesne-profits for the loss which he sustained by being deprived of the proceeds of this 2-annas share while the present defendant held possession of it.

Now it appears to us quite plain, upon the authority of cases which have been decided by this Court, that damages of this kind, under the circumstances relied upon by the present plaintiff, ought to have been sought in the execution-proceedings of the first suit at the time when the possession itself was asked for and recovered, and not by the institution of a new suit such as the present suit. In the course of those execution-proceedings, the Court corrected the error which it had at first committed by putting the present defendant into the exclusive possession of a portion of the entire property. It could and ought (if the present plaintiff had the right he now claims) to have gone further, and to

have not only caused the present defendant to give up the wrongful possession which he had obtained, but also to make compensation for the loss of profits which the present plaintiff had sustained by the dispossession.

One of the cases referred to is reported in 20 Weekly Reporter, p. 239. In that case the plaintiff, who had obtained a decree in the Courts of this country for possession of a certain property, obtained possession of that property in the course of execution-proceedings. But on appeal to the Privy Council, the Privy Council declared that as regards a portion of the property, the plaintiff ought not to have obtained a decree for possession; and upon this decision of the Privy Council being passed, it became necessary for the Courts of this country to replace the defendant in possession of that portion of the property of which he had been wrongfully deprived in the course and by reason of the execution of the erroneous decree originally made by them, and also to give him compensation for the loss which he had sustained by being kept out of possession. The Judges in the latter part of the judgment said: "We think that that precedent and that "opinion" (namely, a certain precedent and opinion which had been referred to in the argument) "are in accordance with the rule "which Courts of justice are bound, when "necessary, to act upon of restoring parties, "so far as they can be restored, to the same "position as they were in at the time when "the Court by its erroneous action in the "course of suit displaced them from it."

We take the same view now: It is immaterial whether the erroneous action of the Court was due to carrying into effect a wrong decree, or whether it was due to execution-proceedings wrongly conceived for the purpose of carrying out a right decree. In either case the Court, upon the error being ascertained, is bound, so far as it can, to place the aggrieved party back in his original position, and to take means not merely to restore to him the property of which he had been wrongly deprived, but also to give him compensation for such loss as he had thereby sustained. It is competent to the Court in the course of the execution-proceedings to afford the aggrieved person this remedy in full. When a complaint on a ground of this kind, namely, that erroneous process of execution has been issued and enforced, is made during the progress of execution-proceedings or in the course of proceedings after decree, it is, in fact, a question regarding the execution of the decree which falls within section 11, Act XXIII. of 1861. It is therefore not only a matter which can be decided by the Court in the course of the execution-proceedings, but which must be so decided by that Court, and cannot be entertained in the form of a regular suit

It seems to us then that the present suit, if it is founded upon the basis which the learned pleader for the respondent described to us, is misconceived and ought not to have been brought. It is therefore open to us in the exercise of the power which we have under section 15 of the Charter, to set aside the whole of the proceedings which have been had in it.

On the other hand, we might (regard being had to the expense which has been incurred and the time which has been consumed in this litigation) perhaps fairly enough treat the present plaint as if it had been merely an application made in the execution-proceedings of the original suit. And in that case we could deal with the present appeal as an appeal coming to us in due course. But if we take that alternative and look at the merits of the case, it seems to us that the plaintiff has certainly, on the facts put forward by him, no right to damages. While no doubt the present defendant was wrong in taking exclusive possession of any portion of the 16 annas of the property, so also, on the other hand, the plaintiff himself and the other sharers of the property were entirely wrong in taking exclusive possession of their respective portions as against the present defendant. He is by his decree entitled to an undivided share of the whole property, and they are bound to give effect to that decree. It is their duty to obey that decree. They cannot be heard when they ask for damages for having been disturbed in that exclusive possession of part of the property which, under the very terms of the decree, they have no right to maintain as against the present defendant. It appears then that the wrong action taken by the present appellant has been set right, and also that at the same time the request for damages was not made in due course of the execution-proceedings as it ought to have been. And we think, on the facts disclosed in this case, that if the request had been so made the present plaintiff would have had no right to damages. Therefore in either way upon our view of the case, the decree of the lower Court must be set aside.

Accordingly, we reverse the decision of the Lower Appellate Court, and dismiss the plaintiff's suit with costs in all the Courts.

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The 13th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Suit by Lessees for Partition—Act VIII. of 1859, s. 73.

Case No. 867 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 15th January 1874, reversing a decision of the Sudder Moonsiff of that District, dated the 25th June 1873.

Gour Churn Soor (Defendant), *Appellant,*

versus

Jugobundhoo Sen and others (Plaintiffs), *Respondents.*

Baboos Doorga Mohun Doss and *Bykunt Nath Paul* for Appellant.

Baboos Kalee Mohun Doss, Mohinee Mohun Roy, and *Lall Mohun Doss* for Respondents.

A party holding a meeras or perpetual lease of some debuttur lakhiraj property to the extent of 12 annas under co-sharers who covenanted in the pottah that he should be entitled to claim partition, sued the owner of the other 4 annas for a partition, making his lessors co-defendants:

HELD that they might properly have been made co-plaintiffs, and that the Court of first instance should, under Act VIII. of 1859, s. 73, make them such.

Jackson, J.—THE question raised in this special appeal is, whether the plaintiff, holding a meeras or perpetual lease under a 12-anna co-sharer of some debuttur lakhiraj property, is entitled to sue the owner of the other 4 annas for a partition. The plaint set out that he had been compelled to bring this suit on account of the vexatious conduct of defendant No. 1. After the commencement of the suit, one Ram Lukhee intervened, claiming a 2-anna share of this property, and upon that the Moonsiff, who appears to have been otherwise favourable to the plaintiff, determined that the suit could not proceed until it was ascertained whether Ram Lukhee or one of the plaintiff's lessors Madhub Soor was entitled to the 2-anna share as to which the claim was set out. On appeal, the Subordinate Judge considered that this was no bar to the hearing of the suit, and ordered that the case should go back to the Moonsiff for a fresh decision after finding on the issues stated. The defendant now contends in special appeal that the suit will not lie. There is no case cited before us which is precisely in point, and we are inclined to think that difficulty might in some cases arise as to the right of the lessee of one owner to claim a partition with the other owners; but that difficulty appears to be removed in the present case, because the plaintiff's lessors in their meeras pottah have expressly covenanted that he shall be entitled to claim partition. The lessors are co-defendants in the present case, and we understand they have not raised any objection to the suit. But it appears to us that they might properly have been made co-plaintiffs, and the Court having power under section 73 to transfer a party on the record from his position of defendant to that of plaintiff, we think that should now be done. When the lessors are made co-plaintiffs, there can be no objection to the suit being tried. We think, therefore, that the order of the Subordinate Judge ought not to be disturbed; that the lessor-defendants should be made co-plaintiffs, and the suit should proceed. The costs of this appeal will abide the final decision. If the Court should come to the conclusion that the plaintiff had ground for seeking this partition, there seems no ground why he should not obtain the costs of this appeal as well as of the proceedings generally.

The 14th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Right to partition.

Case No. 172 of 1874.

Special Appeal from a decision passed by the Deputy Commissioner of Goalparah, dated the 11th November 1873, reversing a decision of the Extra Assistant Commissioner of that District, dated the 17th July 1873.

Mitta Kanth Audhikaree (Plaintiff), *Appellant,*

versus

Nirunjun Audhikaree and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Gopal Lall Mitter for Respondents.

It is not necessary that there should be evidence of disputes and quarrels, or of any pecuniary loss or gain, between the joint owners of a property, before a Court can interfere to make a partition; nor is the circumstance that it is a right to perform the worship of an

idol, one which deprives a joint owner of the right to partition.

Couch, C.J.—WE think that the reasons for which it has here been held that one of several joint owners of a property is entitled to a partition, apply to this case. The circumstance that it is a right to perform the worship of the idol, is not one which deprived any of the joint owners of the right to a partition, and compels the Court to say that they shall be obliged to perform the service jointly, and to undergo the many inconveniences which might arise from such a state of things. In this very case we have an instance of division having already taken place, and the worship being now performed by three sets of persons by turns.

The Deputy Commissioner appears to us to have misunderstood the nature of the plaintiff's claim. He seems to have thought that there must be an arrangement binding upon the parties that there should be this division. In another part of his judgment he seems to have thought that there must be proof of disputes and quarrels between them before the Court could interfere to make a partition. It is not necessary that there should be evidence of disputes and quarrels, or of any pecuniary loss or gain, as he seems to have thought in another passage of his judgment, where he says: "In reality the decision in "suit involves no pecuniary loss or gain, since "each sharer would reap the profits arising "from the payment made by their disciples "in turn." The suit is founded upon the right of the plaintiff, as one of several owners of this, which may be described as property, to a partition. No doubt, the plaintiff is entitled to that; and the decree of the first Court was right in awarding it. But that decree has not made provision for the term which each of the three persons, the plaintiff and the two defendants, should have; and does not state whether the plaintiff is to have his turn first, or second, or third. We must therefore direct the Extra Assistant Commissioner to determine by lot in what order the plaintiff and the two defendants shall exercise the right to worship the idol; and having determined that he should insert it in his decree, so that it will be settled in what order they are to exercise the right of worship.

The decree of the Deputy Commissioner will be reversed, and the case will be returned to the Extra Assistant Commissioner for the purpose of completing the decree in that way. The appellant will have his costs.

The 14th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Suit to set aside a Deed or Will—Stamp—Court Fees Act, Sch. II., art. 17, Cl. 3.

Case No. 204 of 1874.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 29th July 1874.

Joy Narain Giree (Plaintiff), *Appellant,*

versus

Grish Chunder Mytee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Kalee Mohun Dass* and *Ram Churn Mitter* for Appellant.

No one for Respondents.

Upon the principle laid down by the Privy Council in the case of Takoordeen Tewarry *vs.* Nowab Syud Ali Hossein Khan and others (21 W. R., p. 34). *viz.*, that where a plaintiff asks to have a deed or will set aside, there is a prayer for substantive relief, it was held that a plaint for confirmation of possession and for setting aside a forged and invalid will, could not come under the Court Fees Act, Sch. II., art. 17, cl. 3; but must be stamped according to the value of the subject-matter of the suit.

Note by the Deputy Registrar.—THIS appeal is from an order of the lower Court in a suit "for confirmation of possession by declaring proprietary right to the properties, real and personal, as per schedule, and for *setting aside* a forged and invalid will," or, according to the statement at the head of the grounds of appeal, "for confirmation of possession and *cancellation* of a document dated the 26th Bysack 1268."

The properties which form the subject of the suit are valued at Rs. 93,102-7.

The Court fee paid is Rs. 20; which the pleader on the part of the appellant (Baboo Ram Churn Mitter) urges is the fee provided for such a suit by clause 3, No. 17 of Schedule II. of the Court Fees Act of 1870.

He states, moreover, that objection to that fee was taken before the lower Court and overruled.

The terms of the law referred to are—

"Plaint or memorandum of appeal to obtain a declaratory decree where no consequential relief is prayed ..... Rs. 10."

The Rs. 20 paid in this case is thus accounted for:—

For a declaratory decree for confirmation of possession.....Rs. 10.

For a declaratory decree as to the invalidity of the will.....Rs. 10.

For the purpose of determining the amount of the Court-fees payable in this case, it is necessary to consider whether or not any relief is sought.

It has been held by Mr. Justice Norman, when officiating as Chief Justice (page 412, Weekly Reporter, Volume XV.), that where a document affecting the interest of the plaintiff is sought to be set aside, that amounts to a prayer for relief; and that the ordinary instances given in which relief is not prayed for, are those which relate to bills to perpetuate testimony and bills of discovery.

The plaint in the present case is not simply for a declaration of right, for it seeks relief; and the form in which it seeks it *is to have the will set aside.*

Plaint.—In this view the decision of the lower Court on the objection of the defendants to the fee payable under clause 3, No. 17, Schedule II., was wrong, as the law applicable to the case is clause (*c*) of para. iv. of section 7, which prescribes "that the fee payable shall be computed according to the amount at which the relief sought is valued in the plaint;" and it is for this Court as the Court of appeal to consider whether under para. ii. of section 12, the plaintiff should not be required "to pay so much *additional fee** as would have been payable had the question been rightly decided" by the lower Court.

* *i. e.*, Rs. 1,380, the fee payable being Rs. 1,400.

Appeal.—As to the present appeal, the fee payable will have to be determined in accordance with the terms of section 4 of the Act, which prescribes that "no document specified in the 1st or 2nd Schedule to this Act, shall be filed, &c., in the High Court in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence, unless there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee." The only provision, either in Schedule I. or Schedule II., applicable to this case is, that in No. 1 of the former Schedule; the fee chargeable being Rs. 1,400.

Note by the Registrar, the Taxing Officer.—The question in this case is whether if the Court were to pass an order (1) confirming the appellant in possession, or (2) declaring the will invalid, or (3) were to pass both such orders, the effect would be to grant the appellant consequential relief.

If the effect of such declaratory order or orders be to grant consequential relief, the proper stamp to be affixed to the petition of appeal under clause 1, Schedule I. of Act VII. of 1870 would be Rs. 1,400; if not, the stamp would be Rs. 10 for each application for an order, or Rs. 20 for both, as has been affixed by appellant under clause 17, para. iii of Schedule II. of the Act.

Partly with reference to the case cited by the Deputy Registrar, and partly with reference to the Privy Council appeal case, Takoordeen Tewarry *vs.* Nowab Syud Ali Hossein Khan, given at pages 340, 341 of the 21st Volume of the Weekly Reporter, Civil Rulings, I am of opinion that consequential relief would follow if a declaratory decree were given in this case.

But as the question appears to be one of general importance, I submit it under section 5 of Act VII. of 1870 to the final decision of the Chief Justice.

Decision of the Court.

Couch, C.J.—The Judicial Committee of the Privy Council appear to us to have been of opinion in the case reported in the 21 Weekly Reporter, page 34, Takoordeen Tewarry *vs.* Nowab Syud Ali Hossein Khan and others, that where a plaintiff alleges a deed not to be genuine, and asks to have the deed set aside, there is a prayer for substantive relief. They say that "on the whole they agree with the substance of both the decisions below that these deeds are not genuine and ought to be set aside;" and that the High Court ought not merely to have made a decree that "so much of the decree of the Court below as declares that the plaintiffs are the rightful owners of the property be confirmed;" that is, the High Court was not right in making a merely declaratory decree. This appears to us to be an authority of the highest tribunal that where a plaintiff asks to have a deed or will set aside, there is a prayer for substantive relief.

The clause in the Schedule of the Court Fees Act under which the appellant says that he has a right to affix to his petition of appeal a stamp of Rs. 20 is, that "a plaint or memorandum of appeal in each of the following suits may be on a stamp of Rs. 10;" and one of the suits mentioned is a suit to obtain a declaratory decree where no consequential relief is prayed. If consequential relief is prayed, a stamp of Rs. 10 is not sufficient.

Here, according to the opinion of the Judicial Committee, consequential relief is prayed, and the appellant cannot relieve himself from the obligation to pay the full stamp by saying that he does not ask for consequential relief, and that he will be content with a decree of this Court merely declaring his right to obtain possession. And when we look at substance rather than form in this case, the suit is really to obtain consequential relief. The effect of it is that whereas a person, if a will be valid, would be entitled under it to execution of an order of Her Majesty in Council, the plaintiff anticipating the claim for execution, brings this suit, which really is to extinguish that right and to stop the party from obtaining execution of the order or decree. It is really a suit for something more than a declaration of title; it is to obtain what would be a substantive relief.

We think the stamp is not sufficient, and that the petition of appeal must be stamped according to the value of the subject-matter of the suit.

The 14th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Rent Suit—Intervention—Question of Title.

Case No. 2795 of 1873.

Special Appeal from a decision of the Officiating Judge of Backergunge, dated the 28th August 1873, affirming a decision of the Moonsiff of that District, dated the 19th February 1873.

Radhamonee (Plaintiff), *Appellant,*

versus

Ram Narain Dey and another (Defendants), *Respondents.*

Baboo Kashikant Sen for Appellant.

Baboos Chunder Madhub Ghose, Bama Churn Banerjee, and *Nullit Chunder Sen* for Respondents.

In a suit for rent, where a third party intervenes, the Court does not err in law in going into the question of title, where this is necessary in order to decide who has been in the enjoyment of rent.

THE plaintiff in this case, Radhamonee, is the special appellant. The parties to the suit are Radhamonee, the plaintiff, Ram Narain Dey, the ryot-defendant, and Rajcoomar, the intervenor. Rajcoomar is the adopted son of Gour Chunder, and Radhamonee is the adopting mother of the intervenor. Radhamonee sued the defendant Ram Narain Dey on a dowl kuboolent for rent, and in this case, which was a simple rent case in its inception, the question whether Radhamonee's vendor, Kali Krishno Ghose, was the beneficial owner of the howla, or the father of the intervenor, has cropped up, and a decision has been arrived at by both Courts incidentally on a question of title which involves the right in a howla paying a sudder jumma of Rs. 1,000 and the collections of which, according to the Moonsiff's finding, amount to Rs. 2,300, leaving a profit of Rs. 1,300, so that the howla in suit at 10 years' purchase would be worth about Rs. 13,000. In this suit, therefore, for rent for the small sum of Rs. 11 odd annas there has been a finding upon a very important question, namely, who is the beneficial proprietor of the howla, and it has so happened that, according to the present practice of this Court, it has fallen to my lot to decide this case sitting singly. Had I had any doubts as to the proper decision to be passed in the case, I should have reserved it to be decided with another Judge sitting with me, but as I have no doubt on the question involved in the appeal, I proceed to decide the case.

The decision of the Moonsiff is a very elaborate one, and one which does him great credit, and as he has gone very minutely into the facts of the case, I propose to give the history of the case from his decision. It appears that there were five suits instituted by the plaintiff for arrears of rent against ryots of the howla, the plaintiff stating that the howla formerly belonged to Kali Krishno Ghose, who is admittedly a close connection of the plaintiff's late husband Gour Chunder; that she, the plaintiff, purchased the howla from Kali Krishno Ghose in 1226. The intervenor, Rajcoomar, the adopted son of the late Gour Chunder, on the other hand, states that the howla was the property of his father, Gour Chunder, and that Kali Krishno Ghose was his benamdar; that he, the intervenor, had caused the nominal transfer of the howla to the plaintiff, but that he, Rajcoomar, has been all along in the enjoyment of the rents of the howla. It is only necessary, with reference to the case of the ryot-defendant, to state that he denied the plaintiff's title, and stated that he had all along paid rent to the intervenor. The first Court laid down the following issues, namely, whether

the plaintiff or the intervenor is in receipt of the rent of the land in respect of which the claim is made; 2ndly, if the plaintiff is in receipt of the rent, what was the amount due to her? The Moonsiff observes that both parties, being well aware that the essential point for decision in this case was who was the beneficial owner of the howla, have produced "an ample and very heavy amount of evidence." There can be no doubt on referring to the record, which I have done casually, that this is quite correct; there is a great mass of evidence adduced by both parties. Then the Moonsiff says that, on a very careful consideration of the whole of the evidence, oral and documentary, adduced by both parties, he found that the intervenor has all along been in possession and enjoyment of the rent, and that Kali Krishno Ghose is a mere benamdar. He then refers to the fact, which is of course consistent with the benamee theory set up by the intervenor, that many of the documents are in the name of the benamdar Kali Krishno. Then, with reference to the custody of these documents, which is an important element in the case, the Moonsiff says that some of the documents are in the hands of the plaintiff, and some in the hands of the intervenor, but that the older documents relating to the howla are in the hands of the intervenor. Then he alludes to a suit which was brought by the brothers of the late Gour Chunder Roy, and explains away the conduct of Rajcoomar in that case as not inconsistent with his present averment that the howla belongs to him, and was held benamee by Kali Krishno Ghose. Then he also refers to the circumstances under which the nominal transfer has been made by Rajcoomar to the plaintiff, and then he applies the test upon which the pleader for the special appellant has laid so much stress in his argument, namely, where the purchase-money came from, and he found that Kali Krishno had no funds of his own; that he never held any employment; that he was a protégé of the family of Gour Chunder; and that he spent his whole life in assisting in the management of the estate of his maternal uncle Gour Chunder Roy, and that he never had or acquired any funds from which he could purchase this howla. Then he goes very carefully into the oral evidence; he says that the plaintiff has examined six witnesses and the intervenor fourteen witnesses. Of course I lay no stress upon the number of witnesses examined on the side of the intervenor as compared with the number examined on the side of the plaintiff, but the Moonsiff says in commenting upon the oral evidence that the witnesses examined by the intervenor are five of them highly respectable pleaders of the District Court; and on this part of the case, I can, from personal knowledge of those gentlemen, say that they are respectable; and then he says that the others are two of them respectable amlas of neighbouring landholders, one a School Pundit, and the others substantial ryots of the mehal in dispute. Then, with reference to the oral evidence of the plaintiff, he says that it consists of a Tehseeldar, whose testimony he entirely rejects for reasons given by him, and of other witnesses whose evidence he also does not consider credible; and he holds on the whole of the evidence that the intervenor is the beneficial owner of the property, and, as such, has always been in possession of the same and in the enjoyment of the rent; that Kali Krishno Ghose was a mere benamdar who was never in possession and enjoyment of the rent. He therefore dismissed the plaintiff's suit.

The Judge of Backergunge, Mr. Tottenham, has confirmed this decision; he also goes very carefully into the whole case, and he concurs in the finding of the Moonsiff.

In special appeal the points taken are that, under the facts and circumstances of the case, the Courts below have erred in law in making the intervenor a party to the suit; 2ndly, that, even if it be conceded for argument's sake that the intervenor has been rightly made a party, the Courts below have erred in law in entering into intricate questions of title in this case; and also that the Lower Appellate Court was wrong in law in not deciding the benamee plea of the intervenor in accordance with the test authoritatively laid down by the Privy Council in the case of Gossain *vs.* Gossain,* namely, the source whence the purchase-money came. These are the principal grounds taken in special appeal.

The pleader for the special appellant contends that, as the suit was based on a kubooleut, and as the tenant did not deny that kubooleut in his written statement, but merely supported the intervenor's case, the only question for decision in the case was whether the defendant was the tenant of the plaintiff, and whether the rent was due to the plaintiff as alleged by her; and in support of this contention the pleader has referred to two cases, one in Vol. XX., Weekly Reporter, page 384, and the other in Vol. XVIII., page

* 4 W. R. (P. C.) 46.

526. The ruling in Vol. XX. is to this effect: In that case the suit was for rent, and the special appellant in that case thought fit to intervene, and get himself made a party to the suit. An issue was then raised whether the property formed part of one mouzah or of another mouzah. Of course, as the learned Judges who decided that case very properly observed, this was giving an entirely new scope and character to the suit, and therefore the learned Judges thought proper to strike out all issues relating to Gooroo Prosunno Banerjee, the intervenor in that case. Now this is not at all a suit of the description referred to in that decision. The plaintiff in the present case sues a ryot for rent; the ryot states that the plaintiff has no title whatever in the howla; that she never received rent from him, the ryot; and that he has all along paid his rent to a third party, the intervenor Rajcoomar. Both parties allowed the issue to be raised which was raised in the first Court, and which involved the question whether the plaintiff was the beneficial owner of the howla or the intervenor, and both parties adduced evidence, oral and documentary, in support of their respective contentions; no issue being raised as to whether the kubooleut of the defendant was genuine or not; in short, it was quite unnecessary to raise that issue, as the main issue as between the parties which was accepted by them, and upon which they adduced evidence, was the issue raised by the Moonsiff, namely, who was the beneficial owner of the howla.

Then, with reference to the decision to be found in Vol. XVIII., which decision the pleader for the special respondent admits would certainly press him if the circumstances were the same in that case as in this case; that decision was passed by Justices Phear and Ainslie, judgment being delivered by Mr. Justice Phear. In that case the intervenors were found to have purchased property in another person's name, and to have allowed that person to deal with that property as his own, and to hold out to the world that he was the beneficial owner of the property; and therefore the Judges held that he could not be allowed in equity to interfere in a suit for rent.

The present case is a very different one. There is in this case the finding of both Courts, in which I entirely concur, to the effect that the plaintiff is not the beneficial owner of the property; that she well knew that Kali Krishno was not the real owner, but that her husband, the late Gour Chunder Roy, was the real proprietor, and that she, the plaintiff herself, was merely the benamdar of the intervenor. I am therefore of opinion that neither of these cases applies to the present suit.

Then, with reference to the question whether the Courts below have erred in law in entering into the question of title in this case, I am of opinion that they have not so erred, inasmuch as it was necessary, in order to decide the issue as to who had been in enjoyment of the rent, the plaintiff or the intervenor, to go into the question of title.

Then, with reference to the test which the pleader for the special appellant contends ought to have been applied to this case, namely, the question as to where the purchase-money came from, the Moonsiff has gone into that part of the case, and has distinctly found that Kali Krishno Ghose, the benamdar, was a mere protégé of the family, and had no resources whatever of his own with which to purchase this howla; and this finding has been confirmed by the Judge.

On the whole case, therefore, I am of opinion that there has been no error in law in the decision of this case, and concurring as I do with the lower Court on the merits, and holding that the beneficial owner of the howla in suit is the intervenor, and not Radhamonee, the special appeal must be dismissed with costs.

The 17th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Sale without Right—Liability of Vendor.

Case No. 321 of 1874.

Special Appeal from a decision passed by the Officiating Second Subordinate Judge of Mymensingh, dated the 27th November 1873, reversing a decision of the Moonsiff of Niklee, dated the 28th September 1872.

Amanoollah (Plaintiff), *Appellant,*

versus

Mahomed Nasir (Defendant), *Respondent.*

Moonshee Serajul Islam for Appellant.

Baboo Bykunt Nath Doss for Respondent.

Where a party sells property to others, and it afterwards appears that he had not the right to do so, and the

purchasers are in consequence dispossessed, the loss ought to fall on the vendor, and not on the vendees who put faith in his act of selling.

Couch, C.J.—THE plaintiff, by selling a ten-anna share to the defendants, affirmed that he had a right to sell it. If it afterwards appears that he had not the right, and the defendants are dispossessed in consequence of his not having it, the loss ought to fall on him, and not upon the defendants who put faith in his act of selling. It is said in the judgment that this is a private sale. We do not know that there is any difference in this respect between a private sale and a sale by auction in execution of decree. But we do not wish it to be understood that we are laying down the law as to the latter.

The plaintiff having sold the ten-anna share to the defendants, and other persons having established a right to the ten annas, the plaintiff now seeks to oblige the defendants to share the six annas with him. There is no ground upon which he can claim such a right. The defendants are already losers to the extent of four annas by the plaintiff selling to them what he had no right to sell.

The appeal must be dismissed with costs.

The 17th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Purdanasheen Women—Presumption of Undue Influence—Onus Probandi.

Case No. 2185 of 1873.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 23rd June 1873, reversing a decision of the Subordinate Judge of that District, dated the 16th December 1872.

Bibee Rukhun (Plaintiff), *Appellant,*

versus

Shaikh Ahmed Hossein and others (Defendants), *Respondents.*

Messrs. C. Gregory and *M. L. Sandel* for Appellant.

Mr. R. T. Allan and *Baboo Chunder Madhub Ghose* for Respondents.

A Hindoo purda woman is entitled to receive in the courts of this country that protection which the Court of Chancery in England always extends to the weak, ignorant, and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence, which is presumed to have been exerted unless the contrary be shown. In all dealings, therefore, with persons so situated, it is incumbent on the party interested in upholding the transaction to show that its terms are fair and equitable; the most usual mode of discharging such onus being to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other contracting party.

Phear, J.—WE think that, on the facts which are found by the Lower Appellate Court, the Judge ought to have held that the two contracts, namely, the kobala and the ticca lease, were obtained from the plaintiff by the exercise of undue influence. No doubt, in all cases where a party to a suit places his case upon the ground of fraud, deceit, or constructive fraud, such as undue influence, he is bound to establish the material facts upon which he relies as constituting the fraud before he can succeed.

In the present case, according to the view of the evidence taken by the Judge, the plaintiff, at the time when these two contracts were entered into, was an old and infirm woman. It is not stated in so many words that she was also purdanasheen; but it seems almost certain that she must have been so. The Judge says that she had then her husband alive; but he was even older than herself, was blind, and was lying upon his last sick-bed. Pending this state of things, the plaintiff succeeded by inheritance to the property which is the subject of suit. And shortly after becoming entitled to it, whether at the instance of the defendant or not is not quite clear, she entered into some communication with the defendant. She was made to believe, and there seems to have been some foundation for the belief, that one Gujroo was laying a claim to 12-annas share of this property, and was about to take immediate proceedings for the purpose of making good his claim. In this view she entertained proposals from the defendant to purchase a 4-anna share of the property in order that she might have the means of defending her title against Gujroo. And eventually she sold to the defendant this 4-anna share for the price of Rs. 5,000, and leased to him the remaining 12-anna share for a period of 9 years, at a rent which is not mentioned in the judgments of the lower Courts, but which has been stated to us as Rs. 275, after paying the Government revenue. In order to carry on and complete the negotiations for these contracts, the plaintiff removed from her husband's house, and went to the house of the

defendant, where she remained, until the deeds were executed, alone—that is, without any advice excepting such as she might be able to get from the defendant himself or the members of his family and his dependants. She there, at the defendant's house, executed the kobala of sale of the 4-anna share of the property and the ticca lease of the remaining 12-anna share, which instruments she now brings this suit to set aside on the ground that they were obtained from her by undue influence, deception, and fraud.

The facts which we have just mentioned are those which the Judge thinks are made out by the evidence. And it seems to us that the Judge ought, upon this state of facts, to have presumed as against the defendant that he exercised undue influence in obtaining these two deeds from the plaintiff.

The principle which is applicable in matters of this kind has been more than once expressed in decisions of this Court, and may be found amongst other places in the judgment which is reported in a note in p. 31, 1 Bengal Law Reports, Original Side, Civil. It was there said that "a Hindoo "purda woman is entitled to receive in this "Court that protection which the Court of "Chancery in England always extends to the "weak, ignorant, and infirm, and to those "who, for any other reason, are specially "likely to be imposed upon by the exertion "of undue influence over them. The undue "influence is presumed to have been exerted "unless the contrary be shown. It is, there-"fore, in all dealings with those persons who "are so situated, always incumbent on the "person who is interested in upholding the "transactions to show that its terms are fair "and equitable. The most usual mode of "discharging this onus is to show that the "lady had good independent advice in the "matter, and acted therein altogether at arm's "length from the other contracting party."

And this statement of the principle is supported by a reference to three decisions of the English Court of Chancery. We need hardly say that the observance of this principle in order to the due administration of equity and justice is as necessary in the Mofussil Courts as it is in the High Court itself.

Now, on the facts before us, it seems quite plain that the lady had not good independent advice in the matter of selling and letting her property to the defendant, and had not acted altogether at arm's length from the defendant, the other contracting party. On the contrary, she was taken from the only adviser whom she had in the world, namely, a feeble and old husband, who at the time was sick unto death (for he died, we are told, some two or three days afterwards), to the house of the defendant himself, and there, surrounded by the people of the defendant with no other persons from whom she could get instruction or advice, she entered into these contracts. The defendant, in discharge of the burden which lies upon him, is unable even to show that he has paid the consideration-money which he agreed to give on either of these contracts.

Both the lower Courts have found as a fact that the purchase-money of the 4-anna share has not been paid; and both of them are silent as to whether or not any rent has been paid upon the ticca lease. The unexplained omission to pay the consideration-money stipulated for in these contracts is a fact, which, under the circumstances of the case, affords strong evidence of unfair dealing on the part of the defendant, and does much to strengthen the case of the plaintiff.

It has been said on behalf of the defendant that two years had elapsed after the execution of these deeds before the plaintiff complained; and that the time of her complaining is coincident with the time of her having conveyed a 4-anna share of this same property to one Abdool Azeez. And upon these facts we are asked to infer that she herself has really no ground to urge against the fairness of these transactions; that this suit is due to the action and maintenance of Abdool Azeez, a stranger, who has thus, as it were, bought and created a cause of action against the defendant. But it may well enough be answered that, if the plaintiff's case is true, then she was entirely without the means of complaining until, by selling a portion of her property to Abdool Azeez, she got money enough to institute the present suit. On the whole it seems hardly fair on behalf of the defendant to make this imputation against the present suit of the plaintiff. It was, on the facts which the lower Courts found, incumbent upon the defendant to show that his transactions with the plaintiff were fair and reasonable and in the main effected upon equal terms. He has not been able, according to the finding of both the lower Courts, to prove any facts which tend to support a case of this kind. On the contrary, it is manifest that he effected these contracts with an old, infirm, and ignorant woman at a time when she believed herself to be labouring under a pressing necessity, by the means of

getting her into his own power and under his own roof, and there surrounding her by his own people; and he has not even paid her the consideration for these contracts which he agreed to pay, nor, as far as is disclosed by the evidence of his case, the rent which was reserved upon the ticca lease. It seems to us that this is certainly a case in which the doctrine exemplified in Kanaye Lall Jowhari *vs.* Kaminee Debee is applicable, and that the presumption of undue influence must be made because the defendant has done nothing whatever to rebut it.

In this view, we reverse the decree of the Lower Appellate Court, and direct that the kobala and the ticca lease be set aside and declared void of effect, and that the defendant do deliver over possession of the property which is the subject of them to the plaintiff, and further that he do account to the plaintiff for the rents and profits of the land which is the subject of the two suits for the time during which he held possession thereof. As it is found by the Courts below that no consideration has yet passed from the defendant to the plaintiff in the matter of these contracts, there is no occasion, as would otherwise be the case, to direct repayment of the same by the plaintiff to the defendant.

The plaintiff must recover costs in all the Courts.

The 17th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Execution-sale of Malikee Rights—Bond by previous Owner.

Case No. 2462 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 12th July 1873, reversing a decision of the Officiating Moonsiff of Sewan, dated the 27th June 1872.

Meer Gowhur Ali (Plaintiff), *Appellant,*

versus

Hurpal Bhugut (Defendant), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Boodh Sen Singh for Respondent.

The purchaser at an execution-sale of the malikee right of a judgment-debtor is entitled to possession where such right has been in no way pledged or mortgaged, notwithstanding a deed of assignment from the previous owner directing his tenant to make an annual payment to a creditor of interest due under a bond.

The plaintiff is the special appellant in this case. His suit was for possession of 3 beeghas out of 6 beeghas. The plaintiff alleges that he purchased the rights and interest of one Nowbut Singh at an auction-sale in execution of a decree against Nowbut Singh; the date of the purchase being the 23rd of August 1866. The defendant alleges that Nowbut Singh, the late malik, borrowed from him Rs. 199, bearing interest at the rate of Rs. 16 per annum, and that, at the time of executing the bond, a burratchittee, or deed of assignment, was executed, directing the ryot Mohun Bhugut to pay the said sum of Rs. 16 on account of interest to the defendant Hurpal Bhugut; that, therefore, Hurpal Bhugut has a lien upon this property, and that until the plaintiff pays the amount covered by the bond with interest, the plaintiff is not entitled to possession. The Moonsiff gave the plaintiff a decree. The Judge of Sarun has reversed that order. He says, that if the order of the Moonsiff be allowed to stand, then the lien on which the defendant advanced his money to the former malik becomes annulled, and that this is not fair to the defendant; that the plaintiff has succeeded to the former owner's rights in this kasht; and that he cannot avoid the liabilities created thereon by his predecessor. On these grounds the Judge has reversed the decision of the Moonsiff.

I think that the decision of the Judge is manifestly wrong. The plaintiff has purchased the malikee right of Nowbut Singh in the lands in dispute; of this there can be no question. Nowbut Singh, the former malik, appears to have borrowed money from the defendant Hurpal Bhugut. The bond under which this money was borrowed is not a mortgage, and this much has been admitted by the pleader who appears for the special respondent; and the burratchittee, which was executed at the same time as the bond, simply directs the tenant to pay to Nowbut Singh's creditor Rs. 16 per annum. The plaintiff having, as already observed, purchased the malikee right of Nowbut Singh in execution of a decree, he is clearly entitled to possession as malik. The Judge is clearly wrong in stating that the plaintiff has succeeded to the former owner's rights in this kasht. What he has succeeded to is the malikee right of Nowbut Singh, and as that malikee right in the property was in no way pledged or mortgaged, as admitted by the pleader for the respond-

ent, and as is clear from the terms of the bond and the burratchittee, the decision of the Moonsiff is manifestly correct both in law and fact. It must therefore be restored, the decree of the Judge reversed, and this appeal decreed with costs. Pleader's fees one gold mohur.

The 17th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Review—Act VIII. of 1859, s. 376—Special Appeal—Act VIII. (B.C.) of 1869, s. 102.

Case No. 2598 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 9th July 1873, reversing a decision of the Moonsiff of Buxar, dated the 27th March 1873.

Goor Dyal Roy and others (Plaintiffs), *Appellants,*

versus

Deka Noonya (Defendant), *Respondent.*

Baboo Taruk Nath Palit for Appellants.

Baboo Kalee Kishen Sen for Respondent.

During the pendency of a suit for rent, a plaintiff applied for postponement on the ground that he was unable to obtain a copy of a document which he had applied for from the Collectorate. The Moonsiff refused postponement, and gave him a modified decree, plaintiff subsequently obtained a review of judgment, and a decree in full. The Judge in appeal decided that the Moonsiff was wrong in admitting the review, because plaintiff had not mentioned that he was previously unacquainted with the existence of the document:

HELD that the review was properly admitted under Act VIII. of 1859, s. 376.

HELD that, although no question as to a title to, or interest in, land had been determined, Act VIII. (B.C., of 1869, s. 102, did not apply, for the Judge had come to no determination at all in the case, which must be remanded for trial by him.

THE plaintiff is the special appellant. This is a suit for rent. The Additional Moonsiff of Buxar gave the plaintiff a modified decree. During the pendency of the suit the plaintiff applied to the Additional Moonsiff to postpone the case, stating that he had applied for a copy of the jumma-bundee of 1872 from the Collectorate, and not being able to obtain the copy up to that time he could not adduce it in evidence, and he asked for a postponement. The Additional Moonsiff thought proper not to postpone the case, and gave the plaintiff a modified decree. The plaintiff then applied for a review, and another Moonsiff admitted the review, holding that the applicant for review, the plaintiff, had satisfied him, the Moonsiff, that he could not adduce the jumma-bundee at the time when the former decree was passed. On admission of the review the Moonsiff gave the plaintiff a decree in full. The defendant then appealed to the Judge, and the Judge says that the Moonsiff was altogether wrong in admitting the review, because in the application made by the plaintiff for time to file a copy of the jumma-bundee of 1872, there is no mention whatever made of the fact that the plaintiff was previously unacquainted with the fact of the existence of such document, that therefore there were no grounds for admitting the review, and the decision of the Moonsiff admitting that review must be reversed, and the decision of the Additional Moonsiff, who gave the plaintiff a modified decree, restored.

I think the Judge is clearly wrong in this case. Under section 376 of the Code of Civil Procedure, a party who has discovered new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, may apply for a review of judgment. Now in this case the plaintiff did not apply on the ground of having discovered new matter or evidence which was not within his knowledge, but on the ground that he knew of the existence of the new matter or evidence, that he had applied for a copy of it, and that the Collector did not furnish him with the copy in time to file it. It was not the fault of the plaintiff, therefore, that he could not adduce it at the time the decree was passed. He satisfied the Moonsiff who admitted the review that such was the case, and therefore under section 376 the review was properly admitted.

The pleader for the special respondent contends that no special appeal will lie, inasmuch as this is a suit for rent for a sum less than Rs. 100; and under section 102, Act VIII. of 1869, as no question relating to a title to land or to some interest in land between parties having conflicting claims thereto has been determined by the Judge, no special appeal lies. This contention is obviously untenable, inasmuch as the Judge has come to no determination at all in this case. It may be that if the Judge had decided the case against the plaintiff, there would have been no special appeal, inasmuch as the claim was for rent, and for a sum under Rs. 100; but as the Judge has come to no determination at all, on the erroneous sup

position that the review was improperly admitted, the case must be remanded to the Judge, who will try the appeal as it originally stood, namely, as an appeal by the defendant from the decision of the Moonsiff of Buxar decreeing the plaintiff's claim in full. Costs to follow the result.

The 18th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Arbitration-award—Jurisdiction.

Case No. 955 of 1874.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 19th February 1874, reversing a decision of the Moonsiff of Sulkia, dated the 24th November 1873.

Bykunt Nath Mookerjee (Plaintiff), *Appellant,*

versus

Prionath Ghose (one of the Defendants). *Respondent.*

Baboos Mohinee Mohun Roy and *Mohendro Lall Mitter* for Appellant.

Baboo Romesh Chunder Bose for Respondent.

Where two arbitrators gave an award in one sense, and the third in an opposite sense, a Moonsiff was held not to have been authorized, in the absence of corruption or misconduct, in setting aside the award, because he surmised partiality from the fact that one of the arbitrators was a relation of the defendant, that circumstance having been known when the reference was made.

Jackson, J.—It appears to us there is no valid ground for this special appeal. The parties to this suit referred the matters in dispute to arbitration. The three arbitrators did not agree in the award, two of them giving the award in one sense, and the third in an opposite sense. The Moonsiff inquired into the grounds on which the award of the majority was based, and being of opinion that it was not borne out by the evidence, he set it aside. The Judge, on appeal, held that the Moonsiff was not authorized, in the absence of corruption or misconduct alleged and proved, to set aside the award. In this we think the Judge is right. There is a case cited from 12 Weekly Reporter, page 93, in which a Division Bench of the Court held that in such circumstances the Moonsiff had been right. That appears to have been a very strong case. The Moonsiff found, as the learned Judges say, that the arbitrators had given the award in direct opposition to the testimony of witnesses whom their own statement showed they accepted and believed, and the perversity of their award in the judgment of the Moonsiff raised a reasonable presumption of misconduct. We do not think it necessary to say whether, in the circumstances of that case, we should have given the same judgment as was given by the Division Bench. Perhaps we should. But that is not the case here. No misconduct or corruption is imputed to the arbitrators. The utmost that the Moonsiff says is that the award smacks of partiality, and the partiality is surmised from the fact that one of the arbitrators was a relation of the defendant. That was not a circumstance unknown at the time when the reference was made. Both the parties knew whom they selected as arbitrators, and took them with their relationships and probable bias. If the Courts referring matters to arbitration were at liberty to take up the award, and consider the grounds on which it is based, there would be an end to the finality of arbitration-awards, which the law intended. The appeal will be dismissed with costs.

The 18th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Mokurrureedar—Khas Tenures—Onus Probandi.

Case No. 2774 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Gya, dated the 10th September 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 13th January 1873.

Ram Nirajun Bhut (Plaintiff), *Appellant,*

versus

Ram Nath Singh (Defendant), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Doorga Mohun Doss for Respondent.

A mokurrureedar of a village is entitled to possession of every beegha of land in it, unless the party cultivating the same can show a good title against him. A party

setting up a khas tenure as against the mokurrureedar is bound to prove such tenure.

THE plaintiff is the special appellant in this case. He sued to recover possession of 20 beeghas 10 cottahs of land in the village of Belahee. The plaintiff alleges that that village belongs to Bissessur Gossain and others in equal moieties, and that he, the plaintiff, took a mokurruree of the entire village from Bissessur and the other sharers. The plaintiff further alleges that an 8-anna share of the village was formerly leased to Nuseeb Singh, that that lease has expired, and that, on the plaintiff attempting to get possession, he was opposed, and that Nuseeb Singh holds over and does not allow the plaintiff to get possession. Ram Nath, the brother of Nuseeb Singh, intervened, and was made a party under section 73. He says that he holds a kasht under the sabek maliks, Bissessur and others, and that he is willing to pay the plaintiff his share of the crops, but that he cannot be ejected. The first Court found for the plaintiff. The Moonsiff went into the evidence carefully, and for reasons given by him decreed the plaintiff's suit.

The Subordinate Judge, Moulvie Imdad Ali, has reversed that decision.

I think the case must go back. The decision of the Subordinate Judge is very unsatisfactory. He has not decided the case upon the real issues between the parties, and he has set aside the Moonsiff's decision, which is a very careful one, without giving any sufficient reasons for so doing. Now it strikes me that there are certain points in this case that the Subordinate Judge ought to direct his attention to.

In the first place, Ram Nath, who sets up a kasht tenure as against the plaintiff, who is the admitted mokurrureedar, is bound to prove that kasht tenure. The onus is on the respondent, and not upon the plaintiff, because, the plaintiff being the admitted mokurrureedar, he is entitled to possession of every beegha of land in this village, unless the party cultivating the same can show a good title as against him. This has been often ruled by this Court, and requires no further elucidation. It is to be observed that Ram Nath does not file his pottah, although the nephew of his lessor Ramoo Gossain deposes that the pottah and kubooleut of Ram Nath were executed in his presence. Ramoo Gossain also deposes that that kubooleut may be with his aunt, the wife of Bissessur Gossain, Ram Nath's alleged lessor, who has gone to Benares, but be that as it may, Ram Nath was bound to file his pottah and prove his title, and he did not do so. I also think that, in this case, looking to the position of the parties and to the defence of Nuseeb Singh, who pretended to have nothing to do with the case, and particularly to the fact that the intervenor Ram Nath is supported mainly by the evidence of the nephew of the plaintiff's lessor, that this is very probably an attempt on the part of the plaintiff's lessor to neutralize the effect and value of the plaintiff's mokurruree.

The Subordinate Judge, therefore, ought to try the case very carefully, and not in the perfunctory manner in which he appears to have disposed of it.

The case will, therefore, go back to the Subordinate Judge; he will throw the onus on Ram Nath, and make him strictly prove his alleged kasht holding, and, on his failing to do so, he will give the plaintiff a decree.

Costs to follow the result.

The 18th August 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Issues—Special Appeal.

Case No. 2115 of 1873.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 21st June 1873, affirming a decision of the Moonsiff of Seetakoond, dated the 31st March 1873.

Mahomed Basiroollah Bhoonia (Plaintiff), *Appellant,*

versus

Ahmed Ali (one of the Defendants), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Bhyrub Chunder Doss for Respondent.

In a case in which, although no issues were framed after the defence was put in, yet the plaintiff examined witnesses, and was in no way prejudiced by the omission, the High Court did not give effect to an objection on the ground of such omission, which was urged by him for the first time in special appeal.

IN this case the special appeal must fail. The District Judge has found, concurrin-

with the Moonsiff, that the defendant, respondent, obtained from Azeezoollah a tuppadaree pottah, and, by virtue of that instrument, he has been in possession for more than 12 years. It has been also found by the Appellate Court that Azeezoollah managed the property in dispute for his father Abdoollah. If the plaintiff repudiates the lease, he is barred by limitation. If he admits the defendant's tenancy, he cannot question the lease granted by Azeezoollah after acquiescing in it for more than 12 years. In this view of the case, it does not become necessary to notice any other grounds of special appeal excepting the 2nd, 3rd, and the 7th of the petition of appeal.

It was in the discretion of the original Court to allow the defendant, respondent, to put in his defence, and adduce his evidence at a late stage of the case, although he did not appear at the first hearing. Whether that discretion has been rightly exercised or not is not for me in special appeal to decide. Therefore I cannot interfere on this ground.

With reference to the 7th ground of special appeal, it seems to me that it is by no means a settled point of law in this country that the denial by the tenant of the landlord's title works a forfeiture of the tenancy. However, in this particular case, the point does not arise. The tenancy in this case, as found by the Courts below, was created, not by Abdoollah, but by Azeezoollah. The defendants never denied the title of Azeezoollah, and whether the denial of Abdoollah's title is tantamount to a denial of the title of the landlord, would depend upon the facts established in the case. For example, if the tenant was not aware that Azeezoollah was merely acting as a manager for Abdoollah, the denial by the tenant of Abdoollah's title would not amount to a denial of the landlord's title. Therefore, in this particular case, before the question of law can arise, sufficient facts must be found. But this question of fact I think the Lower Appellate Court has decided against the plaintiff. The Judge has held that "there was no denial of title sufficient to work a forfeiture." Therefore this ground of special appeal also fails.

There remains only the 3rd ground to consider. It is true that, after the defendant, respondent, was allowed to put in his defence, no fresh issues were framed as required by law. But the plaintiff examined witnesses to rebut the case made by the defendant, and from that evidence it appears that he was fully aware of the nature of the case he was called upon to meet. He did not raise any objection upon this ground either before the first Court or before the Lower Appellate Court. As it seems to me that the plaintiff has not by any means been prejudiced by the omission to frame the issues, I ought not to give effect to this objection (*vide* B. L. Reports, Volume VI., page 148).*

The result is that the special appeal will be dismissed with costs.

The 19th August 1874.

Present :

The Hon'ble J. B. Phear and W. F. McDonell, *Judges.*

Partition of Jumma—Act XI. of 1859, ss. 10, 11, & 13—Private Partition—Sale—Rights of Auction-purchaser.

Case No. 2373 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 11th August 1873, reversing a decision of the Additional Moonsiff of that District, dated the 14th April 1873.

Gungadeen Misser and another (two of the Defendants), *Appellants,*

versus

Kheeroo Mundul (Plaintiff), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Boodh Sein Singh for Respondent.

The proprietors of a revenue-paying mehal obtained, under Act XI. of 1859, s. 10, a partition of the jumma in the Collector's books, but no corresponding butwarra

* 15 W. R. (P. C.) 15.

under s. 11. At the same time, by private partition, each took exclusive possession of his own portion in lieu of his undivided share of the estate. After this, plaintiff bought from one of the sharers (defendant No. 4), in whose exclusive possession they were, 25 beeghas of land, on account of which he then applied to the cultivating jotedar (defendant No. 3) for a kubooleut and rent. These were refused him at the instigation of defendants Nos. 1 and 2, who were auction-purchasers of the separate share of certain defaulting shareholders, sold under Act XI. of 1859, s. 13. Plaintiff, accordingly, sued for possession of his purchase by "determination of right:"

HELD that the sale by the Collector passed to the auction-purchaser the share of the defaulters as it was registered in the Collectorate books, *i. e.*, an undivided share in the entire estate, and not such portion as the defaulting shareholder might have chosen as between himself and the other shareholders to take as an equivalent. The plaintiff was, therefore, not entitled as against defendants 1 and 2 to have exclusive possession of any portion.

Phear, J.—THIS was a suit brought by the plaintiff Kheeroo Mundul against four defendants, Gungadeen Misser, Jain Chowdhry, Shewdyal Gope, and Luchmun Dass Gossain, to obtain, "by determination of right," possession of certain specified 25 beeghas of land. The revenue-paying mehal, within which these 25 beeghas of land lie, belongs to several proprietors, who have taken advantage of the provisions of section 10, Act XI. of 1859, and have obtained a partition of the jumma in the Collector's books, but no corresponding butwarra has been effected of the mehal by the Collector. At the same time the different shareholders have, by some sort of private partition come to among themselves, appropriated different portions of the mehal—that is, each has taken exclusive possession of his own portion in lieu of his undivided share of the mehal. Kheeroo Mundul, the plaintiff, has bought the 25 beeghas of land which are the subject of dispute from one of the sharers in whose exclusive possession they have hitherto been in the way I have just mentioned. And he says that, on applying to the jotedar who cultivates this plot, and who is defendant No. 3, for a kubooleut and for rent in respect of it, treated as an entirety exclusive of other shareholders, he, the jotedar, at the instigation of the defendants Nos. 1 and 2, refuse to give the kubooleut or to pay the rent so required. The defendants Nos. 1 and 2, it seems, are persons who have bought at an auction-sale held by the Collector for default of revenue, under section 13, Act XI. of 1859, the separate share of certain defaulting shareholders of the same mehal,—a share which is registered under section 10 of the same Act, as has already been mentioned. And the defendant No. 4 is the plaintiff's vendor.

The question thus appears to be whether the plaintiff, as purchaser from one of the shareholders of this mehal, who has, until the date of sale, been in exclusive possession of the 25 beeghas of land, which is the subject of suit, together with other land, in lieu of his undivided share of the mehal, is entitled to have exclusive possession of that land as against the defendants Nos. 1 and 2 who have bought the share of certain other defaulting proprietors at the Collector's auction-sale. It may perhaps be doubted whether the facts set out in the plaint are quite sufficient to give the plaintiff a good cause of action against the principal defendants. But if it be assumed that they do so, then the question which is to be determined is that which I have just now stated. It is an additional fact in the case that one, if not both of the two first defendants, is (independently of the purchase which they have made at the auction-sale) a shareholder in the estate, and has been holding, and probably now is still holding, exclusive possession of a portion of land as his original share. The plaintiff contends that the defendants Nos. 1 and 2, by their purchase at the auction-sale, got no more than such right of exclusive possession to portions of the mehal as the defaulting shareholders had relatively to their co-shareholders; in other words, that they did not, by that purchase, acquire a right to the defaulting shareholders' registered undivided share of the whole mehal. The argument is that, inasmuch as the defaulting shareholders were content to hold exclusive possession of specific portions of the mehal in lieu of their undivided share, the purchaser at the auction-sale, which was held under section 13, of the share belonging to them, only gets those specific portions.

After giving consideration to this subject, we think that the plaintiff's contention cannot be maintained. Section 10, Act XI. of 1859, says that, "when a recorded sharer "of a joint estate held in common tenancy "desires to pay his share of the Government "revenue separately, he may submit to the "Collector a written application to that effect. "The application must contain a specification "of the share held in the estate by the "applicant. The Collector shall then cause "to be published in his own office, in the

"Court of the Judge, Magistrate (or Joint-"Magistrate, as the case may be), and "Moonsiffs, and in the Police thannas in "whose jurisdiction the estate or any part "thereof is situated, as well as on some "conspicuous part of the estate itself, a "copy of the application made to him. If, "within six weeks from the date of the "publication of these notices, no objection "is made by any other recorded sharer, "the Collector shall open a separate account "with the applicant, and shall credit separately to his share all payments made by "him on account of it. The date on which "the Collector records his sanction to the "opening of a separate account shall be "held to be that from which the separate "liabilities of the share of the applicant "commence."

This section obviously applies to the case of one who wishes to be treated by the Collector as an undivided shareholder of a revenue-paying estate. The following section 11 applies to the case of one who desires to be recorded as a sharer of a joint estate, whose share consists of a specific portion of the land of the estate. The whole of the proprietors of the estate in the present instance separating themselves substantially into three groups obtained a corresponding division of the jumma of the mehal under section 10, and not under section 11; and therefore the share of each registered group which the Collector had in his books and had to deal with was an undivided share of the entire revenue-paying estate, not a specific portion of the land of the estate. Then section 13 says, that "whenever the Collector shall have ordered "a separate account or accounts to be kept "for one or more shares, if the estate shall "become liable to sale for arrears of revenue, "the Collector or other officer as aforesaid, "in the first place, shall put up to sale only "that share or those shares of the estate "from which, according to the separate "accounts, an arrear of revenue may be "due." The section further provides that "the share or shares sold, together with the "share or shares excluded from the sale, "shall continue to constitute one integral "estate, the share or shares sold being "charged with the separate portion, or the "aggregate of the several separate portions "of jumma assigned thereto."

The effect of this plainly is that the sale of the Collector passes to the purchaser the share of the defaulting shareholder in the entire estate as it was registered in the Collector's books, *i. e.*, an undivided share if registered under section 10, and a specific portion of the estate if registered under section 11. In the present case, therefore, it must be an undivided share. And if we were to hold otherwise, in the way contended for by the plaintiff, namely, that the purchaser only got such portion of the land constituting the estate as the defaulting shareholder may have chosen as between himself and the other shareholders for any reason to take as equivalent to his undivided share, then that portion might, in some cases, be a very inadequate security indeed for the proportion of revenue payable by the defaulting shareholder. And the purchaser who bought at the auction-sale under section 13 might find that he was grossly deceived in his bargain. He might, after having paid the full value of the defaulting shareholders' undivided share in the estate, discover that he got a very inadequate portion of the estate as the result of his purchase. It was not the intention, we think, of the Legislature to introduce uncertainty of this kind into auction-sales held for the purpose of realizing the revenue. On the contrary, it is rather the general principle of the Legislature to make these sales effective to pass the full share of the defaulting shareholder free, so to speak, of all incumbrances. We think therefore that, on the facts of this case, the plaintiff was not entitled, as against the defendants Nos. 1 and 2, purchasers of an undivided share of the estate under section 13, Act XI. of 1859, to have exclusive possession of any portion of the mehal.

It was pressed upon us that, inasmuch as the defendants Nos. 1 and 2 were one or both of them previously shareholders in this estate, and as such enjoying their portion of the land exclusive of the others, in the same way as the rest of the shareholders, there arose an equity in this case as between them and the plaintiff, which ought to lead the Court to hold that at any rate these defendants got no more than the defaulting shareholders' particular specific share by virtue of their purchase. But we are unable to say that there is any equity arising between the parties on this ground.

The plaintiff's suit fails, and ought to be dismissed. The first Court held this view; but, on appeal to the Subordinate Judge, the decree of the Moonsiff was reversed, and the plaintiff's suit decreed. We are of opinion that this was wrong, and that the decree of the Subordinate Judge must be reversed, and the plaintiff's suit dismissed with costs.

The 19th August 1874.

Present :

The Hon'ble W. Ainslie, *Judge.*

Execution-sale under Erroneous Decree—Reversal of Decree—Rights of Purchaser.

Case No. 2367 of 1873.

Special Appeal from a decision of the Subordinate Judge of Bhaugulpore, dated the 12th August 1873, affirming a decision of the Moonsiff of Monghyr, dated the 20th December 1872.

Ram Suhai Singh (Defendant), *Appellant,*

versus

Chutter Kooer and others (Plaintiffs), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Mr. R. T. Allan for Respondents.

J and N borrowed money from P, and, as security, N pledged certain landed property. P sued on his bond, and obtained a decree against J and the representatives of N. He then transferred his decree to C and F, who, in execution, seized property belonging separately to J, who, to protect her own property, paid the whole debt, and then brought a suit against N for contribution. Having obtained a decree, J attached the property originally mortgaged by N, claiming over it something equivalent to a mortgage-lien. Upon this one Nilkant claimed the property as purchaser from N, and succeeded in getting the attachment taken off. Thereupon J brought a suit against Nilkant, N, and others, to have it declared that the mortgage to P had become assigned to her as a consequence of her having paid off the debt due to P. Her suit was dismissed in the first Court; but she obtained a decree in the second Court, under which she sold the property to R, while a special appeal was pending, the result whereof was to set aside the decree:

HELD that, under the execution-sale, R bought the rights and interests, not of Nilkant, but of N; and as the result of the special appeal was to declare that there were no rights and interests of N in the property, J bought what was worthless.

THE special appellant in this case is the auction-purchaser of a certain property, which was sold at the suit of Jukree Kooer as if it had been under a mortgage created by Nunda Kooer. The facts of the case appear to be as follow: Jukree and Nunda Kooer borrowed money from one Poresh Nath, and as security for that loan, Nunda Kooer pledged certain landed property. The mortgagee, Poresh Nath, sued on his bond, and obtained a decree against Jukree and the then representatives of Nunda Kooer. He transferred his decree to Chutter Kooer and Futteh Kooer, who put it into execution, and seized property belonging separately to Jukree Kooer. In order to protect her own property, Jukree Kooer paid the whole of the debt, and then brought a suit against her co-debtor for contribution; and, having obtained a decree, attached the property originally mortgaged by Nunda Kooer, claiming, as I understand she did, something equivalent to a mortgage-lien over that property. One Nilkant came in and claimed the property as purchaser from Nunda Kooer, and succeeded in getting the attachment taken off. Thereupon Jukree Kooer brought a suit against Nilkant, Nunda Kooer, and others, in order to have it declared that she had a lien over the property originally mortgaged to Poresh Nath, and subsequently attached by herself, and released on the application of Nilkant, and that she was entitled to satisfy her decree for contribution by the sale of that property before any rights created subsequent to the mortgage to Poresh Nath could take effect. In fact I may say shortly that this was a suit to have it declared that the mortgage to Poresh Nath had become assigned to her as a consequence of her having paid off the whole of the money due to Poresh Nath. The suit of Jukree was dismissed in the first Court. But in the second Court she was successful, and obtained a decree for the sale of the property; and accordingly she sold the property in execution of that decree, and it was purchased by Ram Suhai Singh, the special appellant. That sale was held while a special appeal was pending against the decree under which it took place; and the result of that special appeal was to set aside that decree. The case in the 10th Weekly Reporter, page 154, has been cited as authority to establish the proposition that a sale to a *bonâ-fide* purchaser properly conducted under a decree in force at the time does not become void in consequence of that decree being subsequently set aside, that is, that a sale of the property of a judgment-debtor for his own debt does not so become void. Now, in this case, I have no intention of questioning the validity of the sale to Ram Suhai; the question is what was sold to him. The decree for the sale of the property was a proceeding in furtherance of the decree obtained by Jukree Kooer for contribution, and it was in fact a declaration that Nilkant had taken the property of Nunda Kooer, subject to the encumbrances created by her, and that there was therefore still existing an interest capable of being sold as the interest of Nunda Kooer, notwithstanding the subsequent conveyance of the property to Nilkant. This property had been attached as Nunda Kooer's under a decree against her, and it could only

be sold as being Nunda Kooer's. Nothing but the rights and interests of the debtor under that decree could be sold. Nunda Kooer is dead, and the decree was, I believe, against other persons, her heirs; but I use her name for convenience, and intending thereby to include all her subsequent representatives. Ram Suhai therefore bought the rights and interests of Nunda Kooer. He did not buy the rights and interests of Nilkant. If at the date of the sale or of the attachment there were any rights and interests remaining in Nunda Kooer, undoubtedly Ram Suhai is entitled to retain them; but if there were no rights and interests remaining to Nunda Kooer, there is nothing whatever that Ram Suhai can retain. The result of the special appeal to this Court in the suit of Jukree against Nunda Kooer was to declare that there were no rights of Nunda Kooer in the property, the subject of that and of the present suit, existing at the date of the attachment under which Ram Suhai became purchaser. He is therefore in the position, not unfrequently occupied by purchasers at execution-sales, of a person who has bought that which turns out to be worthless.

Baboo Nil Madhub Sein, the appellant's vakeel, has pressed upon me that, inasmuch as Nilkant was a party to the suit in which the decree for sale was made, he must be bound by the sale held under that decree, although the decree was eventually set aside, just on the same principle as a judgment-debtor who succeeds in getting a decree against himself reversed is bound by the sale of his property effected while the decree is still in force. In order to support this, if I understand him rightly, he treated the decree for the sale of the property as one which transferred to Nilkant the debt or liability of Nunda Kooer to make good the money paid by Jukree on her account. I have already said what, according to my view, is the effect of that decree. I do not think that it can be in any way used to make Nilkant a debtor. It was, and from the nature of the suit could only be, a decree to declare that the rights of Nunda Kooer, so far as the then plaintiff Jukree was concerned, were not to be taken as extinguished by the conveyance to Nilkant. The sale was not a sale to satisfy a money-decree against Nilkant; it was a sale to satisfy a decree against Nunda Kooer. It seems to me that there is a very wide distinction between the case of a judgment-debtor whose own property is sold under an erroneous decree, and that of a third party whose property has been taken and sold under another name. If the order of the Court had been that the property of Nilkant was to be sold, then the case in Vol. X, Weekly Reporter, would apply; but the order of the Court being that the property of Nunda was to be sold, if after that it turns out that the property of Nilkant has been sold, I fail to see the application of it. I therefore think that the defendant must be taken to have been a purchaser of that which really had no existence at the time, and that the plaintiffs should succeed.

The special appeal will therefore be dismissed with costs.

The 19th August 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Bntwarra—Disputes between Co-sharers—Principle of Adjustment.

Case No. 1481 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 20th March 1873, reversing a decision of the Moonsiff of Tajpore, dated the 14th September 1872.

Ooma Dutt Chowdhry and others (Defendants), *Appellants,*

versus

Hunooman Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Chunder Madhub Ghose for Appellants.

Mr. Ameer Ali for Respondents.

After partition of an estate among shareholders under Regulation XIX. of 1814, one shareholder (A) claimed from another shareholder (B) 2½ beeghas of land as having been allotted to him by B under a prior agreement in lieu of certain lands originally held by him, which fell into B's puttee. The Collector left the parties to settle the matter between themselves, and A brought a suit against B for his claim in the Civil Court:

HELD that, in a case of this kind, the only principle that can be adopted is that the Court should ascertain the relative value of the lands originally made over by the defendant to the entire lands of the defendant, and that it should assign, out of the present share of the defendant, lands bearing the same relative value to the whole that the former lands bore, this to be done without interference with the proceedings of the Collector under the Butwarra Law, and the plaintiff (if successful) to be brought in as a co-sharer to a limited extent in the land assigned by the defendant.

THE plaintiff is a one-anna shareholder in Mouzah Muthapore, and the defendant is the shareholder of 6¼ gundas in the same

mouzah. There appears to have been a partition amongst the shareholders so far back as 1243, which was followed by an agreement by which the defendant undertook to give the plaintiff 2¼ beeghas of land out of his own share. In the year 1857, proceedings for a partition of the whole of Mouzah Muthapore under Regulation XIX. of 1814 were instituted, and apparently they were completed about the year 1859; the exact date of the completion does not appear. At that time the plaintiff appears to have claimed before the Collector that this 2¼ beeghas of land should be allotted to him in addition to his one-anna share; but the Collector left the parties to settle the matter between themselves. The plaintiff alleges that the lands originally held by him under the ekrar of 1243 fell into the defendant's puttee, and were held by him, and that in lieu of them the defendant gave other 2¼ beeghas out of his puttee to the plaintiff. The defendant, on the other hand, asserts that out of those 2¼ beeghas, 1 beegha and 1 cottah of plot No. 544 came into the possession of the defendant, and 1 beegha 3 cottahs and 19 dhoors in plot No. 615 fell into the puttee of the plaintiff; and that the plaintiff remained unconnected with the land No. 544. This does not exactly deny the allegation of the plaintiff; but I suppose it was meant substantially to do so. In 1869 a further butwarra was made by the Collector, and the lands which the plaintiff says he held in exchange for his original 2¼ beeghas went into the share of Tekun Chowdhry, a person entirely unconnected with the agreement between the parties. In consequence of that, the plaintiff sues to recover from the defendant 2¼ beeghas under the agreement of 1243.

Looking to the terms of that agreement, it seems to me that in effect it gave to the plaintiff the enjoyment of 2¼ beeghas of land of which the revenue was still payable by the defendant. The defendant did not cut down his own fractional share in the estate, but assigned a certain portion of the land belonging to that share to the plaintiff, and this apparently was the view taken of the matter by the Collector in 1857, and the consequence was that the 2 beeghas and 5 cottahs could not be added to the area representing the one-anna share of the plaintiff, so that the whole might be represented by a fraction of the whole estate, because the revenue chargeable on the whole area would be the revenue of the one-anna only. So that in fact the plaintiff continued to hold his one-anna share, and to be a co-sharer in the defendant's 6¾ gundas share to the extent of a defined 2¼ beeghas. If in fact the butwarra of 1857 was supplemented by an assignment of land in exchange for the land originally held by the plaintiff, this would show that the same view of the matter was then taken by the defendant, and would fully establish the right of the plaintiff to have such a decree as a Court is capable of making in this suit, and would also completely meet the plea of limitation. But, unless the plaintiff can prove that there was such an exchange of land, and that after that butwarra he in fact held 2 beeghas and 5 cottahs more than the Collector assigned to him as the quantity representing his one-anna share, the question of limitation becomes a most material one, because it appears that this suit was instituted on the 5th of October 1871, and if, as I suppose, the butwarra was completed in 1859, it may turn out that more than 12 years had elapsed from the completion of that butwarra before the plaintiff came into Court to enforce his right under the agreement of 1243.

The Judge of the Lower Appellate Court has not come to any decision on the facts of the case. He seems to think that the plaintiff is entitled, under the agreement of 1243, absolutely and without reference to any thing that has taken place since, to obtain from the defendant a certain quantity of land.

In the view that I take of that agreement, it seems to me that the Judge is substantially right in holding that the defendant is bound to admit the plaintiff as a co-sharer in his puttee or share to a certain limited extent; but, although the right of the plaintiff under the agreement may be perfectly clear, his right to a decree enforcing that agreement depends upon the finding that the Judge will have to come to on the plea of limitation; in fact, on what was done in the earlier butwarra and on the date from which that butwarra took effect. If the Judge comes to the conclusion that this suit is not barred by limitation, he must consider how a decree is to be made which will be capable of execution.

There is nothing to show on what principle the plaintiff selects particular portions of land as those to which he is entitled; and even in respect of those particular portions of land the judgment of the first Court is that they are so imperfectly defined that the plaint ought to have been rejected merely on that account.

In a case of this kind, it seems to me that the only principle that can be adopted is that

the Court should ascertain the relative value of the lands originally made over to the plaintiff by the defendant to the entire lands of the defendant's puttee; and that it should, through an Ameen or on such other evidence as it thinks sufficient, assign out of the present share of the defendant lands bearing the same relative value to the whole that the former lands bore; and it must be clearly understood that in making this decree the lower Court is not to interfere with the proceedings of the Collector under the Butwarra Law by which new estates were defined and recorded; but that it must, if the plaintiff recovers at all, bring him in as a co-sharer to a certain limited extent in the land which has been assigned by the defendant, and which I presume is now a separate estate of the towjee.

Costs will follow the result.

The 19th August 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Settlement-proceedings—Landlord & Tenant.

Case No. 1575 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 29th April 1873, affirming a decision of the Moonsiff of Monghyr, dated the 29th April 1873.

Syud Shah Ali Ahmed (Plaintiff), *Appellant,*

versus

Doorga Roy (Defendant), *Respondent.*

Moulvie Syud Murhumut Hossein for Appellant.

Baboo Boodh Sen Singh for Respondent.

A landowner seeking to bind his tenants by the settlement-proceedings should show distinctly that they were parties to the inquiry held by the Collector into the nature and extent of their holdings.

The pottah, purporting to have been granted by Sukawut Hossein, the farmer of the property in suit, was found to be a genuine instrument more than thirty years old and in proper custody. This was *primâ-facie* evidence that the ryot who produced it had received a lease from a person who as farmer had power to give the lease. Of course it was open to the other side to contradict this by other evidence; but, in the absence of that, I think the Court cannot now admit the objection that the fact that Sukawut Hossein was Moostajir in 1241 has never been proved. The Subordinate Judge having this pottah before him has tested the credibility of the evidence of the putwaree, and by a certain course of reasoning satisfied himself that the putwaree was not to be believed. That being so, the khusrahs on which the plaintiff relied, being only evidence in corroboration of the oral statement of the putwaree, are of no avail. It has also been said that the pottah produced by the defendant is of a date anterior to the date of the settlement made by Government with the plaintiff. No doubt this is so; but it does not at all follow as a matter of necessity that the proceedings of the Settlement Officer cancelled or overruled the previous arrangement between the landlord and his tenant. Even taking it that the landlord assented to an assessment in excess of the rent receivable by him under the pottah, this is no evidence that the pottah was not properly granted at the rent stated in it, nor is it conclusive evidence that the zemindar has ever received rent at the rate assumed by the Settlement Officer. Settlement-proceedings are primarily proceedings between landowners and the Government. If a landowner seeks to bind his tenant by the settlement-proceedings, he should show distinctly that they were parties to an inquiry held by the Collector into the nature and extent of their holdings: he cannot do so merely by showing the value of the land assessed by the Settlement Officer for the purpose of fixing the amount of revenue he has agreed to pay to Government.

The appeal must be dismissed with costs.

The 20th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Enhancement of Rent—Jurisdiction.

Case No. 307 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 21st November 1873, reversing a decision of the Moonsiff of Atteah, dated the 24th March 1873.

Bhugwan Chunder Roy Chowdhry and others (Plaintiffs), *Appellants*,

versus

Jegur Khan and another (Defendants), *Respondents*.

Baboos Kalee Mohun Doss and *Oomesh Chunder Banerjee* for Appellants.

No one for Respondents.

In a suit for enhancement of rent, if the plaintiffs are unable to show that they are entitled to the rent exactly as they claim it, the Court is not debarred from giving them a decree for such enhanced rent as it thinks ought to be paid—*e.g.*, to divide the land into different classes, and assign a separate rental to each description.

Couch, C.J.—This being a suit for enhancement of rent, an Ameen was deputed to inquire into the quantity of land held by the defendant, and to determine the rates at which rent was paid by the neighbouring ryots of the same class for lands of a similar description and with similar advantages. The Ameen made a report having examined witnesses. And the Moonsiff acted very much upon the evidence of the witnesses that the Ameen examined, not giving much, if any, weight to the evidence of the witnesses examined before himself. On appeal from the Moonsiff's decision, the Subordinate Judge has altogether rejected the evidence of the witnesses who were examined by the Ameen. He says it is not evidence; and he has decided the case independently of it. In this he is wrong. Section 180 of Act VIII. of 1859 gives power to the Court to direct a local investigation whenever it may deem it to be requisite or proper for the purposes of elucidating the matters in dispute. Although the Subordinate Judge thought that this was not a case in which a local investigation should have been ordered, the first Court had power to order it; and, that having been done, the report of the Ameen and the depositions are by the very words of section 180 to be taken as evidence in the suit, and to form part of the record. The Subordinate Judge, therefore, was wrong in saying that those depositions were not evidence; and as we cannot say what effect he would have given to them, we must remand the case in order that it may be reheard with them.

We may notice another error in his judgment. The plaintiffs, as he says, simply claim in their notice three rupees per pakee without stating what was for first or any other class of land. The Moonsiff, acting upon the report of the Ameen that there were two classes of land, made a decree accordingly. The Subordinate Judge appears to have thought that the plaintiffs could not recover enhanced rent estimated according to the class of the land, and that, if they were not able to show that the whole of the land was properly liable to a rent of three rupees, their suit must fail. He says: "It was wrong in the lower Court to divide the land into classes, and fix a rental of three rupees and two rupees eight annas." We think he is wrong in that. We are not aware of any authority that, if the plaintiffs are unable to show that they are entitled to the rent exactly as they claim it, they are not to recover the enhanced rent which the Court thinks ought to be paid. The plaintiffs do not bind themselves so strictly by the notice as that. This matter is mentioned now in order that, when the case is re-heard by the Subordinate Judge, he may avoid basing his decision upon any such view as he has put forward in his present judgment on this question. Possibly, to prevent another mistake it may be well also to point out to him that if he means by the passage, "I find that the "plaintiffs want to increase the rent on the "ground that the productive quality of the "land has increased, and that the value of "the produce has increased. There is no "satisfactory evidence that the productive "powers have increased, and as for the value "of the produce the plaintiffs are not defi-"nite," that the plaintiffs are not to have a decree for an enhanced rent unless they prove an increase in the productive powers of the land, although they may succeed in proving that they are entitled to an enhanced rent on the other ground—that it is the same as is paid for similar lands by the same class of ryots in the neighbourhood—he is also wrong.

The decree of the lower Court will be reversed, and the suit be remanded for a hearing.

Costs will follow the result.

The 20th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Finding in Former Suit—Evidence—Act I. of 1872, s. 13.

Case No. 399 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 3rd December 1873, reversing a decision of the Extra Assistant Commissioner of Gowhatty, dated the 20th September 1873.

Guttee Koiburto (one of the Defendants), *Appellant,*

versus

Bhukut Koiburto and others (Plaintiffs), *Respondents.*

Baboo Bussunt Coomar Bose for Appellant.

aboo Boikuntnath Doss for Respondents.

finding in a former suit, in which the question was between all the parties to the present suit, was to be ad nissible as evidence in this suit under the ce Act, s. 13, although the plaintiffs and defend- the present suit were in form co-defendants in mer.

ouch, C.J.—THE Judicial Commissioner ht in saying that this question—whether oora acquired the land—was settled in revious suit. In that suit the plaintiffs ed that Muthoora acquired the land. present appellant, who was the principal dant, alleged that he had not. There other defendants, some of whom sided the plaintiffs and alleged that Muthoora acquired the land, and others with the dant Guttee, who alleged that he had and the persons who sided with the iffs are the plaintiffs in the present suit. rue that the plaintiffs and defendants s suit were in form co-defendants former; but the position of the parties was that there were certain persons, asserting the case of the plaintiffs and of the defendants. The question was between all of them, and there was a that Muthoora had acquired the land. ecision of the Court in that suit is ible as evidence in this suit under n 13 of the Evidence Act.

he appeal must be dismissed with costs.

The 20th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Moonsiff vested with Powers under Act VI. of 1871, s. 29—Small Cause Court constituted under Act XI. of 1865—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Berhampore, dated the 10th July 1874.

Dwarkanath Dutt, *Plaintiff,*

versus

Bhathu Hawoldar, *Defendant;*

and

Chundoo Vistee, *Plaintiff,*

versus

Sodagur Vistee, *Defendant.*

Where a Moonsiff is vested, under Act VI. of 1871, with power up to Rs. 50, in a place in which there is a Court of Small Causes constituted under Act XI. of 1865 with jurisdiction extending up to Rs. 500, a suit of the nature cognizable by Small Cause Courts, being in amount or value below Rs. 50, ought, by the operation of Act VIII. of 1859, s. 6, to be instituted in the Court of the Moonsiff exercising Small Cause Court powers.

Case.—I HAVE the honor to request the favour of your obtaining from the Hon'ble Court their Lordships' opinion on the following point involved in these two cases:—

Both these suits are suits for claims of the nature cognizable under section 6, Act XI. of 1865, by Courts of Small Causes, the

value however not exceeding Rs. 50, and the defendants in both of them residing within the local jurisdiction of this Court. These plaints were presented subsequent to the date of the publication in the official Gazette of the order of the Local Government investing the Moonsiff with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to the amount of Rs. 50.

It is contended on behalf of the plaintiff that, when the Government has, without withdrawing the jurisdiction of this Court for the trial of cases up to Rs. 50, invested the Sudder Moonsiff with jurisdiction for it, this Court has not by that circumstance lost its jurisdiction with regard to such cases, and that the jurisdiction of the Moonsiff is only concurrent with that of this Court, so far as the trial of cases up to Rs. 50 is concerned.

To my mind the argument does not appear to be valid.

Section 47, Act XI. of 1865, enacts that, except as hereinbefore provided, the provisions of the Code of Civil Procedure shall, so far as the same are or may be applicable, extend to all suits and proceedings under this Act.

The provisions of the Code are therefore applicable to all suits and proceedings under Act XI. of 1865, unless they are repugnant to the provisions of this Act enacted before the 47th section.

Section 6, Act VIII. of 1859, of the Civil Procedure Code, enacts that every suit shall be instituted in the Court of the lowest grade competent to try it. If this section of the Code applies to suits under Act XI. of 1865, the Court of the Moonsiff invested with the jurisdiction for the trial of cases up to Rs. 50 would be the Court of the lowest grade competent to try the cases now in question, and this Court's jurisdiction would be ousted in regard to the trial of such suits. The use of the word 'shall' makes it the imperative duty of the person instituting a suit to institute it in the Court of the lowest grade competent to try it, leaving no option with him in the matter.

This section of the Code can only be shown to be inapplicable to suits under Act XI. of 1865 by showing that there is some provision in Act XI. of 1865, previous to section 47, repugnant to the provisions contained in section 6, Act VIII. of 1859. The only sections of Act XI. of 1865 previous to section 47 that have anything to do about jurisdiction are sections 6, 8, 12, and 16.

Section 6 declares what sort of cases are, according to their nature, cognizable by Courts of Small Causes.

Section 8 declares under what circumstances suits that are cognizable by Courts of Small Causes are triable by them.

Section 12 declares that, whenever a Court of Small Causes is constituted under this Court, no suit cognizable by such Court shall be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes. This section cannot be contended to be repugnant to the provisions of section 6 of Act VIII. of 1859. For, if the argument on which it is based were stretched to its legitimate consequence, the Moonsiff invested with the jurisdiction of a Court of Small Causes for the trial of suits up to Rs. 50 would, instead of having concurrent jurisdiction with this Court, have no jurisdiction at all to try such suits within the local limits of the jurisdiction of this Court. All argument that leads to such absurd conclusions cannot be considered to be valid.

In fact it appears to me that a Moonsiff invested with the jurisdiction of the Court of Small Causes for the trial of cases up to Rs. 50 under section 29, Act VI. of 1871 is a "Court of Small Causes constituted under this Act" within the meaning of section 12 of Act XI. of 1865. In order to find the meaning of the words "Courts of Small Causes constituted under this Act," I shall have to refer to section 3, Act XI. of 1865, which enacts that the Local Government may, with the previous sanction of the Governor-General of India in Council, constitute for the trial of suits under this Act Courts of Small Causes at any place within the territories under such Government.

Section 1, Act VI. of 1871, Bengal Civil Courts Act, 1871, makes section 29 of that Act applicable to Courts of Small Causes established under Act XI. of 1865. Section 29 of the Act enacts that "the Local "Government may invest within such local "limits as it from time to time appoints any "Subordinate Judge with the jurisdiction of "a Judge of the Court of Small Causes for "the trial of suits cognizable by such Courts "to the amount of Rs. 500, and any "Moonsiff with similar jurisdiction up "to the amount of Rs. 50, &c." This Act having been passed by the Governor-General of India in Council, the provision of previous sanction referred to in section 3 of Act XI. of 1865 must be

construed to have been accorded to the Local Government by section 29 of the Act to invest any Moonsiff with jurisdiction up to Rs. 50 as to the Local Government may appear fit.

The Local Government having invested the Sudder Moonsiff with jurisdiction up to Rs. 50 under section 29 has virtually constituted him a Court of Small Causes under Act XI. of 1865, so far as the trial of suits up to Rs. 50 is concerned.

Section 16 enacts under what circumstances the jurisdiction of a person invested with the power of a Judge of Court of Small Causes shall be concurrent with that of the Judge himself; it is only when the Local Government declared that a person invested with such powers shall exercise such powers in a Court of which there is a Judge appointed. In the present case, the Moonsiff had not been invested with the *power*, but with the *jurisdiction* of a Judge of a Court of Small Causes, and it has not been declared by the Local Government that he should exercise such jurisdiction in this Court. But, so far as it appears from the orders, his is a separate Court altogether.

Again, in the case of a person invested with the power of a Judge of the Court of Small Causes without limit to the value of suit, section 6 of Act VIII. of 1859 cannot, from the very nature of the case, apply; and, in consequence, his jurisdiction must necessarily be concurrent, or the Judge appointed under the 13th section would have to be abolished. Moreover, the fact of the Legislature having in one section said in so many terms that the jurisdiction of the person invested with the powers of a Judge of a Court of Small Causes is concurrent with that of the Judge appointed under section 13, its silence in section 29, Act VI. of 1871, on the point argues that it was not the intention of the Legislature to give the Moonsiff only concurrent jurisdiction for the trial of cases up to Rs. 50, but exclusive jurisdiction for it.

The jurisdiction of this Court for the trial of cases up to Rs. 50 was not expressly withdrawn, because there was no necessity for doing so; for, if section 6, Act VIII. of 1859, apply to these suits, the jurisdiction of this Court up to that amount will be virtually withdrawn by the investment of the Moonsiff with such jurisdiction up to that amount within the local limits of this Court.

I am of opinion that section 6, Act VIII. of 1859, does apply to these suits, and that I have no jurisdiction to entertain them. I return the plaints.

But, as doubts are entertained on the point, and as the plaintiff's pleader requests me to submit it to the Hon'ble Court for their Lordships' opinion, I solicit the favour of the Hon'ble Court's opinion on the point whether the Moonsiff, invested with the jurisdiction under section 29, &c., Act VI of 1871, has exclusive jurisdiction up to that amount, or concurrent jurisdiction with this Court up to the same amount.

I therefore return the plaints for presentation in the Court of the Sudder Moonsiff of the district invested with the jurisdiction of the Judge of the Court of Small Causes for the trial of cases up to Rs. 50, contingent on the opinion of the High Court.

The judgment of the High Court was delivered as follows by—

Jackson, J.—The question referred in this case by the Judge of the Small Cause Court at Berhampore is whether a Moonsiff, who has been invested by the Local Government with the jurisdiction of a Small Cause Court up to the amount of Rs. 50, has concurrent jurisdiction with a regular Court of Small Causes in the same place in respect of suits within that limit, or has exclusive jurisdiction over such suits. It appears to us that this question will be sufficiently answered by the expression of our opinion that, in the circumstances of this case, section 6 of the Code of Civil Procedure applies. There is no provision expressly contained in the Act which regulates the Courts of Small Causes—we mean Act XI. of 1865. It is not apparent perhaps that the Legislature contemplated the existence of two such Courts, that is to say, the Court of a Moonsiff so empowered and a regular Small Cause Court in the same place; but certainly there is nothing in the Act which forbids such an arrangement, and where we find one Court of Small Causes with jurisdiction extending up to Rs. 500 and another exercising jurisdiction up to Rs. 50, we have no doubt that the latter Court is the Court of the lowest grade competent to try the suit. Without, therefore, determining whether the Judge of the Small Cause Court has any jurisdiction, we think that, by the operation of section 6, Act VIII. of 1859, a suit below Rs. 50 ought to be instituted in the Court of the Moonsiff exercising those powers, and that the plaint presented in the regular Small Cause Court should be returned to the plaintiff for that purpose.

The 21st August 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree—Execution—Jurisdiction.

Case No. 113 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 16th April 1874, reversing an order of the Moonsiff of that District, dated the 3rd December 1873.

Sunkur Singh (Judgment-debtor), *Appellant,*

versus

Huree Mohun Thakoor (Decree-holder), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Rash Behary Ghose* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

The Court, whose duty it is to execute a decree, is bound to execute it in the shape in which the decree comes before it, and has no authority to permanently stay the execution of any portion thereof — *e. g.*, where a decree is for money and for ejectment in the event of non-payment within 15 days, the Court executing is not competent to extend the period for payment in order to save the judgment-debtor from the alternative consequence.

Phear, J.— In this case we are of opinion that the Lower Appellate Court was right in its judgment.

The question is whether, after decree has been made in a suit to which section 52 of Act VIII. of 1869 (B. C.) applies, the Court which is called upon to execute the decree can give a longer period than 15 days, if no period has been named in the decree, or, if any period has been named in the decree, then a longer period within which, if the judgment-debtor pays the amount decreed, further execution of the decree shall be stayed.

The leading authority on this matter is the decision of this Court, which is reported in a foot-note to the 18 Weekly Reporter, page 412. From the report which is there given, it is not easy to see what precisely was intended to be decided by the learned Judges who determined that case. But we have sent for the paper-book of that case ; and we find that the decision was passed upon special appeal in the due course of the suit itself, and not in the course of execution-proceedings. The decree which was appealed against was a decree passed upon the merits of the whole case between the parties, and in terms it prescribed a longer period than 15 days as the period within which, if the money were paid, execution of the decree should be stayed. And this Court, on special appeal, held that the Lower Appellate Court, in determining the matter on the merits between the parties, had power to make such a decree, notwithstanding the words of section 78, Act X. of 1859 (that is the equivalent section of the former Act to section 52 of Act VIII. of 1869, B. C.). But we do not see that either of the Judges who gave their opinion in that case intended to lay down that any other Court than the Court which had the merits of the case before it, and therefore was able to pass a sufficient and proper decree between the parties, could modify the terms of the decree with regard to the period within which the payment should be made in order to save the judgment-debtor from the alternative consequence of the original decree.

In the case which is before us, the decree was simply a decree for money and for ejectment in the event of non-payment within 15 days. No alteration or extension of time for the payment of the money was made by the Court which heard the case in the first instance, and there was no appeal from its decree. But eventually the Moonsiff, who was called upon to execute the decree, thought it right to stay execution of that portion of the decree which directed the possession of the property to be given up to the plaintiff notwithstanding that the money had not been paid by the judgment-debtor within the 15 days mentioned in the decree.

The Lower Appellate Court has reversed this decision of the Moonsiff passed in the execution-proceedings, on the ground that the Moonsiff was bound to execute the decree in the shape in which it came before him for execution, and had no authority to permanently stay the execution of any portion of the decree.

We think that the Lower Appellate Court is substantially right. If any application upon sufficient ground had been made to the Court of first instance for a review of its original judgment, or if it had appeared to the Moonsiff that the plaintiff was, upon any ground of equity which had arisen between him and the defendant since the passing of the decree, disentitled from claiming the full satisfaction of the decree which had been passed in his favour, then the case might

have been otherwise. But that had not taken place. The matter has arisen simply in the course of the execution of the original decree as it stands unaltered, and nothing has happened between the parties except that the defendant has satisfied the money-portion of the decree without doing so in time to obtain a right to have execution as to the remaining portion stayed. And it seems to us that the Moonsiff was bound, on the facts of the case, to execute that decree in the form in which it came before him.

We dismiss the appeal with costs.

The 21st August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mesne-profits.

Case No. 148 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 7th March 1874.

Swarka Lall Mundur and others (Objectors), *Appellants,*

versus

Nirunder Narain Singh (Petitioner), *Respondent.*

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusuf* for Appellants.

Mr. C. Gregory and *Baboo Gunesh Chunder Chunder* for Respondent.

Where a decree of the High Court simply directed payment, by way of damages, of the proceeds of a specified share of certain property, HELD that it left the lower Court nothing to determine except to assess the rents and profits of the share from which defendants had wrongfully kept the plaintiff out of possession.

Phear, J.—WE think that the Subordinate Judge was substantially right in this case. The decree awarding mesne-profits to the plaintiff did not leave the question so open to the lower Court as generally is the case. The direction of the High Court was, as far as we understand it, that the defendants—that is, the present appellants—should pay to the plaintiffs, by way of damages for the loss which they had sustained, the proceeds or rent and profits of the 16 gundas and 1 cowrie share of the property. By the nature of the case which was founded against the defendants, they had prevented the plaintiffs from realizing the proceeds of that share. And the Court simply directed that they should reimburse the plaintiffs that amount. It did not raise the question whether or not the judgment-debtors had themselves benefited by keeping the plaintiffs out of possession to the extent of the share. In this view of the case, the decision which has been quoted to us from the 21 Weekly Reporter, page 270, has not complete application. The explanation which is there given of the nature of the inquiry into mesne-profits related to an inquiry which was open from the very beginning, and which involved the question of liability as well as amount.

To repeat, as we understand the decree of the High Court in this case, it left nothing for the lower Court to determine except to assess the rents and profits of 16 gundas 1 cowrie share from which the defendants had wrongfully kept the plaintiff. The High Court itself declared the liability of the defendants to pay this money.

We dismiss the appeal with costs.

The 21st August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Dispossession under Colour of Magistrate's Order—Ejectment-suit—Jurisdiction.

Case No. 2940 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 22nd August 1873, affirming a decision of the Moonsiff of Nubeegunge, dated the 28th April 1873.

Deb Chunder Doss and another (Plaintiffs), *Appellants,*

versus

Joy Chunder Pal and others (Defendants), *Respondents.*

Mr. M. M. Ghose for Appellants.

Baboo Anund Gopal Palit for Respondents.

An ejectment-suit on the allegation that defendants had, under colour of an order of the Magistrate, dispossessed the plaintiff of private property belonging to him, was held to be cognizable by the Civil Court.

THE plaintiff is the special appellant in this case. The plaint alleges that the defendants, under colour of an order passed by the Criminal Court, have dispossessed the plaintiff on two dates, namely, on the 25th of Jeyt and the 7th of Augrahan, of private property belonging to, and in the possession

of, the plaintiff. Both Courts have held that they have no jurisdiction to entertain this suit. It is very evident from the decision of the Subordinate Judge that he has come to this finding with great reluctance. He says that the proceedings of the head constable were very unsatisfactory; that all his acts were done in collusion with the opposite party; and that these acts have been greatly injurious to the plaintiff. These are the words used by the Subordinate Judge, but that for all that the Civil Court must hold its hands and "bear with patience;" these also are the words of the Subordinate Judge. The upshot was that both the lower Courts refused to entertain the suit.

Now it appears that certain parties petitioned the Magistrate stating that other parties had obstructed what they called a public road. The opposite party was called upon to show cause. The parties appeared and alleged that the road was not a public one. Then it appears that the Magistrate ordered a jury to be appointed. The constable reported that the jury had not taken up the case. The Magistrate upon this ordered the Sub-Inspector to report on the matter. This order was passed on the 28th of June 1872. On the 3rd of July the opposite party represented to the Magistrate that the jury had not refused to act; that they were willing to do so; and that the report of the constable stating that the jury had refused to take up the matter was a collusive report. The Magistrate, without taking any evidence whatever, states that the jury had refused to act, and therefore it was too late to renew the application; and the Sub-Inspector was again ordered to report. The Sub-Inspector, however, appears to have delegated this duty to the very constable who had already reported in the matter as to the jury not having done their duty. The head constable goes to the spot, and he reports that the parties cited by the plaintiff and the opposite party, and also the parties who were in attendance, were asked and consulted by him, and that the result of their statements was that the road was not in their opinion a public road, but, says the head constable, from what other parties say, it appears that it is a "*go pat*," and that, during the cold season, cattle are in the habit of passing over it. Upon this report the Magistrate, without taking any evidence whatever, orders the road to be opened, but with this proviso that, as to that portion of it on which crops were standing at that time, the road was not to be re-opened until after the crops had been cut. Now the plaintiff in this suit was not a party to these proceedings of the Magistrate, and the proceedings of that officer were hasty if not illegal. Under section 310 of the Code of Criminal Procedure, a person to whom an order is issued under section 308 is bound to obey the same, or to appear before the Magistrate to show cause against the order, or he may apply to such Magistrate for an order for a jury to be appointed. Then section 311 says that, if the person to whom an order under section 308 is issued does not obey such order, or show cause against the same as provided in the Act, or apply for a jury within the time specified in such order, then the Magistrate who issued the order may proceed to carry it into execution at the expense of such person, and that no suit will lie in respect of anything necessarily or reasonably done to give effect to such order. Now, in this case, the plaintiff was not the person to whom such order, as is contemplated by the Code of Criminal Procedure, was issued, for, as already observed, he was not a party to those proceedings, and the present suit is not one to set aside the order of the Magistrate. It is an ejectment-suit on the allegation that the defendants have dispossessed the plaintiff of private property under colour of an order of the Fouzdaree Court. Such a suit, in my opinion, is cognizable by the Civil Court, and I therefore direct the Moonsiff to try it on the other issues laid down by him. Costs to follow the result.

The 21st August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Public Road—Obstruction—Right of Suit.

Case No 2191 of 1873.

Special Appeal from a decision of the Officiating Subordinate Judge of Tipperah, dated the 18th June 1873, reversing a decision of the Moonsiff of that District, dated the 28th December 1872.

Bhugeeruth Dass Koyburto and another (two of the Defendants), *Appellants,*

versus

Chundee Churn Koyburto and another (Plaintiffs), *Respondents.*

Appellants.

Baboo Bharut Chunder Dutt for Respondents.

No one has a right to sue in respect of the obstruction of a public road, even if he dedicated that road to the public, without showing that he has sustained particular inconvenience in consequence of the alleged obstruction.

THE plaintiffs brought this suit alleging that a road, which ran from east to west through the village and to the north of their house, is a public road; that the water or drainage of their house passes over a portion of that road; that the defendants, by raising that road in a particular spot, have obstructed the free drainage of the water of the plaintiffs' house; that on the first occasion of the obstruction arbitrators were appointed, but that, in spite of their arbitration, the defendants have again obstructed the passage of the water by raising the road, and therefore the plaintiffs bring this suit. The defendants denied the plaintiffs' right of user and their enjoyment within such period as to give them that right; they also stated that the land was a public pathway, and that they had thrown a little earth upon the pathway or on a portion of it where it was washing away, and that the plaintiffs have not suffered any particular inconvenience thereby, and that there is another way by which the drainage of the plaintiffs' house can be effected without inconvenience to any person. The first Court, the Moonsiff, found that, from the evidence of the plaintiffs' witnesses even, it was clear that the disputed land was a public pathway; and that is admitted by the pleader for the respondent. Then the Moonsiff says that the defendants have put a little earth upon a portion of this pathway, but that this has caused no injury to the plaintiffs as there would be no difficulty in the water of their house passing through the jhola land which lies in the southern portion of plaintiffs' homestead; that the plaintiffs have fraudulently caused these jhola or low lands to be demarcated in the map as high lands, but that it is proved by the evidence of the witnesses that the said lands were lower by the homestead; and under these circumstances the Moonsiff holds that the plaintiffs have not proved any prescriptive right to the user claimed, and that they have brought this suit out of enmity. He therefore dismissed the plaintiffs' suit. The Subordinate Judge has reversed that decision which he characterizes as unjust. The Subordinate Judge says that it is true that the road is a public road, but that when for more than 20 years the water of the plaintiffs' house has issued out through the pathway which was low, and no one of the place felt any inconvenience to use it as a pathway, it cannot be at all just and proper to raise that pathway, and thereby obstruct the passage of water from the plaintiffs' house.

The grounds taken in special appeal are that the lower Appellate Court is wrong in saying that the evidence proves enjoyment of this water passage by the plaintiffs for more than 20 years; that as both Courts have held that the road is a public road, and as the first Court has held that the plaintiffs had not suffered any inconvenience by the fact of the defendants having placed a small quantity of earth on this road, the suit ought to have been dismissed. I think, on both grounds, that the decision of the Subordinate Judge is wrong in law. The evidence of the witnesses has been read to me, and they do not prove a right of user on the part of the plaintiffs for a period of 20 years. The present case is governed by the new law of limitation, and as the plaintiffs have failed to prove their right of user for 20 years, their suit must fail. Then there is another point on which the suit is manifestly untenable, namely, that the road being a public road, it was for the plaintiffs to show that they had sustained particular inconvenience in consequence of the alleged obstruction on a public road. The leading case on this point will be found in Vol. XII., Weekly Reporter, page 160. The reasons given for holding that no one has a right to sue in respect of the obstruction of a public road, even if he dedicated that road to the public, without showing that he has sustained particular inconvenience, are fully set out in that decision, in which I entirely concur. The decision of the Subordinate Judge is therefore reversed, that of the Moonsiff restored, and this appeal decreed with costs. Pleaders' fees, 1 gold mohur.

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The 24th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Act VIII. of 1859, s. 2—Res Adjudicata—Cause of Action—Origin of Right.

Case No. 438 of 1874.

Special Appeal from a decision of the Officiating Second Subordinate Judge of Mymensing, dated the 9th December 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 21st March 1872.

Kashee Kishore Roy Chowdhry and another (Plaintiffs), *Appellants,*

versus

Kristo Chunder Sandyal Chowdhry (Defendant), *Respondent.*

Baboo Rashbehary Ghose for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

A suit for a declaration of plaintiffs' right to a chur, which they claimed as an accretion to Mouzah L, was held to be barred, under Act VIII. of 1859, s. 2, by a judgment in a former suit, in which they had claimed the same land as an accretion to Mouzah R, because, whether by accretion to the one estate or to the other, the question in both suits was that of title by accretion.

A complainant is bound to bring forward in his suit all the grounds of origin of his right. A difference in the origin of the right is not a matter which makes a different cause of action.

Couch, C.J.—THE present suit is brought for a declaration of the right of the plaintiffs to a chur called Poomarma, and they claim to be entitled to be made parties to the settlement of it. The question in this appeal is, whether they are barred from bringing the present suit by the judgment in the former suit brought by them. Both the lower Courts have held that they are. The former suit, it is admitted, was brought for the same land as this suit is for. It was for the same chur; but it is said the plaintiffs are not concluded by the judgment in it, because in that case the chur was claimed as an accretion to Rughoorampore, and now it is claimed as an accretion to Mouzah Lukhidia. In the plaint in the former suit the chur was described as an accretion to Rughoorampore and others. The Moonsiff appears to have thought that this included Lukhidia, and he gave a judgment for the plaintiffs upon the ground that it was an accretion to both the mouzahs. On appeal the Subordinate Judge was of opinion that the plaint did not set up an acquisition of the right by an accretion to Lukhidia, and he decided accordingly. Now, I think, if we take it either way, that the plaint in the former suit did allege acquisition by accretion to Lukhidia, or that it did not, and only alleged an acquisition by accretion to Rughoorampore, the judgment in that suit is a bar to the claim of the plaintiffs in the present suit.

The case is not distinguishable from the decision of the Judicial Committee of the Privy Council in Woomatara Debea v. Wooma Soonduree Dassee, * 11 Bengal Law Reports 158. Their Lordships in that case say:—"The first question that occurs "to their Lordships upon that section "(section 2, Act VIII. of 1859) is, what is "meant by the cause of action? And in the "present case they are clearly of opinion that "the cause of action in both suits was the "dispossession of the appellant by the fixing "of the boundary which is now complained of "and the other proceedings which culminated "in the decision of the Judge in the Act IV "case. The result of those proceedings "was to affirm the possession of the defend"ants in the land, which was the subject of "the first suit, and to leave the party who "felt aggrieved by them to her remedy by "a civil suit." In this case what has obliged the plaintiffs to bring the action is the settlement with the defendant by the Government, which the plaintiffs say was an encroachment upon their right. The judgment proceeds:—"The first suit was accordingly brought, and in the present suit both "Courts have found, and it has been fairly "admitted at the bar that the land which is "now in dispute is a portion of the land "which was then sued for. The identity "therefore, of the subject-matter of the two "suits is admitted, and, as their Lordships

* 18 W. R. (P. C.) 163.

"have already said, the cause of action in "both was the dispossession of the appellant "by reason of the proceedings then taken." In the present case the identity of the land is admitted, and the immediate cause or occasion of the action is the dispossession. I do not understand their Lordships as alluding here to more than that. It was not necessary for them to define precisely the meaning of cause of action, or what constitutes the cause of action. They then say: "Now it "is perfectly clear to their Lordships upon "the proceedings that the real question in "issue to be determined between the parties "then was, whether the lands then sued "for, which included the lands now sued "for, belonged, as of right, to the talookdar; "or whether they fell within lot 32, which "belonged to the defendants? And it was "open to the plaintiff, the present appellant, "in the former suit to shape her title in "either of three ways." Their Lordships then mention the three ways in which the title might have been shaped. In the present case the real question to be determined in the former suit was, whether the plaintiffs or the defendants were entitled to the chur: they might have shown that they became entitled to it by accretion to Rughoorampore, or by accretion to Lukhidia. That would be only the mode of acquiring the title. Whether it is by accretion to the one or the other, there is no difference in the title. It is a title by accretion; and this was the question which was to be tried, whether the plaintiff had a title to the chur or the defendant? What their Lordships say is applicable to this case. It was open to the plaintiffs in the first suit to shape their case by proving that it was an accretion to Rughoorampore or to Lukhidia. If they did not attempt to show that it was an accretion to Lukhidia, they must, according to this judgment, take the consequences of it. Their Lordships then, speaking of the plaintiff in that case, say: "With the full knowledge of all "the circumstances she chose to say, 'I "'admit that I am in possession of all that I "'was entitled to under the *dowl*, but I claim "'this land, the whole of it, as *towfeer* land.' "The contention now is that, although she "saw fit to take that course then, she has "now a right to fall back upon the other "title." This is like what the plaintiffs contend for now. Although they thought it fit, according to the decision of the Subordinate Judge, to rely only upon accretion to Rughoorampore, they now ask to be allowed to say that there was an accretion to Lukhidia. "It appears to their Lordships that that contention cannot prevail "against the clear terms of the section in "question, or indeed upon principle." They then refer to the judgment delivered by Lord Westbury in the case of Kattama Nauchear in 11 Moore's Indian Appeals, page 72,* and conclude by saying that "the "present case is even stronger than that "referred to, inasmuch as in the latter "the party was a defendant in the first, "and plaintiff in the second suit; whilst the "appellant is plaintiff in both suits, and as "such had in both the means of shaping the "case as she chose." This judgment is conclusive that the plaintiffs in this case having the means in the former suit of proving the title by accretion to Rughoorampore, or by accretion to Lukhidia, or by accretion to both, they are barred by the judgment in that suit, and cannot bring another setting up a title by accretion to Lukhidia; and whether the Subordinate Judge put a proper construction upon the plaint or not is not material. If they did set up a title by accretion to Lukhidia, that has been decided against them. If they did not, they ought to have done it, and having omitted to do it, they cannot do it now.

The judgment of Mr. Justice Holloway in the case reported in III. Madras Reports, page 320, supports this view. I ought not perhaps to refer to a judgment of the High Court of Madras as an authority in support of the decision of the Judicial Committee of the Privy Council; but it is a very learned and able judgment, and on that account I notice it. Mr. Justice Holloway says: "I "shall assume as perfectly clear upon principle that a decree which is to bar must be "a final decree upon the same question of "right between the same parties. In some "of the English cases this principle is more "or less clearly recognized; but it would "not be difficult to show that it will explain "all of them which have been well decided. "The identity of the question will not be "destroyed;" and he states six instances in "which it will not; the sixth being: "By the "origin of the right being different (Sav., "VI. 422)." That is all that can be said in this case, that the origin of the right was in the one case accretion to Rughoorampore, and in the other accretion to Lukhidia. That does not destroy the identity. The learned Judge notices the general rule saying: "He "therefore who sues *in rem* is *primâ facie*

* 2 W. R. (P. C.) 31.

"considered to have offered for determination "all possible grounds upon which the object "of the action can be said to belong to him, "and a decree dismissing that action will "conclude him"—which applies precisely to this case. The plaintiffs must be considered to have offered in the first suit all the possible grounds upon which the object of the action, namely, the chur, could be said to belong to them. He then notices an exception to the rule on which there has never been any dispute that ownership subsequently acquired makes another cause of action; and says that the other exception, which he says has divided the great jurists of the last generation, is contained in the words of Paulus: "But when I sue for a thing the cause of "my saying that the thing is mine not being "expressed, all the causes (of its being mine) "are included in the same suit;" and noticing the difference of opinion as to the meaning of this, he gives as his opinion that where a "complainant has expressed in his first "plaint a definite and single ground of origin "of his right, in this case the dismissal does "not hinder him from complaining later upon "another ground of origin." This seems to be at variance with what he had stated in the previous page; but the distinction cannot be allowed to exist in this country, because it has been decided by the Judicial Committee, as well as in other cases in this Court, that the complainant is not at liberty to do so. According to the judgment of the Judicial Committee, the complainant must avail himself of all the grounds of origin of his right. Whatever grounds there are, the plaintiff ought to bring them forward in his suit. And there are excellent reasons why that should be so. They are stated by Mr. Justice Holloway himself at the end of his judgment, where he says: "It is most desirable and very com-"mendable for a Court to compel the bringing "forward of every ground for relief, and, by "deciding upon it, to place a check upon "constant litigation."

In this case the chur, the subject-matter of the suit now before us, is the same as was claimed in the former suit, and the right, namely, the title by accretion, is the same. The difference is in what may be called the origin of the right, namely, whether it is an accretion to Rugnoorampore or to Lukhidia. That is not, according to the judgment of the Judicial Committee, a matter which makes a different cause of action.

We think that section 2 of Act VIII. of 1859 is applicable, and that the appeal ought to be dismissed with costs.

The 24th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Execution—Attachment—Act VIII. of 1859, s. 270.

Regular Appeals from a decision passed by the Second Subordinate Judge of 24-Pergunnahs, dated the 15th September 1873.

Cases Nos. 312 and 317 of 1873.

Srish Chunder Sircar Chowdhry and another (two of the Defendants), *Appellants,*

versus

Shib Narain Pal (Plaintiff), *Respondent.*

Baboos Tarucknath Sen and *Gopal Lall Mitter* for Appellants.

Baboos Hem Chunder Banerjee and *Brojonath Mitter* for Respondent.

Case No. 321 of 1873.

Shib Narain Pal (Plaintiff), *Appellant,*

versus

Koonjo Kaminee Dabee and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Brojonath Mitter* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

Several decree-holders, executing various judgments, for the most part of very ancient date, against the estate of one R, were in contest in respect of the proceeds of a Government promissory note, which had long been under attachment, but was eventually sold, with accumulated interest, for Rs. 69,000, in accordance with an expression of the High Court's opinion upon appeals presented by two of the decree-holders. Upon that opinion being made known, one of the decree-holders (K K) made, as it were, a fresh attachment of the note, and applied for the sale of it; whereupon it was sold in the Court of the Sub-Judge, who ordered payment in full to K K and two others (B and S), who were acting jointly in execution, and the surplus to be rateably divided among the other execution-creditors. One of these then brought a suit to establish a preferential claim.

HELD that K K, who, as soon as it was ascertained that the fund might be so made use of, first applied for the sale of it, was the person who came under the Code of Civil Procedure, s 270, and was entitled to payment in full: and that B and S had been overpaid, and were liable to repay the surplus to the other decree-holders.

Jackson, J.—THESE Regular Appeals, Nos. 312, 317, and 321, are all by parties

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interested against one decision of the 2nd Subordinate Judge of 24-Pergunnahs, and they relate to his decision in the suit of Shib Narain Pal against the several parties named, who were, as well as himself, parties executing various judgments against the estate of Rajah Damoodur Chunder Deb, deceased; and the contest was in respect of a fund of Rs. 69,000, arising out of the sale of a Government promissory note. These decrees, which the various parties have been executing, are, for the most part, of very ancient dates, and the Government promissory note, which has now been sold, appears to have been under attachment as long ago, at any rate, as 1845, in proceedings taken under the old law of execution, and in some measure under the directions of the late Sudder Court. There appears to have been an impression, upon what founded is not precisely known, that this fund could not be sold in satisfaction of the several decrees; and accordingly the parties interested appear to have limited themselves to attaching it with a view to obtain payments on account out of the interest which accumulated; but the litigation went on, and the result seems to be that interest was suffered to accumulate, and the promissory note, with the accumulated interest, was sold for the sum of Rs. 69,000. The sale took place, it appears, in consequence of an expression of opinion by Mr. Justice Phear in a case which came before him upon appeals preferred by two of the decree-holders, *viz.*, Koonjo Kaminee, who is defendant No 1 in this case, and Brindabun Chunder Sircar, who is defendant No. 2; and upon that expression of opinion being made known Koonjo Kaminee made, as it were, a fresh attachment of the promissory note, and applied for the sale of it, whereupon it was sold, and the sale took place in the Court of Baboo Mohendro Nath Bose, who was then the Second Subordinate Judge; and, according to the view which he took of the rights of the parties, he placed Koonjo Kaminee and Brindabun and Srish Chunder, who were then acting jointly in execution of case No. 32, on the same footing, and he ordered payment to them in full, and the surplus, after paying them, to be divided rateably amongst the other execution-creditors. This suit was brought by Shib Narain Pal, one of them, who considered himself preferably entitled before other decree-holders, in consequence of his diligence, to payment in full. Baboo Brojendro Coomar Seal, who tried the suit, decided that the party who is to be reckoned as the first attaching creditor, and who therefore is entitled to be satisfied in full, is Koonjo Kaminee, the old appellant in case No. 163, who had applied for the sale of the property after the decision of Mr. Justice Phear; and he accordingly held that the amount of her decree should be first deducted, and that defendants Nos. 2 and 3, who are now separate, but who were the joint decree-holders in the execution case No. 32, having received more than they were entitled to, should pay to plaintiff Rs. 1,936 as the amount to which he was rateably entitled on account of his 8-annas share in the execution cases Nos. 124 and 125.

Against this decision first comes the appeal of defendant No. 3, and then that of defendant No. 2, whose cases in fact are similar. They contend that, by reason of their appeal, which was heard along with Koonjo Kaminee's, they are entitled to stand on the same footing with her. We think, however, that the view taken by the lower Court is the correct view under section 270 in the circumstances of the case. The previous decree-holders evidently had no intention of selling this property. It does not appear that they were restrained by any prohibition of the Sudder Court from so doing. Their object was evidently to impoverish the fund by drawing interest on their decrees, and not to obtain satisfaction of those decrees by sale of the promissory note. We think, therefore, that the person who, as soon as it was ascertained that the fund might be so made use of, first applied for the sale of it, is the person who comes under section 270, and is entitled to a payment in full. In that way, by the failure of this first ground of theirs, it is clear that these defendants had been over-paid in the first instance, and were liable to refund to the other decree-holders the surplus which they had received, and therefore we think the plaintiff is justly entitled to receive from them the amount ordered by the first Court. It was sought to raise on the part of these defendants the question whether the plaintiff's execution had not been barred, and whether consequently the suit ought not to fail on that ground. We think that the question of limitation having been raised, and apparently *bonâ fide*, between the decree-holder and the defendant who was the person interested in raising it, and having been decided in favour of the plaintiff, the present appellants are not entitled now to go into that question.

Then there is another appeal on behalf of the creditor, who considers that he ought to have been paid in full, inasmuch as he was

the earlier attaching creditor. Now it has not been very clearly shown who really was the creditor who took out the first attachment, and even if we assume that it was the plaintiff, it appears to us in the circumstances of the case, and looking to the very ancient dates of the proceedings and the evident intention of the parties not to sell the property when each attachment was made, the plaintiff cannot be regarded as being the first attaching creditor within the purview of section 270 of Act VIII. of 1859, as the attachment contemplated in the Code of Civil Procedure is an attachment with the intention of sale. Under these circumstances, we think the decision of the lower Court is on the whole correct, and is the most satisfactory decision at which he could arrive on this rather complicated case. We think, therefore, that all these appeals must fail. As the case is not a very clear one, we think, under the circumstances, we should make no order as to costs.

The 24th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Limitation—Execution—Joint-decree—Act XI. of 1871, sch. II., art. 167.

Case No. 161 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 31st March 1874.

Huruck Roy (Judgment-debtor), *Appellant,*

versus

Zuhooree Mull and others (Decree-holders), *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboos Mohesh Chunder Chowdhry and *Roopnath Banerjee* for Respondents.

Where one of several joint decree-holders made under Act VIII. of 1859, s. 207, a proper application for execution, the date upon which the application was made was held to constitute a point of time from which would run the limitation of three years provided in Act IX. of 1871, sch. II., art. 167.

Phear, J.—In this case the judgment-debtor objects that the decree is barred by lapse of time in respect of three instalments, namely, the instalment made due by it on the 7th April 1868, another due on the 27th March 1869, and the third on the 15th April 1870. And the merits of this objection depend in the first place upon the question whether or not an application for execution, which was made by Gobindo Ram on the 14th June 1871, was an application for the execution of the decree, or rather for enforcing payment of the instalments which were at that time due under the decree, within the meaning of Article 167 in the second Schedule of the Limitation Act.

It appears that the decree was a decree made against the judgment-debtor in favour of several persons jointly, of whom Gobindo Ram was one; and when Gobindo Ram made his application, it was found that it could not be executed within the jurisdiction of the Court which passed the decree, and accordingly it became necessary that steps should be taken under sections 285 and 286 of the Civil Procedure Code for transmitting the decree to the Tirhoot District Court for execution. As a preliminary to the issuing of process of execution in the Tirhoot Court, notice was issued to the judgment-debtor under section 216. And there is no doubt that this notice is very defective, and insufficient in its terms. We were led at first by a consideration of this only to suppose that Gobindo Ram's application of the 14th June 1871 might not have been a true application for the execution of the decree. But now that we have had the application itself read to us, we are of opinion that it conformed substantially to the requirements of section 212 of the Civil Procedure Code. It gave the title of the suit and the amount of the decree, and stated the fact that Gobindo Ram was one only of seven joint decree-holders; and it further in terms asked that a proper certificate should be sent to the Tirhoot Court to enable the decree to be there executed against the judgment-debtor. On the whole, it appears to us that this was such an application for execution of the decree as might be lawfully made by one of several joint decree-holders under section 207 of the Civil Procedure Code; and it was granted by the Court, if not in express words, yet by the issuing of the certificate which was asked for, and the transmission of the record to the Tirhoot Court. This being so, the date upon which this application was made constitutes a point of time from which the limitation of three years would thenceforward run.

And the next application, whether we take it to be that which was made on the 10th September 1872, or that which was made on

the 16th April 1873, was within the period limited by Act IX. of 1871 for the execution of a decree. And this last application is beyond question a proper application made by six out of the seven decree-holders for the execution of the entire decree on behalf of the whole of the decree-holders, and is therefore a proper application to be granted and given effect to, provided it is made within time and is not barred. The Judge has arrived at the conclusion that it is not so barred, and has accordingly granted the application. It seems to us that he was right, and that this appeal ought to be dismissed with costs.

The 25th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Suit by Reversioner—Minor's Admissions—Issues.

Case No. 2790 of 1873.

Regular Appeal from a decision of the Subordinate Judge of Sarun, dated the 26th August 1873.

Jugdeep Narain Sahee (Plaintiff), *Appellant,*

versus

The Court of Wards on behalf of Luchmee Pershad (one of the Defendants), *Respondent.*

Mr. R. T. Allan and *Baboos Kali Kishen Sen* and *Jodoonath Sahoy* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

In a suit by a person claiming as the ultimate heir, in reversion, to the estate of a deceased widow, it was held that the plaintiff was bound, before he could be allowed to succeed against the minor in possession, to pledge himself to a specific case and to prove that case, and the Lower Court was held to have done wrong in raising an issue which was not based and moulded upon some specific affirmative allegation made as part of the plaintiff's case, thus putting the minor to the peril of such an issue merely on a general negative statement made by his guardian.

Phear, J.—On the state of the family, which is admitted by the plaintiff, it seems very clear that the plaintiff is not entitled to succeed in this suit to any extent unless his father Soturhun Sahee died after the death of Mussamut Wooma Koer. And the Subordinate Judge has no doubt raised the following as the fourth issue between the parties: "Whether Soturhun Sahee, the plaintiff's father, died before Mussamut Wooma Koer or not, and how does that affect the plaintiff's claim?" But in delivering judgment he says that, "since the suit is liable to dismission on the above grounds (that is, in view of the genealogical table filed by the plaintiff himself), the second and fourth issues recorded are rendered superfluous, and need not be tried and determined in this suit."

It thus appears that the Subordinate Judge designedly neglected to try the issue which was just read out, and if that issue be put out of the way, *i.e.*, if it be not determined in favour of the plaintiff, the judgment is a right one, and the plaintiff's suit was very properly dismissed.

So that the only question which we are called upon to consider is, whether or not, under the circumstances which have attended the trial of this suit in the Court below, the plaintiff is entitled to have that issue or an equivalent issue tried or not.

Now it is to be remembered that this is a suit brought by a person who makes his claim upon the strength of being ultimate heir of the ancestor of Mussamut Wooma Koer in reversion on the death of intervening female heirs. And when the case was first brought into Court, the plaint contained no statement of the relationship of the plaintiff to the ancestor, or of any facts from which his right of inheritance might be inferred. The suit is, moreover, brought against a minor, and therefore the burden of establishing the material facts of his case lay in an eminent degree upon the plaintiff. He could derive little or no benefit from admissions made on the part of the minor defendant. And when the case was on a late

occasion before this Court upon a former appeal, it was found necessary to reverse the decision of the Lower Court, and to send back the case for re-trial. In the judgment which was then given it was said that "the plaint is even so imperfectly drawn as "not to disclose in any degree the mode in "which the plaintiff proposed to make out "his right of inheritance." And in directing the case to be remanded for re-trial, this Court added, "that the plaintiff must mend his "plaint by putting in a written statement of "the mode in which his title by inheritance "arises, and the defendant must have an "opportunity of putting in a written state-"ment in answer to that, and after that shall "have been done the issues upon which the "case is to be tried must be re-framed and "settled."

This course has been followed. The decision of the Subordinate Judge, as has been already mentioned, was given in favour of the defendant, and hence this appeal.

Now, when we look at the written statement which appears in the record as the written statement of the plaintiff filed after remand, we still find that it is defective in the same way, though perhaps not in the same degree, as the original plaint itself was defective. It fails to set out distinctly the title of the plaintiff to this property. And, as has already been mentioned, upon the state of the family which is set forth by the plaintiff, it is necessary for him, in order to make a title to the property for which he sues, to add the fact that his father died after the date of the death of Mussamut Wooma Koer. But there is not a word in this written statement, although it is intended to serve as an amendment of the plaint, there is not a word about the plaintiff's father, the date of his death, or anything of the kind. In short, there is nothing even now in the plaint and written statement taken together to show specifically what is the title of the plaintiff personally to the property, which is the subject of suit. In the 3rd paragraph of this written statement it is said:—"According to shastras and family usage, there "is, at the present moment, no other heir "than your petitioner to the estate of Baboo "Shew Ram Sahee, as is evident from the "genealogical table affixed to the written "statement." And this is the sole specification of the plaintiff's claim which is given any way. But the genealogical table, while it gives the names of the different members of the family, is almost entirely silent as to the dates of the death of those who are supposed to be dead. Indeed, it does not even say that they are dead. Yet the right of the plaintiff entirely depends upon the actual state of the family as it existed at the time when Wooma Koer died.

It would thus appear that the plaint, considered as amended by the written statement of the plaintiff which now stands upon the record, is very nearly, if not quite, as defective as was the original plaint in regard to the matter of the plaintiff's title.

We find further from the printed paper book that this written statement is not the only statement of his case which the plaintiff has presented to the Lower Court since the remand order was made. He first filed a written statement, which so little complied with the directions of the remand order that the Subordinate Judge refused to admit it.

We refer now to these facts because it is extremely important to notice, and is perhaps significant of the true character of the plaintiff's case, that even after repeated opportunities have been afforded him for the purpose, the plaintiff has to the last neglected to state to the Court the time of the occurrence upon which his right rests. After this review of the state of the case, we are now in a position to say that the fourth issue, which was raised by the Subordinate Judge, was not framed upon any allegation of the plaintiff. In truth, it seems to have originated entirely in the 1st paragraph of the written statement, which the defendant filed after remand. That paragraph is in these words:—"As Soturhun Sahee, "father of the plaintiff, died previous to the "demise of Mussamut Wooma Koer, the "plaintiff has no right of inheritance to the "disputed property under shaster."

This is a general negative statement made by the guardian of the minor in his defence, and amounts to hardly anything more than an assertion to the effect that the plaintiff has no case. In the absence of any specific statement on the part of the plaintiff with regard to his father's death, the lower Court, which had to try the questions of fact necessary to the ascertainment of the plaintiff's cause of action and title, ought not to have raised the issue which it did raise. It seems to be plain enough that the issue ought not to have been framed in its present terms. It was not right to put the minor to the peril of such an issue as the fourth is in its present form. The plaintiff was bound, before he could be allowed to succeed in this suit against the minor who is in possession of the property, to pledge himself to a specific

case, and to prove that case. He ought not to have been left with so much latitude as the fourth issue in its present words gives him, namely: "Whether Soturhun Sahee, the "plaintiff's father, died before Mussamut "Wooma Koer or not?" This issue involves two most important facts, namely, the death of Soturhun Sahee and the death of Mussamut Wooma Koer. And the plaintiff ought to have been made to pledge himself to a specific statement as to the occurrence of each of these facts. Instead of framing an issue of this sort merely upon the general denial of the plaintiff's case given on behalf of the defendant, the Court ought to have based and moulded the issue upon some specific affirmative allegation made as part of the plaintiff's case. No such allegation appears. And therefore we think that the issue ought not to have been raised, and therefore, also, we further think that it was not necessary in the trial which was had in the Court below to try this issue. It has been pressed upon us by the learned pleader who has appeared on behalf of the plaintiff that we ought to give the plaintiff at any rate one more opportunity of putting his case rightly before the Court. We have asked him whether he can inform us what the case of the plaintiff would be on this particular point if we thought proper again to remand the suit for re-trial. But he has been obliged to admit that he is not in a position to do so. The matter then stands thus, that even at this day the advisers of the plaintiff in this Court are unaware of the case which the plaintiff desire to put forward with regard to his title to inheritance. It was even suggested to us during the argument that possibly the devolution of the inheritance upon the plaintiff may have happened by reason, not of the death of his father, but of his having become an ascetic and retired from the world. So little certainly does there seem to be with regard to the nature of the case upon which the plaintiff relies for success in this suit! And it seems to us that this point is one of cardinal importance, because the present suit is only the latest phase of litigation of very long standing, indeed. In 1861, a suit was brought by as many as 16 persons claiming to be entitled to this very same property as heirs in reversion, upon the death of Mussamut Wooma Koer's mother. And the present plaintiff was one of the plaintiffs in that suit. It is very remarkable, however, that neither in the description of the parties to that suit, nor in the plaint, nor elsewhere in the proceedings, is there a single word to indicate that the present plaintiff's father was then alive. And yet, if the plaintiff is to succeed in the present suit, as has already been more than once stated, his father must at that time have been alive, and have been one of the persons entitled to sue in that suit for the property. Indeed, the present plaintiff could not, if his father were then alive, have been an heir, and could not, in other words, have any strict right to be a plaintiff in that suit. No doubt, in family-suits, which are brought to recover property, it often happens that many members of the family, who are not strictly parceners in the property, are joined as parties with the actual parceners. And probably no sound inference as to Soturhun's death could be raised merely from the fact of the present plaintiff's name appearing as plaintiff in that suit. But it is significant that not only does his father not appear as a party, but the absence of his name is not accounted for in any way. That suit went by appeal to the High Court, and an appeal against the decision of the High Court was preferred to the Privy Council, or at any rate an appeal to the Privy Council was instituted; yet, in all these proceedings, which were antecedent to this litigation, there is not one word to indicate that the present plaintiff's father was alive, or one word to show, if he was not alive, when he died, and when his interests in this estate ceased and devolved on the present plaintiff.

Moreover, the appeal to the Privy Council was put an end to by a compromise between the litigant parties. At that time, it is said, the present plaintiff's interest had been assigned to one of his co-plaintiffs in that suit, and for that reason his name was excluded from the compromise; yet again in this document, which recited the facts which had occurred, and stated the relations between the parties, no mention in any way was made of the present plaintiff's father. Still later again, upon the death of Wooma Koer, the present plaintiff unsuccessfully applied to the Judge for a certificate to collect her debts, and in his petition asking for this certificate he set out, as of course he was bound to set out, the right upon which he claimed the certificate. If the present contention which is made on his behalf before us is correct, he could at that time have only been entitled to the certificate on the hypothesis that his father had died in the interval between the death of Wooma Koer and the application for certificate, for he could, in the lifetime of his father, have no right to the certificate;

that is, it would only be in the event of his father having died subsequently to the lady whose debts he desired to collect, that he would have any right to the certificate. But in this petition he does not say anything of this kind. He makes no mention of his father whatever. And lastly, in the plaint as originally filed in this suit, as has been already stated, there was not a fact mentioned which bore upon his right to inheritance. In the two written statements which have been filed since, there is equally an absence of statement of facts upon this point. So that on the whole we find that the plaintiff has persistently for a long course of years been entirely silent with regard to the date of the death of his father upon occasions when, if it be assumed that his present contention is a true one, he must almost necessarily have stated his father's existence and the reason why he came into Court instead of his father.

On the whole, it seems to us that there is no reason why we should remand this case to the lower Court merely for the purpose of enabling the plaintiff to amend his plaint in this particular point—a point to which his attention must have been drawn very many times before, and which he has had very many opportunities to make clear if he had chosen to do so. The record being taken as it has come up to us, it is very plain that the plaintiff's suit ought to be dismissed.

There is an additional circumstance which is not without very considerable weight in this case, namely, that, according to the compromise which has been already alluded to and the statement which has been made before us in Court, the present plaintiff assigned his interests in the matters in suit to one Kuldeep Narain, his uncle (or one who stands in the uncle's generation of the family), before the compromise was come to. And it would seem that the only reason why the present plaintiff was excluded from that compromise was because Kuldeep Narain, his uncle, took his place by virtue of that assignment. If that be so, and if that state of things still continues, then the present plaintiff has no right of suit whatever. And it is not pretended that he has got a re-assignment from Kuldeep Narain.

On the whole it seems to us that the plaintiff has entirely failed to show either in his plaint or in his subsequent written statement that he has any merits which ought to be sent down to be tried. We therefore dismiss the appeal with costs.

The 27th August 1874.

Present:

The Hon'ble J. B. Phear and G. G Morris, *Judges.*

Suit by Reversioner—Zur-i-peshgee Deed by Widow.

Case No. 2429 of 1873.

Special Appeal from a decision of the Subordinate Judge of Sarun, dated the 23rd August 1873, reversing a decision of the Moonsiff of that District, dated the 12th March 1872.

Rughoobar Doyal Singh (Defendant), *Appellant,*

versus

Bhekaree Singh and another (Plaintiffs), *Respondents.*

Mr. C. Gregory for Appellant.

Moonshee Mahomed Yusuff for Respondents.

In a suit by an alleged reversioner to set aside a zur-i-peshgee deed and ikrarnama executed in favour of defendant No. 2 by A K, the widow of one F S, the defence was that the first defendant K M was the daughter of A K and F S, and she being alive, plaintiff had no right. The first Court found, in favour of the defendant, that K M succeeded to the property as heir of F S. The Lower Appellate Court found that the zur-i-peshgee deed was valid, and gave plaintiff a decree for possession conditional on paying the amount of money secured thereby:

HELD that this decree might have been good in a redemption-suit in which the defence might have taken a different form; but, under the circumstances, the suit ought to have been dismissed.

Phear, J.—WE think that the decision of the Lower Appellate Court is wrong.

The plaintiff sought to set aside a certain zur-i-peshgee deed and an ikrarnama, which were executed in favour of the defendant No. 2 by Mussamut Anundee Kooer, the widow of one Fakeer Singh, while in possession of this property to which they relate. The case of the plaintiff is that the Mussamut took the property as the widow of Fakeer Singh for the estate of a Hindoo widow, and that he was the next heir to Fakeer Singh alive at the death of Mussamut Anundee Kooer. The defendant, on the other hand, says that Mussamut Komul Mookhee, the first defendant, was the daughter of Anundee Kooer and of the deceased Fakeer Singh, and that she being alive the plaintiff has no right.

There can be no doubt that the issue thus raised is the principal issue in the case. If Mussamut Komul Mookhee is the daughter

of Fakeer Singh, then the plaintiff has no right to come into Court and ask that these deeds should be set aside. The first issue which was raised in the Moonsiff's Court involved the question whether Mussamut Komul Mookhee succeeded to the property after the death of Anundee Kooer as the daughter of Fakeer Singh and his heir, and that issue was found expressly by the Moonsiff in favour of the defendant, appellant.

On appeal to the Lower Appellate Court against the decree of the Moonsiff, it was not then made one of the grounds of appeal that the finding of the Moonsiff on this issue was wrong. For this reason alone it would seem that the decree of the Lower Appellate Court cannot be sustained. But more than this, the Subordinate Judge found that the tur-i-peshgee deed was a good and valid deed binding on the property, at least to the extent of a very large portion of the consideration.

While this is the case, the plaintiff can have no right to recover possession of the land. The Subordinate Judge nevertheless declared judicially that he had a right to redeem, and gave him a decree for possession conditional upon his paying the amount of money which he held was secured by the tur-i-peshgee lease. This might have been a good decree upon the facts found by the Subordinate Judge if the suit had been presented to the Court in the form of a redemption-suit. But the plaintiff never put his case in that light. He claimed to be entitled to this property absolutely as the present heir of Fakeer Singh. If he had sued to redeem, then it is possible that the defence might have taken an altogether different form from that which the principal defendant was obliged, under the circumstances of this case, to set up; and above all, the defendant, if he had submitted to the claim for redemption, would have been entitled to his costs.

It would, therefore, seem that, on the facts which have been found by the Lower Appellate Court, the plaintiff's suit ought to have been dismissed.

But it is said in addition to these facts that Mussamut Komul Mookhee being a defendant in this suit has by her written statement repudiated her own right to the heritance. And we have been asked to hold that the plaintiff can take advantage of the written statement of Mussamut Komul Mookhee to this effect and recover as of his own right from the principal defendant.

We think, however, that this is not so. He can only recover against the principal defendant upon the strength of the title which he alleges in his plaint. And the written statement of Mussamut Komul Mookhee does not operate as evidence in favour of the plaintiff to support this title as against the principal defendant. It may be most effective as against herself so far as the plaintiff seeks to have a decree against her. But it does not alone give a title to the plaintiff as against the principal defendant; it also comes too late, because it has the effect (if any effect it has) of proving that the plaintiff had not got a title at the time when he brought his suit.

On the whole, it seems to us that the decree of the Lower Appellate Court is wrong, and must be reversed with costs in both the Courts.

The 26th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Sale before Attachment.

Case No. 2416 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 9th July 1873, reversing a decision of the Moonsiff of that District, dated the 28th May 1872.

Ram Burun Singh (Plaintiff), *Appellant,*

versus

Jankee Sahoo (one of the Defendants), *Respondent.*

Baboo Kumla Kant Sen for Appellant.

Moonshee Mahomed Yusuf for Respondent.

The owner of any property is not precluded by law from selling it before attachment, even though he knows that a judgment-creditor is seeking to get process of execution against it.

Phear, J.—We think that this case must be remanded for re-trial to the Lower Appellate Court. It seems to be beyond question that the plaintiff obtained, on the 30th December 1871, a conveyance of the property which is the subject of suit from the person who was at that time owner of it. This conveyance is produced in evidence. It appears to have been registered at or about the time when it was made. The Judge disposes of the case in the following passage: "The defendant, on the 22nd December 1871, "petitioned for execution of his previous "decree, and he then included in the

"list filed by him the property in suit, and "prayed for its attachment and sale. Eight "days after this, on the 30th December, the "plaintiff's kobala was executed. It is "unnecessary to go further than this. Exe-"cuted under such circumstances it must be "set aside."

But the view which seems to be here expressed is, we think, not correct. If the plaintiff gave full *bonâ-fide* consideration for his conveyance, then he obtained a good title to the property from the owner notwithstanding that he knew the fact (if he did know it) that the present defendant was seeking to get process of execution against this property. The law only forbids transfer of property after it has been attached. Before it is attached, there is nothing to prevent the owner from selling it if he can obtain a purchaser; and there is nothing to prevent any one from purchasing it. Indeed, the best mode in which a judgment-debtor can obtain the means to discharge a decree standing against him might be for him to sell a portion of his property, and with the purchase-money to pay the debt. There is nothing whatever in the Civil Procedure Code to prevent a transaction of this kind. And the purchaser is not bound to see to the application of the money.

So that the principal question which the lower Court had to try was the question whether or not the plaintiff gave substantial consideration for the property which was the subject of the kobala of the 30th December 1871. And this question the Lower Appellate Court has not tried. We therefore reverse the decision of the Lower Appellate Court, and remand the case to that Court for re-trial.

Costs will abide the event.

The 26th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Bond—Interest—Penalty.

Case No. 1694 of 1873.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 31st March 1873, reversing a decision of the Moonsiff of that District, dated the 28th November 1872.

Hurreenath Doss (Defendant), *Appellant,*

versus

Kalee Pershad Roy (Plaintiff), *Respondent.*

Baboo Tarucknath Sen for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Where money was borrowed at an interest of 1 rupee 6 annas per cent. per mensem, under a bond in which it was stipulated that, if principal and interest were not repaid within a given time, the borrower would have to pay interest at the rate of 3 rupees per cent. per mensem from the date of the bond to the date of payment: HELD that the clause relating to the higher rate of interest was a penalty-clause not enforceable in a Court of Equity.

Mitter, J.—THE material portion of the bond out of which this case has arisen is to the following effect: "I have borrowed from "you Rs. 399, and have agreed to pay "interest at the rate of 1 rupee 6 annas "per cent. per mensem, and to repay the "principal money with interest in the month "of Choit 1278. Should I fail to repay the "principal money with interest within the "stipulated time, I shall pay interest at the "rate of 3 rupees per cent. per mensem from "the date of the bond to the date of the "payment." The bond is dated 19th Srawun 1275, and in it certain immoveable properties are hypothecated as collateral security. The debtor failed to repay the principal money with interest within the month of Choit 1278, but a few months later, *i. e.*, in Assar 1279, he paid to the plaintiff Rs. 660, a sum which is larger by 2 rupees 8 annas than the amount due as principal and interest, if interest be calculated at 1 rupee 6 annas per cent. per mensem. In the following Assin, *i. e.*, September 1872, this suit has been brought to recover from the defendant a further sum of Rs. 320 on the ground that, under the alternative clause of the bond, the debtor is liable to pay the higher rate of interest, *viz.*, 36 per cent. per annum.

The Moonsiff has disallowed the claim, holding that the clause relating to the payment of 36 per cent. interest is a penalty-clause, and not enforceable in a Court of Equity. The Judge on appeal has taken a different view of the contract, and has entirely decreed the claim.

The only point in this special appeal before us is whether or not the clause in question is to be deemed as in the nature of a penalty.

I am of opinion that the decision of the Judge on this point is erroneous, and the provision in the bond upon which the plaintiff relies must be treated as in the nature of a penalty. In B. L. R., Volume XI.,* page 1350, there is a case which is so much exactly in point that the judgment reported there may be treated with slight alterations of dates

* 19 W. R. 271.

and names as a judgment in this case. On a reference to the report of that case, it will appear that almost all the arguments upon which the Judge relies in this case in support of his conclusion have been fully met. It is quite unnecessary, therefore, to repeat them here. For the reasons mentioned in that judgment, in which I fully concur, I think that this special appeal should be allowed, and the plaintiff's suit dismissed with costs in all the Courts.

Markby, J.—I concur.

The 26th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Enhancement of Rent—Presumption of Uniform Payment.

Case No. 917 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 20th January 1874, reversing a decision of the Assistant Commissioner of Manbhoom, dated the 16th September 1873.

Rajputtra Sanji Lall Ram Narain Singh Deo Bahadoor (Plaintiff), *Appellant,*

versus

Nudea Pundah and others (Defendants), *Respondents.*

Baboos Umbica Churn Bose and *Gopeenath Mookerjee* for Appellant.

Baboos Bungshee Dhur Sen and *Rash Beharee Ghose* for Respondents.

In a suit for rent for 1278 B.S. at an enhanced rate, where defendants showed that they had paid rent at a uniform rate for twenty years, HELD that the presumption thence arising (of the rent not having varied since the permanent settlement) was not rebutted by the mere fact that the defendants had acquired the tenure from another person originally in 1226 B.S.

Markby, J.—IN this case there is no doubt that, upon the written statement of the defendants, the case made was that they were the mokurrureedars under a person of the name of Narattum Pati; but that view of the facts, which would have been an answer to the plaintiff's case, has not been accepted by the Courts below, and another view of the facts has been taken by the Courts in which the parties acquiesced, namely, that these defendants hold as tenants directly under the zemindar. No doubt that would enable the zemindar to maintain this suit; but at the same time it would also enable the defendants to set up another defence, namely, that they had paid rent at an uniform rate for twenty years; and that they have established to the satisfaction of the Lower Appellate Court. The only question is whether the Lower Appellate Court was wrong in law in holding that the presumption arising from the uniform payment of rent for twenty years has not been rebutted. The mere fact that the defendants acquired this tenure from another person originally in 1226, is not in law necessarily an answer to the case made by the defendants, namely, that they had paid rent of the tenure at an uniform rate for twenty years. That being the only ground of special appeal in this case, the appeal must be dismissed with costs.

The 26th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Mortgagee—Notice of Foreclosure—Reg. XVII. of 1806.

Case No. 713 of 1874.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 12th January 1874, reversing a decision of the Moonsiff of Bishtopore, dated the 17th February 1873.

Nudyar Chand Chuckerbutty and others (Plaintiffs), *Appellants,*

versus

Roop Dass Banerjee (Defendant), *Respondent.*

Baboo Nil Madhub Sen for Appellants.

Baboo Rash Beharee Ghose for Respondent.

A second mortgagee under a mortgage-bond is entitlep to notice of foreclosure under Regulation XVII. of 1806.

Markby, J.—IN this case the two main questions to be tried were whether the instruments upon which the two parties respectively relied—the plaintiff's bond and the defendant's conditional sale—were respectively genuine documents. The first of these questions is found by both the lower Courts in the plaintiff's favour, but we do not think the genuineness of the defendant's conditional sale has been sufficiently determined by the District Judge. The plaintiff being in possession, the defendant must prove his

conditional sale by such affirmative evidence as the District Judge can accept. The Moonsiff did not think the conditional sale proved; and unless the Judge reverses this finding and holds the defendant's deed to be genuine, the plaintiff must get a decree.

If the defendant establishes the genuineness of his conditional sale to the satisfaction of the District Judge, and the decision of the Moonsiff is reversed upon this point, then the present suit must fail, but not upon the ground stated by the District Judge. The District Judge is of opinion that the plaintiff, as a second mortgagee under a mortgage-bond, was not entitled to notice of foreclosure. Upon this point no express decision has been cited, but it seems to us that it must be taken as settled by the Privy Council decision reported in 10 Moore, page 1.* We must read this decision with another decision reported in 7 B. L. R., page 136,† where it was held that in cases to which the Regulation of 1806 does not apply "the "interest of the mortgagee under a deed of "conditional sale becomes absolute according "to the terms of the contract by the mere "failure of the mortgagor to redeem." When, therefore, in the former case it was held that an attachment-creditor was entitled to notice of foreclosure, we must infer that the Privy Council considered that a person having a claim of that description upon the property came within the provisions of the Regulation as to notice.

Of course, if an attachment-creditor is entitled to notice of foreclosure, it will be impossible to exclude the holder of a mortgage-bond. We think, therefore, that the plaintiff was entitled to notice of foreclosure under the Regulation, and that if he has not received such notice, the conditional sale has not as against him become absolute.

But under his conditional sale the defendant is entitled to possession upon default in payment of the loan, and, therefore, if the conditional sale be genuine, the plaintiff can only recover possession after having redeemed.

The case, therefore, turns entirely upon the genuineness of the conditional sale. If that is established, this suit must be dismissed. If not, the plaintiff is entitled to a decree.

The appeal is remanded to the District Judge to be re-heard; costs will abide the result.

* 1 W. R. (P. C.) 19.
† 15 W. R. (P. C.) 35.

The 27th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VI. (B. C.) of 1862, s. 10—Collector's Jurisdiction—Enhancement of Rent.

Case No. 2312 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 30th June 1873, modifying a decision of the Officiating Additional Moonsiff of Begoosurai, dated the 18th March 1873.

Mr. L. G. Crowdy (Plaintiff), *Appellant,*

versus

Omrao Singh (Defendant), *Respondent.*

Mr. M. L. Sandel for Appellant.

Baboo Boodh Sen Singh for Respondent.

The Collector's duty under Act VI. (B. C.) of 1862, s. 10, is to ascertain the actually existing rates of rent payable by the ryot to the zemindar; he has no jurisdiction to assess the rent at enhanced rates.

Phear, J.—We think that the Lower Appellate Court was wrong in dismissing the suit on the ground that notice of enhancement had not been served in accordance with the Rent Law. This suit was brought to recover arrears of rent, not at an enhanced rate, but at the rates which the ryot was bound to pay on the existing relation between himself and the zemindar. And the Collector's finding in the matter of the rates come to under section 10, Act VI. (B.C.) of 1862, was a finding of fact as to the actually existing rates. The Judge is entirely without authority, so far as we can see, for raising the presumption that the rates found by the Collector were rates in excess of those previously payable by the ryot. The Collector had no jurisdiction to assess the rent at enhanced rates; his duty under section 10 was to ascertain the actually existing rates of rent payable by the ryot to the zemindar. And his conclusions on that matter are final, unless they have been appealed against and reversed or modified on appeal. It is not contended that any appeal was preferred in this case. And therefore the determination of the rates by the Collector was conclusive evidence of the actually existing rates of rent payable by the ryot to the zemindar, *i. e.*, the plaintiff. We adhere to the view of

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he section which we expressed in the case of special appeal No. 1982 of 1873,* lately heard and determined by this Bench. We must, therefore, reverse the decision of the Lower Appellate Court; and inasmuch as there was no appeal to that Court against the rates of rent found by the first Court, we think that the decision of the first Court must be affirmed. Indeed it is not suggested that there was any evidence upon the record which could legally be put against the Collector's determination of the rates of rent. We, therefore, reverse the decision of the Lower Appellate Court, and affirm that of the first Court with costs in this Court and in the Lower Appellate Court.

The Judge remarks in this case that "enhancement has been attempted wholesale under the arbitrary provisions of Act

* The 18th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Case No. 1982 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 3rd July 1873, affirming a decision of the Officiating Additional Moonsiff of Begoosurai, dated the 31st March 1873.

Ruttoo Singh and another (Defendants), *Appellants,*

versus

L. G. Crowdy and others (Plaintiffs), *Respondents.*

Baboo Kalee Kishen Sen for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

Phear, J.—THIS was a suit brought by a ticcadar to recover from the defendants arrears of rent payable in respect of certain plots of land.

It seems that three principal questions were raised in the first Court with regard to both defendants, namely, questions as to the rate of rent payable; as to the quantity of land for which it was payable; and also as to the truth of the allegation made by both defendants that the plaintiff had turned them out of a certain portion of the land for which the rent was sought. And as regards the second defendant, Ruttoo Singh, a fourth issue was raised, namely, whether the plaintiff had obtained by lease the right to recover the rent from Ruttoo.

All these issues were determined by the first Court against the defendant. And on an appeal from the decree of the first Court, the Lower Appellate Court confirmed the decision of the first Court. The Subordinate Judge says: "The following issues are framed from the grounds of appeal:—

"Issues:—

"Whether the decision of the Collector under section 10, Act VI. of 1872, as regards the rate, is sufficient to pass a decree in this case or not? and whether the plaintiff has acted in accordance with the provisions of law or not?"

And upon this issue, or issues, as the Subordinate Judge terms it, he goes on to say: "In my opinion, the decision of the Moonsiff is correct, and the provisions of section 10, Act VI. of 1872, have been duly complied with by the plaintiff, and the defendant, who was at liberty to put forward his objection and appeal against the order of the Collector, failed to do so and remained silent. Hence he can now urge no objection in respect of jumma; also, in accordance with the law, it was necessary for the Collector to act in such manner; therefore it is ordered that the appeal be dismissed."

It is now argued before us that, in this judgment, the Subordinate Judge has not dealt with the principal issues in dispute between the parties. But it seems to be plain that, whether the question to which the Subordinate Judge addressed himself was happily expressed by him or not, it was substantially the sole question which was raised before him on appeal. It appears that, previously to the date when the suit was brought, the plaintiff had taken proceedings against the defendant under the provisions of section 10, Act VI. of 1862, B.C., with respect to the very land which is the subject of the present suit. And as a consequence of that proceeding he obtained a decision of the Collector, declaring the quantity of this land, the rate of rent which was payable for it, and that that rent was payable by the defendant. If this decision is to be treated by the Court in this suit as a conclusive evidence between the parties, then it disposes of the two first issues in the case. And by the last words of section 10, Act VI. of 1862, B.C., it is enacted that "the decision of the Collector on all matters inquired into and determined by him under this or the last preceding section shall be final, unless the same shall be reversed on appeal therefrom to the Civil Court."

The Subordinate Judge says expressly that the defendant did not appeal from the decision of the Collector to the Civil Court, and that consequently that decision, which the Subordinate Judge further says was come to in due course of proceeding according to the provisions of the Act, is final and conclusive between the parties.

This being so, the two first issues were completely disposed of, and there remained only one issue between the plaintiff and the first defendant—namely, the issue as to whether or not the plaintiff had dispossessed the defendant of a portion of the land for which this rent is claimed. And, no doubt, on appeal to the Subordinate Judge, the decision of the Moonsiff on this point was objected to. But there is no indication in the judgment of the Subordinate Judge that this objection was pressed. And the learned pleader who appears on behalf of the defendant cannot undertake to say that it was. The Subordinate Judge says that from the grounds of appeal the issues which he states, and which have been recited above, arise. The inference is that no other matter than that which is involved in these issues was pressed upon the attention of the Appellate Court by the appealing parties.

And there seems to be very forcible reason why this should be so, because we find from the judgment of the Moonsiff that the evidence as to the ouster complained of by the defendants was of an entirely worthless character.

Lastly, as to the fourth issue, which was framed between the plaintiff and the defendant Ruttoo, that issue was so conclusively disposed of by the admission of the defendant's own father—the person who let the right of collecting the rents to the plaintiff—as to render it impossible for the defendant successfully to appeal against it. And there can be no doubt that the objection upon this point was not pressed for decision upon the Lower Appellate Court. As has before been remarked, it is very plain that the only question which the Lower Appellate Court was called upon to decide between the parties was the question whether or not the decision of the Collector under Act VI. of 1862, B. C., was, under the circumstances of this case, conclusive evidence between the parties of the facts determined by it; and that question having been answered in the affirmative, the whole substance of the defendant's case was gone.

We dismiss the appeal with costs.

VI. of 1862; it behoves this Court to take specia care that those on whom Act VI. presses so heavily should have the full benefit of their legal rights."

We think the Judge was wrong in allowing considerations of this kind to influence him in his judgment. It must have been entirely the fault of the ryots themselves that it became necessary for the plaintiff to have recourse to the provisions of section 10, Act VI. (B.C.) of 1862. If they had chosen to acknowledge their situation of liability towards the plaintiff, they could have had the rates of their rent determined in a formal and regular suit instead of through the means of special proceedings under section 10 of this Act. We repeat it must have been solely their own fault that those proceedings were rendered necessary, and they cannot well complain of the consequences, nor can they be said to have any peculiar equitable rights against the zemindar upon the ground of his having put in force the special provisions of this Act, to obtain the information, and to settle the questions which they were bound to afford and to answer, and from which they chose to hold aloof.

The 27th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Jurisdiction—Act VIII. (B.C.) of 1869.

Case No. 2448 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 9th July 1873, affirming a decision of the Moonsiff of that District, dated the 2nd May 1872.

Gobind Mahtoon and others (Plaintiffs), *Appellants,*

versus

Ram Khelawun Singh (one of the Defendants), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee* for Respondent.

A Civil Court has jurisdiction to try a suit for possession whether it be brought under Act VIII. (B.C.) of 1869 or as a regular civil suit.

THE plaintiffs are the special appellants in this case. The suit of the plaintiffs has been dismissed by both Courts, because the Courts considered that the suit ought to have been brought under the provisions of Act VIII. (B.C.) of 1869. The Moonsiff found that the plaintiffs' plaint shows and discloses that the plaintiffs are cultivators of the land in suit, and that the defendant, Ram Khelawun Singh, is the landlord; and the plaintiffs are therefore, says the Moonsiff, certainly wrong in bringing this suit in the Civil Court, setting up a right of occupancy, and valuing their suit with reference to the value of the land claimed; on the contrary, says the Moonsiff, the suit should properly have been brought and tried under Act VIII. of 1869. The Judge in a few words has upheld the decision of the Moonsiff

The only ground taken in special appeal is that the lower Courts are wrong in law in holding that the suit does not lie, for, when the suit was instituted in the Civil Court, it ought to have been decided on the merits, whether it be considered as a suit under Act VIII. of 1869 or as a regular civil suit; the Court having jurisdiction to try it in whatever form it may have been instituted.

During the course of the argument, the pleader for the special appellants has referred to two decisions—one to be found in Volume XIX., Weekly Reporter, page 106, and the other in Volume XVIII., page 99. The latter decision appears to me to be in point, and I think that the Moonsiff ought to have tried this case on the merits; but at the same time I cannot shut my eyes to the fact that the plaintiffs have brought this suit to recover possession on the ground of an ancestral right, and that they have valued the suit as such, evidently with the intention of taking advantage of the period of limitation which governs suits under Act VIII. of 1859. I therefore remand the case to the Moonsiff to try the suit on the merits; but, with reference to the conduct of the plaintiffs in this case, I think that they ought to pay the costs of this appeal.

The 27th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act XL. of 1858—Recall of Certificate—Appeal.

Case No. 204 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of the 24-Pergunnahs, dated the 4th May 1874.

Chumutkar Mohinee Dassee (Petitioner), *Appellant,*

versus

Raj Rakhal Mitter (Opposite Party), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Opendro Chunder Bose for Respondent.

Where a Civil Court, in the exercise of its discretionary power, refuses to recall a certificate granted under Act XL. of 1858, there is no appeal from such refusal.

Jackson, J.—It appears to us that this is a case in which we cannot properly interfere by way of appeal. The 21st section of Act XL. of 1858 provides that the "Civil Court," by which is meant the District Court, for any sufficient cause, may recall any certificate granted under this Act." The appellant before us made an application to that effect, but the Judge did not see sufficient cause to admit the application, and therefore refused to make any order recalling the certificate. Section 28 says: "All orders passed by the Civil Court or by any Subordinate Court under this Act shall be open to appeal." Here there was no order passed by the Civil Court. The Civil Court had discretionary power to recall the certificate. It considered that no sufficient cause had been shown for so doing, and therefore refused to make any order. It appears to us that there is no appeal in such a case, and if there is an appeal, it is not such as that our appellate jurisdiction should be exercised; because it is to be observed that, by the 2nd section of the Act, "except in the case of proprietors of estates paying revenue to Government, who have been or shall be taken under the protection of the Court of Wards, the case of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court." That provision invests the Civil Court with a particular jurisdiction and a discretion which cannot be advantageously transferred to the High Court or other appellate tribunal.

The appeal is dismissed, but under the circumstances without costs.

The 27th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Pre-emption—Limitation—Onus Probandi.

Case No. 2272 of 1873.

Special Appeal from a decision passed by the Officiating Deputy Commissioner of Cachar, dated the 30th July 1873, affirming a decision of the Moonsiff of that District, dated the 16th May 1873.

Nutun Singh and another (Plaintiffs), *Appellants,*

versus

Mogdhun Singh and another (Defendants), *Respondents.*

Baboo Romesh Chunder Bose for Appellants.

Baboo Byednath Dutt for Respondents.

In a suit to enforce the right of pre-emption, brought after the period of limitation prescribed for such suits, where plaintiff alleged that he was not aware of the sale, and therefore claimed to compute limitation according to Act XIV. of 1859, s. 9, HELD that plaintiff was bound to prove that he had been fraudulently kept out of all knowledge of the sale of the property in dispute.

The plaintiffs are the special appellants in this case. The suit was to enforce the right of pre-emption with reference to 2 beeghas 17 cottahs and 8 chittacks of land, which the defendant No. 2 sold to defendant No. 1. The parties in this case are Hindoos. The sale by defendant No. 2 to defendant No. 1 took place on the 7th of Phalgoon 1271, corresponding with the 18th February 1865. The suit was instituted on the 17th of March 1873. Both under the old Limitation Law (Act XIV. of 1859) and the new Limitation Act of 1871, the period of limitation is the same, namely, one year from the period when the purchaser takes possession under the sale.

Now, in this case it is very clear that the suit has been brought many years after the period of limitation prescribed for such suits had expired. The plaintiff says that he was not aware of the sale until the 19th of February 1873, and therefore he claims to compute the period of limitation according to section 9 of Act XIV. of 1859. Now, the plaintiff clearly had to prove the case set up

by him, namely, that he was fraudulently kept out of all knowledge of the sale till the vendor (defendant No. 1) applied to the Collector for mutation of names.

The first Court found that the plaintiff was well aware of the sale, he being resident in the vicinity of the vendor's and purchaser's houses. And it was also proved by the evidence of a respectable Government servant, a mirasdar, that the plaintiff knew of the sale and purchase from the date thereof. The first Court accordingly dismissed the plaintiff's suit.

The second Court has confirmed that decision; at least it holds that defendant No. 1 became proprietor and possessor of the land from the date of the kobala; and unless the kobala is proved to be a forgery—which has not been done—the plaintiff's claim must be dismissed. It is true the Lower Appellate Court does not go particularly into the question whether plaintiff knew of the sale or not, but he dismisses the suit.

I think the appeal must also be dismissed with costs, one gold mohur being allowed as pleaders' fees.

The 27th August 1874.

Present :

The Hon'ble F. B. Kemp, *Judge.*

Measurement—Act VIII. (B.C.) of 1869, s. 38—Rents—Collector's Jurisdiction.

Case No. 2674 of 1873.

Special Appeal from a decision passed by the Second Subordinate Judge of Bhaugulpore, dated the 18th September 1873, reversing a decision of the Officiating Additional Moonsiff of Begoosurai, dated the 25th June 1873.

Mr. W. G. Crowdy (Plaintiff), *Appellant,*

versus

Poorun Sing (Defendant), *Respondent.*

Mr. M. L. Sandel for Appellant.

Baboo Doorga Doss Dutt for Respondent.

Where an application is made to a Collector under Act VIII. (B.C.) of 1869, s. 38, for the measurement of certain lands, without any "special application" to him to determine the rates of rent, any proceedings regarding the rates of rent are inadmissible.

THE plaintiff is the special appellant in this case. He appears to have sued a number of ryots for rents, claiming the rent according to the rate assessed by the Collector under the provisions of section 38 of Act VIII. of 1869, B.C.

The first Court gave the plaintiff a decree. The second Court, the Subordinate Judge of Bhaugulpore, reversed that decree. He holds that the prayer of the petition to the Collector under section 38 (Act VIII. of 1869, B. C.) was simply for a measurement of the lands; that the Collector passed an order for measurement alone; and that therefore whatever proceedings were carried on regarding the rates were inadmissible, as there was no prayer to that effect. The Subordinate Judge also finds that the rents of the land in question are in fact what they have been stated to be by the defendants, and that the plaintiff has never received rents from the defendants at the rates claimed.

This suit depends entirely on the construction to be put upon the petition, which is not, as it is said to be, drawn up under the provisions of section 10 of Act VI. of 1862, but under those of section 38 of Act VIII. of 1869. It is clear to my mind from the heading of that petition, that it asked for a measurement of the lands. The words are "beomeyd pymash," and the order of the Collector is "wastéh tamil pymash," &c., and when the papers were returned, they were called the "kaguz-e-pymash." No one objected to these papers, and they were approved of by the Collector. Under section 38 of Act VIII. of 1869, it is provided that the Collector shall, on application being made under this section, proceed to measure the lands, and ascertain and record the names of the persons in occupation of the same, or, *on the special application* of the proprietor, or other person entitled to receive the rents of the land, *but not otherwise* shall proceed to ascertain, determine, and record the tenures and under-tenures, the *rates* of rent payable in respect of such lands, and the persons by whom respectively the rents are payable.

There was no "special application" in this case on the part of the proprietor or other person asking the Collector to determine the rates of rent, and therefore the Subordinate Judge was, in my opinion, quite right in the decision which he has passed.

But it is contended that he ought to have passed an opinion on the evidence independent of the question whether the rates found by the Collector were binding on the defendants or not. It does not seem to me that there is any force in this contention.

The appeal must be dismissed with costs, one gold mohur being allowed as Vakeel's fee.

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The 28th August 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Execution-sale—Notice—Act VIII. of 1859, s. 256.

Case No. 120 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Rajshahye, dated the 17th April 1874.

Gobind Chunder Aooch (Judgment-debtor), *Appellant,*

versus

Bamun Doss Mookerjee (Decree-holder), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

No one for Respondent.

An execution-sale, properly notified, may be adjourn- d with the consent of the parties.

The issue of a notice of sale after the death of the iginal decree-holder, and before any person had ap- ed to be registered as the substituted decree-holder, ot an irregularity which would warrant the setting de of a sale under Act VIII. of 1859, s. 256.

Ainslie, J.—THE first objection taken in is appeal is that the Court below has not sidered whether there was any issue of tification of sale at all. The appellant, en he came into Court, and took time from e respondent, agreed that, if the money was t paid in on the given date, the property ould be sold on that date without further tice. This is *primâ-facie* evidence that ere had been a proper notification issued, d being an admission of the party himself, s evidence of the best character.

Then it is said that the finding about a cond notice of sale after postponement is egular, and cases were cited, one from Weekly Reporter, page 11, Miscellane- s Rulings, and another from 6 Weekly porter, page 84, Miscellaneous Rulings. e first case is clearly distinguishable from is, because, although the debtor obtained ne from the creditor, it does not appear t he had undertaken to allow the sale to eed without further notification, and not ake any objection on that ground. The in 6 Weekly Reporter is also inappli- e, because, although there was that under- ng in that case, the sale was not held ome time after the date limited in the ertaking; and it is upon that ground the decision is based. There is nothing in the law to prevent adjournment of a sale properly notified with the consent of the parties.

Now it is said that the Court ought not to allow the execution to proceed without further inquiry as to the right of the person who is now on the record as decree-holder to represent the deceased decree-holder. The Court has power to substitute parties under section 208 of the Civil Procedure Code at its discretion. Although the debtor raised some objection to the substitution, he does not appear to have put that objection in such a form as would enable the Court to give effect to it. He never mentioned the name of any person who, according to his belief, was the rightful representative of the deceased. Under these circumstances, all that the Court had to do was to satisfy itself that there were *primâ-facie* grounds for admitting the applicant to be registered as decree-holder.

The principal ground of appeal is that there has been a material irregularity in the proceedings in the case, in that the notification of sale was issued at a time when the original decree-holder was dead, and before any person had come in to get himself registered as decree-holder. It is said that the original decree-holder made the application for the issue of the notification of sale, and that he paid the necessary expenses of issuing that notification; but that he died some time after that and before the actual publication in the mofussil. This publication took place in December, and, on the 5th of January following, the party who now appears as substituted decree-holder came into Court, and from that time proceedings have been carried on at his suit; and it appears that the judgment-debtor, under an arrangement by which he admitted the validity of the previous proceedings, promised to make payment by a certain date, or, in default of payment, to make no objection to the sale being held upon that date. Although it may be taken that the issuing of the notification in December after the death of the original decree-holder was irregular, yet that irregularity seems to have been mended by subsequent proceedings; and it is certainly not an irregularity which warrants the setting aside of the sale under section 256. That section says: "No sale shall be set aside "on the ground of irregularity unless the "applicant shall prove to the satisfaction of "the Court that he has sustained substan- "tial injury by reason of such irregularity." Now, whatever injury may have been alleged

in the Court below, no attempt has been made in this Court to show that any injury that was sustained was by reason of irregularity; and it seems to us difficult to understand how the mere difference of name in the sale-notification could have been the cause of substantial injury.

This appeal is dismissed.

The 28th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Enhancement of Rent—Service of Notice—Substituted Service.

Case No. 67 of 1874.

Special Appeal from a decision passed by the Judge of Jessore, dated the 21st November 1873, reversing the decision of the Additional Moonsiff of Narail, dated the 30th June 1873.

Bissonath Sircar (Defendant), *Appellant,*

versus

Tara Prosonno Mozoomdar and others (Plaintiffs), *Respondents.*

Baboos Kalee Mohun Dass and *Motee Lall Mookerjee* for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

Substituted service of notice is good only where the person who is to be served personally is keeping out of the way.

In a suit for arrears of rent at enhanced rates, when the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, even though service of notice to enhance is not proved.

THE defendant is the special appellant in this case. The suit is brought to enhance the rent of the defendant's holding. The defendant's answer is that no notice was served on him, and that the rent could not be enhanced, inasmuch as he was holding under a kaimee mokurruree pottah dated the 25th Magh 1231. These were the principal grounds of the defendant's statement.

The Moonsiff of Narail found first that the notice was not served. The Moonsiff observes that, under section 14 of Act VIII. (B.C.) of 1869, it is provided that the notice "shall, if practicable, be served personally on the under-tenant or ryot," but that in this case no attempt was made to serve the notice personally on the defendant; that the defendant's witnesses state that, when the peadah went to the defendant's house to serve the notice, he did not call out his name; that they had no proof that he was not in the house at the time; and that the persons from whom they heard that the defendant was not in the house have not been called and examined.

As to the merits of the case, the Moonsiff found that the defendant had proved his pottah of the 25th Magh 1231, from the appearance of the document itself, from the fact that it was more than 30 years old, that it had come from the proper custody, and that it had been produced in Court on several previous occasions. And he adds that the testimony of the defendant himself and of his witness No. 1 proves that the document is genuine, and that it has come from proper custody. The Moonsiff gives full credit to the defendant's evidence on this point.

Then, with reference to the kubooleut of the same year, but of a different date, filed by the plaintiffs, he finds it to be a forgery, and he says that it "appears quite evident "that the plaintiffs, in collusion with the "defendant's co-sharer, Prannath Sirkar, "have brought this action against the "defendant."

On appeal the Judge has taken a different view from the Moonsiff. As to the service of notice, the Judge says that "the witnesses "who saw the notice served state that they "did not find defendant at his house, and "that they *were told* he was absent, and "that the notice was accordingly stuck up "outside his house;" and he considers this service sufficient.

Now, in a case reported in Vol. XII., Bengal Law Reports, Privy Council Cases, page 229 (Ramchunder Dutt *vs.* Jugheschunder Dutt),* dated the 22nd and 25th March 1873, their Lordships observe that "in cases of "substituted service, that is, service substi-"tuted for personal service, which the "statute requires whenever it is practicable, "the Courts should take care to be satisfied "that the condition on which alone "substituted service is good exists, namely, "that the person who ought to be served "personally is keeping out of the way. "It will not be sufficient to show that the "notice has been attached to the door,

* 19 W. R. 353.

"unless the condition which renders such a "mode of service good has been first "established to the satisfaction of the "Court."

Now anything more unsatisfactory than the evidence as to the service of the notice it is impossible to conceive. The first witness who says he has received ten *bhels* for some former offence, states that he *heard* from the defendant's cousin that he (defendant) was not in the house, and that he made no *further* inquiry. The serving peadah asked nobody where the defendant was, and did not even call out his name.

The other witness says that, when they came to defendant's house, defendant had run away, the peadah made no inquiry as to where he was gone to, and they did not call out defendant's name. He heard from Moheem that defendant had run away (Moheem has not been called and examined), and the notice was affixed to the thatch of the house.

The next witness, Lukhee Kant, also heard from Moheem that defendant was not in the house. The peadah made no further inquiry, and he did not even call out the defendant's name; and the notice was stuck up on the *door* of the house, a very different place from the thatch as deposed to by the preceding witness.

It is quite clear that, even if the Moonsiff had not gone into the merits of the case, it ought to have been dismissed under the Privy Council ruling referred to above.

However, as the Moonsiff has gone into the merits, the case comes under the ruling of this Court in the case of Nuffer Chunder Pal Chowdhry *vs.* Poulson, decided on 24th January 1873, and reported in 19 W. R., page 175, in which it was "held (the Privy Council adopting a decision of the High Court) that, in a suit for arrears of rent at enhanced rates, when the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though service of notice to enhance is not proved."

Therefore in this case all that the plaintiff would be entitled to is a declaratory decree. But I do not think that he is entitled even to that for the following reasons:—

The Moonsiff found the pottah to be genuine; the Judge found it otherwise. Now the reasons given by the Judge are very unsatisfactory. First he says that the pottah filed by the defendant is written on paper which has "the peculiar soft feel that is apparent in so many of the forged documents in use in this district."

Now, as it happens, that the kubooleut relied on by the plaintiffs, and which the Judge accepts as genuine, is also written on paper of the same "peculiarly soft feel" as the pottah, only that in the kubooleut the creases are avoided in the writing, which is not the case in the pottah. Next the Judge says that the only evidence to prove its genuineness is that of defendants Bishonath and Hurrish Chunder, the nephew of defendant's vendor Nilmony, and all that they say is that, when he sold the property, Nilmony gave this pottah to the purchaser. But the Judge seems to think it impossible that Nilmony would have given up the pottah to the defendant, because he did not hold the entire holding.

The Moonsiff states that the pottah has been produced in Court on several former occasions, but, according to the Judge, this statement is incorrect.

It appears that there was a case brought by one Chundee Churn Mitter in the Principal Sudder Ameen's Court in 1862 to set aside a survey-map, in which case the present plaintiff and Brojonath Sircar were defendants. As to this the Judge says that, as the plaintiff's kubooleut was filed in that case, the pottah would also have been filed if it was a genuine document, because the land covered by it was identical with that covered by the kubooleut. But, in that suit, the now defendants and plaintiffs were co-defendants, and between them there was no question then as to the genuineness of the pottah.

Now, looking at the pottah itself, it seems to be a genuine document. The deed recites that there had been a suit between the grantor of the pottah and the defendant's predecessor, which was numbered 638, and that possession was given through an Ameen named Joykisto Ghose, and the boundaries of the land are given, and by its terms the rent could not be enhanced. If the pottah, as the Judge says, had been recently fabricated, the defendant would not by filing it have run the risk of an inquiry as to whether there really was such an Ameen as Joykisto Ghose or not, or whether there was a suit No. 638 in which the names of the parties, &c., agreed with those given in that deed, or not. I think the pottah is a genuine document, and, concurring in the decision of the Moonsiff, I decree this appeal, reversing the decree of the Judge, and restoring and affirming that of the Moonsiff with costs. Pleader's fee in this Court, ¼ gold mohur.

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The 28th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Notice under Act VIII. of 1859, s. 216—Execution—Limitation—Act IX. of 1871, Sch. II., art. 167.

Case No. 172 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 17th April 1874, reversing an order of the Moonsiff of Mudhoobanee, dated the 13th December 1873.

Koonj Beharee Lall (Decree-holder), *Appellant,*

versus

Girdharee Lall (Judgment-debtor), *Respondent.*

Baboo Judoonath Sahoy for Appellant.

Baboo Hureehur Nath for Respondent.

A notice issued within time under Act VIII. of 1859, s. 216, and actually served upon the judgment-debtor, constitutes a starting point for the commencement of a new period of limitation under Act IX. of 1871, Sch. II., art. 167; any question as to its *bona fides* notwithstanding.

Phear, J.—THE present application for execution was made on the 12th July 1873; and that date was certainly within three years of the 10th April 1871, when notice was served upon the judgment-debtor under section 216 of the Civil Procedure Code. This being so, the present application is within time under the words of article 167, Schedule II. of Act IX. of 1871.

It has been argued before us that the notice of April 1871 ought not to be reckoned as a *bonâ-fide* proceeding, and therefore ought not to be availed of. But the express words of the Legislature have made it a starting point in the counting of time, and there is no doubt that, at the date when the notice was issued and served, time had not run against the judgment-creditor to bar him, because the decree itself was only passed on the 23rd July 1868. We are not aware ourselves of a single case in which it has been held that notice issued under section 216, and actually served upon the judgment-debtor, has been held a nonentity as not being a *bonâ-fide* application for execution of decree. But, however that may be, there can be no doubt that the Court was not barred from issuing that notice, because it was within time; and that being so, it is, as has already been mentioned, by the express words of the existing Limitation Law, made a starting point for the commencement of a new period of limitation. We think that the Lower Appellate Court was wrong in its decision, which must therefore be reversed, and execution must issue.

The appellant must have his costs both in this Court and in the Court below.

The 28th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Wassilat—Interest—Executions-proceedings.

Case No. 174 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 17th April 1874, modifying an order of the Subordinate Judge of that District, dated the 8th September 1873.

Ajoodhya Pershad and others (some of the Judgment-debtors), *Appellants,*

versus

Jowahir Lall and another (two of the Decree-holders), *Respondents.*

Baboo Judoonath Sahoy for Appellants.
Baboo Kalee Kishen Sen for Respondents.

Where a decree directs wassilat, together with interest, to be assessed during the execution-proceedings, in respect of the period of the plaintiff's dispossession, the interest cannot be reckoned to run upon each of the separate sums due in respect of the several years of dispossession.

Phear, J.—THE decree in this case directed that wassilat should be assessed during the execution-proceedings in respect of the period of the plaintiff's dispossession, and ordered that the judgment-debtor should pay the wassilat so assessed together with interest. The decree does not, as the Judge seems to imagine, deal with separate sums in respect of the several years which constituted the period of dispossession, and direct interest to run upon each of those separate sums. Indeed it would have been irregular if it had done so. And therefore the order of the Subordinate Judge seems to be a right order, and ought not to have been disturbed by the Lower Appellate Court.

As to the second objection, we are unable to say on special appeal that the results

which both the lower Courts have seen reason to deduce from the jummabundee papers were not justified as a matter of fact. In all cases the evidence as to the receipts is to be taken strictly against the wrong-doer. We have not had any ground shown to us for supposing that any injustice had been done to the judgment-debtor.

On the whole, we think that the order of the lower Court, so far as it affects the interest directed to be paid, should be set aside. The rest of the order will stand.

The appellant is entitled to his costs both in this Court and in the Lower Appellate Court.

The 28th August 1874.

Present :

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Enhancement of Rent—Form of Notice—Act VIII. (B. C.) of 1869, s. 18.

Case No. 2290 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 1st September 1873, reversing a decision of the Moonsiff of Diamond Harbour, dated the 25th November 1872.

Shib Narain Ghose (Defendant), *Appellant,*

versus

Aukhil Chunder Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Before a landlord can enhance his rent, he is bound to inform his tenant by written notice of the specific grounds on which he claims to enhance; *e. g.*, if it is sought to base enhancement on increased productive powers of the land, there ought to be a special declaration of the particular causes of increase; the mere words of Act VIII. (B. C.) of 1869, s. 18, cl. 2, are not to be considered sufficient notice in all cases.

Ainslie, J.—THIS is a suit for arrears of rent at enhanced rate after issue of notice. The Lower Appellate Court has found the tenure to be liable to enhancement, and remanded the suit for determination of the questions whether or not all the grounds of enhancement, as stated in the notice, are true; and if so, what rates of rent the plaintiffs are entitled to? The special appellant objects to the finding of fact as to the liability of the tenure to enhancement, and also urges that the notice is bad, and the suit ought to have been dismissed. The objection as to the finding of fact is two-fold: *firstly*, that the Judge is wrong in refusing to use the hisabs relied upon by the defendant as evidence in the case; and, *secondly*, that he has fallen into error in saying that it was not shown for what years certain dakhilas were given. Now the Judge, after setting out the explanation tendered by the defendent to account for the non-production in the earlier suit of the hisabs now produced, observes: "Now this story, "which is borne out by the record, suffi-"ciently explains why the defendant did "not produce the dakhilas which had been "lost, but it does not afford any explanation "why these hisabs, which must, if genuine, "then have been in his possession, were not "produced or even referred to. It is impos-"sible for me to believe that they then were "in existence, and yet that no reference "whatever was made to them in any of the "stages of this case. The chief ground of "the appeal to the Judge apparently was "that the Deputy Collector decided the case "too hastily, and without giving him time "to ascertain what had become of the "dakhilas. Now, if, at the time he made "that appeal, these very hisabs, which were "sufficient to prove all that it was essential "he should prove in that case, were actually "in his possession, is it possible that he "should not have alluded to them, or asked "the Judge to accept them at the appeal-"stage, a request which is so constantly "made in appeals preferred to the Judge? "But, instead of this, he only stated that "unfortunately his documents had been lost." The Judge, therefore, has clearly come to

the conclusion that the hisabs now tendered in evidence are not genuine documents; and having come to this conclusion, he says it must be held that the defendant has quite failed to prove payment at unvaried rate, and that his jumma is consequently liable to enhancement. It is urged that the Judge neglected to consider the oral evidence. We do not think that this was so, but rather that he considered it in connection with the hisabs put forward by the defendant, which he held to be spurious. Then, as to the other part of the objection, it is clear that the Judge held not only that the dakhilas produced in the former suit, and which had been proved to have been destroyed in the cyclone of 1864, had not been sufficiently proved, inasmuch as the defendant failed to show to what years they referred; but he further held that they would have been insufficient to establish the defendant's case as not extending over more than a few of the years for which it was necessary for him to prove payment at an unchanged rate. Assuming that the defendant's own evidence as to the years to which the lost dakhilas applied is true, it still appears that they do not range over any thing like a period of twenty years, and they do not of themselves prove an uniform payment of rent during that period. The defendant attempted to supplement this deficiency by other evidence, which is found to be false; consequently, we think there are no grounds on which we should disturb the finding that the tenure is liable to enhancement.

The question then remains whether the notice served on the defendant is sufficient to support this suit. The defendant appears to hold this land in four separate mouzahs, to three of which the notice applies; and the first Court, in disposing of the plea that the notice is defective, found in favour of the plaintiffs that these jummas had never been consolidated, and so far we must take it that the Judge concurred with the first Court. The notice of enhancement sets out two grounds: *firstly*, that the productiveness of the land and the value of the crops had increased independently of the tenant's expense and exertion; and *secondly*, that the jumma is less than that current for surrounding lands in the same village. The Moonsiff held the notice to be insufficient under the second head. He did not consider the first at all, as he had come to the conclusion that the tenure was protected from enhancement. The Lower Appellate Court, in its remand-order, does not deal with the question of the sufficiency of the notice in terms; but we think we must take it that the Judge held the notice to be good, inasmuch as he directs the Moonsiff to determine whether or not all the grounds of enhancement stated in it are true, and if so, what rates of rent the plaintiffs are entitled to.

On behalf of the special appellant, a decision in 21 Weekly Reporter, p. 33, was cited. That judgment shows that the lands to which that suit referred were very extensive, and were comprised in not less than 59 separate plots, and it was held that a notice specifying all the grounds of enhancement mentioned in the Act without any detail showing the particular lands to which the grounds were intended to apply was not a sufficient notice in such cases. The Chief Justice says as follows: "The intention of "that is that the under-tenant or ryot shall "be informed of the grounds upon which "the landlord seeks to have the higher rent. "This is not satisfied by giving a notice "specifying all the grounds of enhancement "mentioned in the Act, some of which may "apply to one part of the land and some "to another. It leaves the tenant in uncertainty as to the ground upon which the "higher rent is demanded. It does not "give him information which, we think, it "was intended he should have. In this "case there are 59 plots of land, containing "altogether 124 beeghas. It is impossible "to suppose that the same grounds of enhancement, even if they were consistent, "would apply to every plot. One part "may be subject to enhancement on one "ground, and another part on another, and "this notice does not enable the tenant to "tell what it is that the landlord really "asserts as to his right to enhance." The Court did not hold that the notice was bad, simply because it failed to contain all the three grounds of enhancement mentioned in section 18 of Act VIII. of 1869 (B. C.), but because there was nothing in it to give the ryot information of the particular grounds of the claim to enhancement stated by the plaintiff. Then the question is, whether, in the present case, the notice gave such information. As to the second ground of enhancement, *viz.*, that the rents paid were below the prevailing rates, it may probably be assumed that it was intended to apply to the whole of the lands in the three villages mentioned, each portion being compared with those immediately adjacent to it, and that it was so far a good notice; but, when we look

to the first ground stated in the notice, *viz.*, that the productiveness of the land and the value of the crops had increased independently of the expense and exertion of the tenant, it is difficult to see how this can be taken as a declaration that the productive powers of the land had increased in every part from the same or similar causes, and to an equal extent, when no cause at all is stated. It was said that the notice is in the form prescribed by section 18, but it appears to us that section 18 does not prescribe the form of a notice at all. It only declares in general terms the conditions under which a claim for enhancement can be maintained. Under the second clause of the section there may be a general declaration that the value of the produce has increased otherwise than through the agency of the tenant, as from a general rise in the prices, and such a declaration would probably apply to the whole of the lands held by the tenant; but if it is sought to base enhancement on increased productive powers of the land, there ought to be a special declaration in the notice of the particular causes of increase. If, for instance, a ryot has a large holding comprising land of various descriptions, one part may be capable of being improved by improved facilities of irrigation, and another part by means of an opposite character, *viz.*, by improving the drainage; it cannot in such a case be held that a notice merely in the words of the second clause of section 18 sufficiently informs the ryot as to the zemindar's claim. We think a landlord is bound to inform his tenant by written notice of the specific grounds on which he claims to enhance, and that the mere words of the clause are not to be considered sufficient notice in all cases. On these grounds, we would hold that the notice in this case, so far as it is a notice under the second clause of section 18, and based on the increased productive powers of the soil, is bad; but that so far as it is based on the other part of the clause, *viz.*, the increased value of the produce arising from a general rise in prices, it is a good notice. It is not for us to say whether there is any evidence on the record as to this particular point. That will have to be considered by the first Court in carrying out the order of remand. The notice must be taken to be a sufficient notice under the 1st clause and under the first branch of the 2nd clause of section 18, and not a sufficient notice under the second part of the latter clause. Consequently, we think that this special appeal must be dismissed with costs.

The 28th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Special Appeal—Questions of Evidence—Uniform Rent—Presumption under Act VIII. (B.C.) of 1869, s. 4—Eviction—Tenant's Rights.

Case No. 40 of 1874.

Special Appeal from a decision passed by the Judge of Jessore, dated the 17th November 1873, affirming a decision of the Moonsiff of Narail, dated the 31st March 1873.

Rashbehary Ghose (Plaintiff), *Appellant,*

versus

Ram Coomar Ghose (Defendant), *Respondents.*

Baboos Kalee Mohun Dass, Motee Lall Mookerjee, and Bungseedhur Sein for Appellant.

Baboo Grija Sunkur Mozoomdar for Respondent.

In this case there having been a conflict of opinion between the Court of first instance and the Lower Appellate Court as to the character and sufficiency of the evidence, the High Court in special appeal took into consideration and decided the question of evidence.

In order to support a finding of uniform payment of rent for 20 years (Act VIII. B.C. of 1869, s. 4), it is not necessary that there should be evidence bearing directly on every year of that number; it is sufficient if the whole interval is included between limits upon which the evidence bears, provided that that evidence is such as to lead to the belief that the rent was uniform throughout the intervening period.

If a ryot holding at a particular rent is unlawfully evicted, he does not necessarily cease to hold at that rent; and if he is restored to possession, he is restored to his original holding.

THE main point for decision in this special appeal is, whether the ryot-defendant, special

respondent, is entitled to the presumption arising under section 4, Act VIII. of 1869, that is to say, whether he has proved that the rent which he has paid has not been changed for a period of 20 years before the commencement of the suit. Now, in arriving at a decision on this point, I propose to guide myself by the remarks laid down by Mr. Justice Phear in a decision to be found in Vol. VIII., Weekly Reporter, page 285. That learned Judge observes "that the rent may have remained unchanged during any number of years, although the actual payments in respect of rent may, from one cause or another, have been very unequal during the same time, or even nothing;" and further on in the same judgment, "that to support a finding of uniformity for any given number of years, it is not necessary that there should be evidence bearing directly on every year of that number, that is twenty years; it is sufficient if the whole space of that time is included between limits upon which the evidence bears, provided that that evidence is such as to lead to the belief that the rent was uniform throughout the intervening period." Now in this case the dakhilas which have been filed by the ryot range from the year 1241 to the year 1278, a very long period. The suit is brought in 1279. The Courts below have come to a different conclusion with respect to the evidence filed by the ryot in support of his plea of uniform payment of rent for 20 years. The Moonsiff has rejected that evidence. The Judge has thought it good and sufficient. Both judgments are careful judgments, and both officers have carefully gone into the case. There being a conflict of opinion I have given the case full consideration, and it has been fully and ably argued before me. The ryot has to prove the uniform payment of rent from say 1259 to 1279. Now in this case the ryot has given his evidence, and he swears to the genuineness of the dakhilas filed by him. The opposite party, instead of producing their naebs and other officers to rebut the evidence of the ryot, has forced the ryot to go into the enemy's camp and to cite the zemindaree amlah. I may say with reference to the evidence of the zemindaree amlah that, with the exception of the fact that one of them says that the word "joe" in one of the dakhilas filed by the defendant is not in his handwriting, their evidence is on the whole in support of the defendant's plea. Looking therefore to the proof which has been filed by the defendant in support of his plea of uniform payment of rent from 1259 to 1279, the first thing that strikes one is that there is a break in the continuity of these payments; the break is from 1260 to 1268. The ryot, to account for that, states that he was ousted by a vis major, that he brought a suit and obtained possession, and the decree of the Court giving him possession is filed. In a case which is to be found in the special number of the Weekly Reporter, page 91, it has been ruled by a Bench of two Judges of this Court that if a ryot holding at a particular rent is unlawfully evicted, he does not necessarily cease to hold at that rent; that eviction, though it would put an end to the ryot's possession, would not destroy his holding, and therefore if a ryot is restored to possession he is restored to his original holding. Now from 1268, when the ryot was restored to his holding and to his original possession, to 1269, the rent was deposited in the Collectorate. This has been supported by challans. In 1270 the three co-sharers of the superior holding appear to have separated and Bama Soonduree, the lessor of the special appellant, from that period, or from 1270, collected the rents of her one-third share; from 1270 to 1273 the rent was then collected at a uniform rate from the defendant, and a dakhila was given to him for the rent of those years on the 19th of Magh 1276, and the said dakhila has been proved by one of the amlahs of the special appellant, Dinonath. From 1274 to 1276 the rent was also deposited in the Collectorate. A suit appears to have been brought by the plaintiff for the rent of those years, but his suit was dismissed, inasmuch as the Court found that the defendant had already deposited the rents for these years in the Collectorate. The rents for the years 1277 and 1278 were also deposited by the defendant, the ryot, in the Collectorate, and I am informed by the pleader who appears for the ryot that the special appellant himself drew out that money, and that averment has not been contradicted by the pleader for the special appellant. I think therefore on the whole that if ever there was a case in which a ryot has proved his plea that he is entitled to the presumption arising under section 4, namely, by payment at a uniform rate for 20 years prior to suit, this is a case. I therefore confirm the decision of the Judge, and dismiss the special appeal with costs.

Pleader's fees 1 gold mohur.

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The 28th August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Enhancement of Rent—Suit by Co-sharer—Objection.

Case No. 48 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Tipperah, dated the 12th September 1873, reversing a decision of the Moonsiff of Nassirnuggur, dated the 10th April 1873.

Gour Kishore Dutt and others (Plaintiffs), *Appellants,*

versus

Shaikh Akbur and others (Defendants), *Respondents.*

Babos Umbika Churn Banerjee and *Bharut Chunder Dutt* for Appellants.

Moulvie Serajul Islam for Respondent.

In a suit for enhanced rent, the objection that plaintiff sued without joining his co-sharers with him as parties was not allowed to be taken for the first time in the Lower Appellate Court.

This was a suit for enhanced rent. The plaintiff stated that he was the ijaradar; that the ijara, taking it as a whole, was Rs. 12 annas 12 gundas; that the defendant ryot was liable to pay enhanced rent; and that, according to the *russud* of the plaintiff's ijara, that is to say, deducting 7 annas and 5 gundas, he was entitled for the remaining 5 annas odd gundas to so much rent.

The defendant took no objection on the plaintiff's suing to enhance without joining his co-sharers in the suit, nor did the defendant take any objection to the notice having been served in 1277.

The Moonsiff gave the plaintiff a decree.

The Judge reversed that decree, holding that, that, because the plaintiff had not joined his co-sharers as parties, the suit must fail. He also held that the plaintiff's ijara commenced in 1278, and that therefore the notice of 1277 must be false, and must be bad. On these two grounds alone the Judge reversed the Moonsiff's decision. The Ameen, who was sent to make an enquiry, found that the collections were separate, that is, that the collections of the 7 annas odd gundas were separate from the collections of the 5 annas and odd gundas.

This plea was not taken in the first Court, and it ought not to have been raised by the Judge under the ruling of this Court in the case of Nanoo Roy *vs.* Jhoomuck Lall Dass, to be found in 18 Weekly Reporter, page 376.

Then as to the notice, it is clear that the Judge has mistaken the plaintiff's case. The plaintiff was the former ijaradar, and this was only a renewal of the former ijara, and therefore there was nothing wrong in the notice having been issued in 1277.

The decision of the Judge must be reversed, and the case remanded to him for trial of the other questions raised before the Moonsiff.

The 31st August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Evidence of Payment of Rent—Agent's Receipts.

Cases Nos. 2449 and 2454 of 1873.

Special Appeals from decisions passed by the Officiating Judge of Purneah, dated respectively the 26th and 27th August 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 14th July 1873.

Shaikh Ameer Buksh and another (Plaintiffs), *Appellants,*

versus

Yusuf Ali and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellants.

Moonshee Mahomed Yusuf for Respondents.

Receipts signed by the landlord's agent, if shown to be authentic, are *primâ-facie* evidence of payment of rent, but not conclusive evidence.

Phear, J.—We think that this case has not been sufficiently tried in the Lower Appellate Court. The burden lay upon the defendant to prove that he paid the money which was claimed from him. He produced receipts purporting to have been given him by the putwaree of the plaintiff. In the first of the two cases, the Judge says: "The "lower Court has very improperly decreed "the whole amount, relying on the fact that "the putwaree and his naib are relations of "the defendants. This is no reason for decree-"ing the amount claimed; if the putwaree

"has realized the amount, he and not the "ryot is responsible; and even suppose the "putwaree to have granted the receipts "without having realized the rent, he is "still responsible. The defendants hold "receipts duly attested, which bar any "further claim on the part of the zemindar." But the Judge stopped short of saying that, in his opinion, actual payment by the defendant to the putwaree or naib-putwaree is in fact proved. He seems to say: "It is enough for the defendant if he produced duly-attested receipts;" that is, we suppose, receipts signed by the agent of the plaintiff. Now, although receipts of this kind, if shown to be authentic, are *primâ-facie* evidence of payment, they are not conclusive evidence of payment. And the first Court, for reasons which it gave, disbelieved these receipts. It formed the opinion that the receipts had been written and signed by the naib-putwaree for the purpose of affording a defence to these actions. And, of course, it may be conceived that this may be a true view of the result of the evidence. But however this may be, the Lower Appellate Court ought to have come to a definite finding of fact with regard to this point.

In the second case the Judge says: "This "case is very similar to the one decided "yesterday, No. 124 (that is, the first of "the two cases); the defendants plead pay-"ment in full, and produce receipts which "have been attested by the collecting officer. "If the putwaree has granted receipts for "money for which he has not accounted, the "responsibility lies upon him. Defendant "has proved payment, and must therefore be "discharged from all liability."

Here, again, we find the Judge speaking as if the receipt signed by the putwaree was itself conclusive on the issue which he had to try. It would appear when he said "the defendant has proved payment," he meant that he has produced receipts signed by the plaintiff's agent. But, for the reasons just now given, this is not enough. The Lower Appellate Court ought, upon all the evidence before it, to come to a finding of fact whether or not the defendant had actually paid the money as he said he had.

We reverse the decision of the Lower Appellate Court in the first of these cases, namely, 2449, and remand the case to that Court for retrial. Costs will abide the event.

In the second of the two cases, namely, 2454, no appeal lies, and therefore the appeal must be rejected but without costs.

The 31st August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act XL. of 1858, ss. 8 & 9—Appointment of Manager—Procedure.

Cases Nos. 159 and 199 of 1874.

Miscellaneous Appeals from an order passed by the Judge of Purneah, dated the 10th June 1874.

Syud Hyder Reza and another (Petitioners), *Appellants,*

versus

The Collector of Purneah (Opposite-party), *Respondent.*

The Advocate-General and *Messrs. J. P. Kennedy, C. Piffard, G. H. P. Evans, M. M. Ghose, G. Gregory, C. Gregory,* and *R. T. Allan, Baboo Ashootosh Dhur,* and *Moonshees Mahomed Yusuf, Abdul Baree* and *Serajul Islam* for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

Under Act XL. of 1858, s. 9, the Judge has no power to appoint the Collector as manager of the estate of the minor, until he is satisfied that no person has established title to a certificate under a will or deed, and that there is no relative willing and fit to be entrusted with the charge of the property; and both these alternatives must be proved to the Court in the ordinary way by evidence brought before the Court.

Phear, J.—In these cases, it appears to us that proper judicial discretion has not been exercised in the matter of the petitions. The Judge says: "In such a case the law "directs me to enquire into the propinquity "and fitness of relations willing to act for "the minors, and to adjudicate accordingly. "My enquiry is, of course, supposed to be "more or less judicial; at the same time I "am not bound to strict evidence or proce-"dure, as the law empowers me to act *even* "*on a Collector's* report of fitness; and it "must therefore fully recognize my right "and my duty to act upon my own opinion "of fitness even though it may not be "founded on legal evidence with all its "technical adjuncts. The object of the law "too is clearly very much more the pro-"tection of the minors than the adjudication

"of the claims of the contending applicants." And accordingly, in this view, the Judge has determined the matters before him rather upon speculative grounds than upon the foundation of any facts established by proper evidence; and we think for this reason that his decision cannot be allowed to stand.

We have before, on other occasions, found it necessary to point out that, under section 9, Act XL. of 1858, the Judge has no power to appoint the Collector as manager of the estate of the minor until he is satisfied that no person has established title to a certificate under a will or deed, and that there is no relative willing and fit to be entrusted with the charge of the property of the minor. And both these alternatives must be proved to the satisfaction of the Court in the ordinary way by evidence brought before the Court. The 8th section, no doubt, says: "The Court may call upon the Collector or "Magistrate for a report on the character "and qualification of any relative or friend "of the minor, who may be desirous or "willing to be entrusted with the charge of "his property or person." And the Judge deduces from this section that the Legislature intended to relieve the Court generally from the necessity of proceeding, as in ordinary cases, upon evidence, and enabled the Judge to act upon his own personal opinion, however that opinion might have been formed. But it seems to us hardly necessary to remark that the true effect of this section is just the reverse of this. The Legislature, when it thought it necessary to make an express exception from the ordinary rules regarding the character of receivable evidence in favour of the Collector or Magistrate's report, must have assumed that the ordinary rules of procedure, evidence, and trial would, in other respects than that which was excepted, be followed and observed. So far from thus relieving the Court from the obligation of ascertaining the necessary facts through the means of evidence, it seems to point out by implication that that course must not be deviated from except in the expressly mentioned particular.

We must, therefore, reverse the order of the Judge, and we send back both petitions to the Judge in order that he may rehear the matter of them after giving all parties concerned fair and reasonable opportunity of producing before him such evidence relevant to the material allegations of the petitions as he may think necessary and proper.

We make no order with respect to costs.

The 31st August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. (B. C.) of 1869, ss. 38 and 39—Procedure—Right of Suit—Appeal.

Cases Nos. 2330 and 2331 of 1873.

Special Appeals from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 23rd June 1873, reversing a decision of the Moonsiff of Durbhungah, dated the 28th November 1872.

Mr. G. W. Crowdy (Petitioner), *Appellant,*

versus

Goburdhun Roy and others (Opposite Party), *Respondents.*

Baboos Juggodanund Mookerjee and *Amerendronath Chatterjee* for Appellant.

Baboos Gopal Lall Mitter and *Neel Madhub Sein* for Respondents.

According to the procedure prescribed in Act VIII. (B. C.) of 1869, ss. 38 and 39, until the Collector has entered upon his inquiry, there is but one party concerned; and no proceeding in the shape of a suit or appeal can find place until after the Collector has completed his measurement and record.

Phear, J.—UNDER section 38 of the Bengal Rent Law, a proprietor of an estate or tenure, or other person entitled to receive the rents of an estate or tenure, who cannot ascertain who are the persons liable to pay rent to him in respect of the lands or any part of the lands comprised in his estate or tenure, may apply to the Court which would have had jurisdiction in case a suit had been brought for the recovery of those lands, for an order to measure the lands. And upon such application being made, and the necessary costs being deposited, the Court must order such lands to be measured, and cause a copy of the order to be transmitted to the Collector in whose jurisdiction the lands are situate, "together with the sum so deposited for "costs, and the Collector shall thereupon "proceed to measure such lands and shall "ascertain and record the names of the "persons in occupation of the same, or, on "the special application of the proprietor or "other person aforesaid, but not otherwise, "shall proceed to ascertain, determine, and "record the tenures and under-tenures, the "rates of rent payable in respect of such

"lands, and the person by whom, respectively, "the rents are payable." The Collector is bound to act upon this order. And section 39 enacts that, "after he shall have finally "completed any such measurement and re-"cord, the Collector shall return a copy thereof "to the Court by which such measurement "had been ordered, and such Court shall "receive and record the same; and every "decision of the Collector made in pur-"suance of the provisions of section 38 "shall be appealable as if the same had "been an order of the Court into which such "copy had been returned, made upon the "day on which such copy was so returned; "but save as aforesaid, every decision of "such Collector made in pursuance of the "provisions of section 38 shall be final." The course of procedure that is here prescribed seems to be very clear, and it will be observed that until the Collector has entered upon his inquiry and got parties before him on the ground, there is but one party concerned, namely, the person who applies to the Court for an order to measure. It is not until after the Collector has entered upon his work and completed his measurement and record that any proceeding in the shape of a suit or appeal can find place. When, however, he has made his measurement and record and returned it to the Court, any one of the persons aggrieved thereby may appeal as if this had been an order of the Court into which it had been returned. The recorded decision, or if such an appeal is presented and the recorded decision of the Collector is modified or reversed on appeal, then that altered decision, is final and binding on the parties concerned.

In the case which is before us, it appears that Mr. MacDonald applied on 2nd March 1872 to the Moonsiff, under this section 38, for an order to be made on the Collector for measurement of certain land. And the Moonsiff, after several intervening proceedings, in which no one was concerned except Mr. MacDonald, on the 13th March 1872, made an order upon the Collector, which he himself afterwards somewhat modified in extent. After this order was made, namely, on 1st October 1872, one Goburdhun and others having, or claiming to have, shares in the same property with Mr. MacDonald, objected to the Moonsiff that his order ought not to have been made, because Mr. MacDonald was not the sole proprietor of the estate or tenure. And the Moonsiff, upon this objection being made, appointed the 23rd November for the production of evidence and the hearing and determining of the matter of this objection. And, finally, on the 28th November, the Moonsiff overruled Goburdhun's objection. Against this decision of the Moonsiff so overruling Goburdhun's objection, an appeal was preferred to the Judge on the 4th December 1872. And the Judge passed his decision on the 23rd June 1873, reversing the decision of the Moonsiff; and it is against this final decision of the Judge that the present appeal has been preferred to us.

After the explanation which was just now given of the force and effect of sections 38 and 39 of the Rent Law, it is hardly necessary for us to say that all these proceedings of appeal are entirely misplaced and without jurisdiction. The order which the Moonsiff originally made to the Collector on the 13th March was, in its nature, an *ex-parte* order, and it was not turned into a plaint or starting-point of a suit by reason of the objection made by Goburdhun on the 1st October 1872. It may be that Goburdhun had, at that time, a right to point out to the Moonsiff that his proceedings had been irregular or ill-founded if the case were so. And the Moonsiff might have jurisdiction, if upon hearing the objection and the answer to it he thought the objection ought to prevail, to alter his original order. As to that it is not necessary now to say anything. But it seems to us that this objection of Goburdhun did not amount to the institution of a suit upon which a regular course of appeal would run.

It has to be noticed that after Goburdhun's objection had been preferred—indeed, it seems after it had failed — another shareholder or set of shareholders, Ram Lall and others, also objected to the Moonsiff against his original order. And the Moonsiff, on the 11th February 1873, finally heard and determined this objection, and made an order limiting in some degree or modifying his original order of March 1872. He recalled the order so far as it applied to the whole of the estate or tenure for which Mr. MacDonald had asked an order for measurement; but said it might issue with respect to a specified portion only of that estate. Against this order of the Moonsiff an appeal was preferred to the Judge on the 5th March 1873. This appeal was taken up at the same time with the appeal which Goburdhun presented to the Judge, and was with it disposed of by the decision of the Judge which had already been spoken of, passed on the 23rd June 1873. This set of appeal proceedings is equally irregular and wanting

in foundation with those which started with Goburdhun's objection. It must, therefore, also be set aside. We think, under the circumstances of the case, that there should be no order for costs either in this Court or in the Court below.

It may be added that nothing which has been said now will operate in prejudice of either party taking any proper steps, if they desire, for impeaching the jurisdiction of the Moonsiff to make the order which he did make.

The 31st August 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Right of Occupancy—Transfer—Acquiescence.

Case No. 2458 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 23rd August 1873, affirming a decision of the Moonsiff of that District, dated the 24th June 1873.

Shaikh Ameen Buksh and another (Plaintiffs), *Appellants,*

versus

Bhyro Mundul and another (Defendants), *Respondents.*

Mr. C. Gregory for Appellants.

Mr. M. L. Sandel for Respondents.

The conduct and acts of a zemindar may be such as to take a case out of the purview of the Full Bench decision in 22 Weekly Reporter, p. 22, which declares that a right of occupancy is not transferable, *e. g.*, where a zemindar has clearly recognized a transfer and done everything in his power in accepting the transferee as his tenant.

In this case, the plaintiff, the zemindar, is the special appellant. He sued to eject the ryot, special respondent, on the ground that he had no right of occupancy. The Moonsiff laid down this issue, whether the defendants have, by virtue of the purchase of Doolaroo Mundul, their father and ancestor, of the rights of the former jotedar, Hosseinee Baujara, and in consequence of the registration of the names of Doolaroo Mundul, as purchaser, and of themselves in the zemindar's serishta, and by payment of rent, acquired the right of occupancy of the former tenant, or not? The pleader for the plaintiff appears to have been examined by the Court, and the Moonsiff says that it is admitted that the land of the disputed jote was formerly the jote of Hosseinee Baujara; that he held possession of it for upwards of twelve years; that by virtue of a purchase made in execution of a decree, first the name of the purchaser Doolaroo Mundul, ancestor of the defendants, and after his death, that of the defendants, were registered in the zemindaree office in the year 1274; that the rent has been paid all along by the ancestors of the defendants and the defendants themselves; and that they have also paid a portion of the rent for the year 1280. The Moonsiff, therefore, under the circumstances of this case, held that the defendants had acquired a right of occupancy, and that they could not be ejected. The Judge, in a few words, has confirmed that decision.

The grounds of special appeal are that the Lower Appellate Court is wrong in holding that the plaintiff cannot oust the defendants owing to his having received rent from them and acknowledged them as his ryots in succession to the former holder; and, secondly, that the defendants were bound to prove that by law, or by custom having the force of law, they had acquired a good title to hold the lands under their purchase of Hosseinee's rights; and that this the Lower Appellate Court has not found.

The facts of the case are these: The former tenant, Hosseinee Baujara, was the debtor of the defendants' father, and in execution of a decree in a bond-suit the holding of the debtor, Hosseinee Baujara, or rather his rights and interest in that holding, were sold, and were purchased by Doolaroo Mundul, the father of the defendants. The plaintiff's pleader, in his examination in the Court below, admitted that Hosseinee Baujara had acquired a right of occupancy. He also admitted that Doolaroo's name—that is, the name of the purchaser at the sale in execution—had been registered in the zemindaree serishta "bu-zurieh khureeddaree;" that Doolaroo had paid rent up to 1274, when he died; and that, after his death, the names of defendants had been similarly registered in the zemindaree serishta, and that rent had been paid by the defendants up to 1280.

A great many cases have been cited during the course of the argument, and it appears clear from the decision to be found in Volume XXII., Weekly Reporter, page 22, Full Bench, that it has been ruled by this Court that a right of occupancy is not transferable; that it is a mere creature of the Act; and that if it does not depend upon any custom, it cannot be transferred. Now, the

only question that I have to decide in this case is, whether, owing to the conduct of the zemindar in this case, the present case is taken out of the purview of the Full Bench ruling or not. It is admitted that the defendants before the Court have not been in occupation of the land in dispute for twelve years; their occupancy does not extend beyond eleven years; but it has been contended on behalf of the special respondents, that, independent of the ruling of the Full Bench, equities may arise as between the zemindar and his tenant which may bind the former. The pleader for the respondents lays great stress upon the admission made by the pleader for the plaintiff, special appellant, before the Moonsiff. There it is admitted by the pleader that the special respondents' father's vendor had acquired a right of occupancy, when his rights passed in execution of decree to the special respondents' father; he also admitted that the name of the father of the special respondents had been registered in the zemindaree serishta, acknowledging his khureed-daree title; he also admitted that up to 1274 (the purchase having taken place in execution of decree in April 1862) the special respondents' father had been paying the rent to the zemindar, and there is a further admission that, after the death of their father Doolaroo, the defendants, special respondents, had paid the same rent to the zemindar up to 1280.

Now, in a very recent case, which was decided by the present Chief Justice and Mr. Justice Birch, reported in Volume XXII., Weekly Reporter, page 169, those learned Judges, having the Full Bench decision, to be found in the same volume of the Weekly Reporter, page 22, before them, remark that the landlord in that case—namely, the case in Volume XXII., page 169—had not, in any way, recognized the transfer or done anything which could amount to an acceptance of the tenant, or allowing the tenancy to be given up. From these remarks it is clear that these learned Judges, having the Full Bench case before them, appear to have thought that there might be cases in which, by the conduct and acts of the zemindar, the case would be taken out of the purview of that Full Bench decision.

Now, I think the present case is one which, by the acts and conduct of the zemindar, is clearly taken out of the purview of the Full Bench decision. As already observed, it is admitted by the plaintiff's pleader, who was examined in the Court of first instance, that the holding of the present tenants, special respondents, was registered in the zemindar's serishta on the strength of the purchase in execution of decree; that rent for many years was received from Doolaroo, the father of the special respondents, and after his death from the special respondents themselves up to 1280. I therefore hold in this case that there has been a clear recognition of the transfer, and that the zemindar has done everything in his power in accepting the defendants as his tenants, and allowing the former tenancy of Hosseinee Baujara to be given up and transferred to the special respondents.

I therefore dismiss the special appeal with costs. Pleaders' fees, one gold mohur.

The 31st August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Heirs and Representatives—Liability—Breach of Contract—Damages.

Case No. 243 of 1874.

Special Appeal from a decision of the Officiating Judge of Tipperah, dated the 1st November 1873, affirming a decision of the Subordinate Judge of that District, dated the 7th May 1873.

Mr. J. P. Delanney (Plaintiff), *Appellant*,

versus

Mussamut Bibee Jan and others (Defendants), *Respondents*.

Baboo Nullit Chunder Sen for Appellant.

Baboo Bharut Chunder Dutt for Respondents.

The heirs and representatives of a deceased person are liable according to equity and good conscience to pay, not merely the actual debts of the deceased, but also the damages which arise from his breaches of contract.

Couch, C.J.—THIS suit is brought upon an agreement which the plaintiff says was entered into with him by the deceased Namoollah Darogah on taking a dur-ijara; the agreement being that the deceased would deliver up at the end of the dur-ijara certain papers which he was to keep or procure during the time he held the land. The plaintiff asks either that the papers may be delivered up to him or that he may have damages.

The first Court, the Subordinate Judge, dismissed the suit. I do not think it is necessary to notice any portion of that judgment, because the judgment which is appealed from to us is that of the Officiating Judge. He says that the covenant, as he calls it, upon which the suit is based, is vague, so far as the specification of the papers to be delivered over are concerned; and from first to last there is no obligation in the kubooleut by which the dur-ijaradar bound himself to keep any papers of the kind. He is to hand over, "at the expiry of his lease, *stith jummabundee paidawaree* papers, chittas and kubooleuts executed by the ryots in his favour. But suppose he never had or kept such papers, suppose his agreements with the ryots were parol and not reduced to writing, what then? At the end of his lease he hands over to the plaintiff nothing, and he tells him that nothing represents all the papers in question which he kept. He was under no obligation to keep any accounts, and therefore the covenant amounts to no more than this that, if the plaintiff can prove any particular papers of the kind were kept up by the dur-ijaradar, he will be entitled to recover them from him." Now, the kubooleut by no means bears out what I have just read. In the kubooleut there is this passage: "I shall hold possession of all the lands in the said mehal, preserve the boundaries thereof, grant pottahs to, and take kubooleuts from, ryots and cultivators, under my signature at the full rate prevailing in the pergunnah and the village, realize rent accompanied by chalan, and grant dakhillas." It is clear from this that the intention of the parties was that Moollah Darogah should take kubooleuts from the ryots and should keep the papers; and if he, as the Judge supposes, never had kept such papers, and his agreements with the ryots were parol and not reduced to writing, he would not be performing his agreement. What follows must of course be read in connection with this passage. He says, "Of the lands and jummas I shall submit to you true and correct *stith jummabundee* and *paidawaree* papers every year, and kubooleuts from tenants and chittas of the whole of the land, on the determination of the time limited. Should I not submit them, you shall institute inquiry, and take them according to the law in force. I shall, without objection, deliver any paper that may be called for at any time by you or by the hakims." Then there is another passage: "I too at the time of making settlement with ryots shall get this condition reduced into writing," showing that settlements with ryots were to be in writing. The fair and reasonable construction of this kubooleut is quite opposed to the supposition of the Officiating Judge. It shows that papers were to be kept which would be of great use to the plaintiff at the expiration of the lease. In this respect, therefore, there is a grave error in the judgment, and it is one of the grounds upon which the Officiating Judge has affirmed the decree of the Subordinate Judge dismissing the suit.

Further, he says: "It is contended that, because they (that is, the defendants) inherited the assets of the deceased, they are bound to make good all his obligation. They are certainly bound to make good from those assets any ascertained money-debt due by the deceased, but the obligation to keep up and deliver over certain accounts (supposing them to exist) is purely personal obligation very different from a money-debt, and will not descend to heirs and representatives." Here, again, in holding that the heirs and representatives of the deceased were only liable for money-debts, the Officiating Judge is wrong. The heirs and representatives are liable, according to equity and good conscience, to pay, not merely the actual debts of the deceased, but to pay the damages which arise from breaches of contract by the deceased. It is not necessary that it should be an ascertained debt. They are liable so far as they receive property from him on a promise to do a collateral act which is uncertain and rests only in damages, which is the case here. It was a personal obligation on his part which he had broken during his lifetime, according to the facts found in the case, and for which he would have been liable to pay damages. I consider that the persons who, in the case of Mahomedans, inherit his property, ought to be placed in the same position as regards liability for the acts of the deceased as executors are who take the whole of the personal property of the deceased. Therefore, there is again a serious error in the judgment of the Officiating Judge, which, without the other, would be a ground for setting aside his decree. The plaintiff, however, unless he proves the existence of papers, cannot have a decree for them specifically ordering them to be delivered up. But, if the papers are not in existence through the fault of the deceased, who by the kubooleut agreed to keep such papers, the plaintiff will be entitled to recover such damages as he may show that he has sustained. What

those damages may be we cannot tell. By dismissing the suit on the ground on which it has been dismissed by the lower Courts, the plaintiff has not had an opportunity of showing the damage he has sustained.

We reverse the decree of the Officiating Judge, and substitute for it a decree reversing the decree of the first Court, and remanding the case to it for re-trial.

Costs will follow the result.

The 1st September 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Hindoo Law—Succession—Daughter—Father—Mitakshara Law.

Appeal from the judgment of the Hon'ble C. Pontifex, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Chotay Lall (one of the Defendants), *Appellant,*

versus

Chunnoo Lall and another (Plaintiffs), *Respondents.*

Mr. Montriou (*Messrs. Evans* and *Palit* with him) for Appellant.

Mr. Kennedy (*Mr. Lowe* with him) for Respondents.

Property inherited by a Hindoo woman from her father does not, under the Mitakshara Law, descend on her death to her heirs, but reverts to the nearest heirs of her father.

THE plaint in this suit set out that one Thakoor Doss Baboo, of the sect of Jains, a resident in the North-Western Provinces of India, came to Calcutta in the year 1814, and remained there till his death, retaining the usages and customs of his sect; that he died on the 13th of February 1860 intestate and without leaving any male issue or widow, but leaving him surviving an only daughter, Luckhee Bibee, then an infant of the age of five years, and a brother's son named Inder Chand; that, on the 20th of August 1861, the Administrator-General of Bengal obtained letters of administration to the estate of Thakoor Doss Baboo, and took, and has now, possession of the estate. The plaint then stated that Luckhee Bibee married the defendant Chotay Lall on the 22nd November 1850; that Inder Chand, the brother's son of the Thakoor Doss Baboo, died on the 28th of May 1861 intestate and leaving him surviving Nunnoo Lall and Chunnoo Lall, one of the plaintiffs in this suit, his only sons and heirs; that, on the 4th of September 1872, Luckhee Bibee died at Arrah without leaving issue, but leaving Chotay Lall, her husband, and Nunnoo Lall and Chunnoo Lall, her surviving; and that, on the death of Luckhee Bibee, Nunnoo Lall and Chunnoo Lall became entitled to the estate of Thakoor Doss Baboo as his heirs; that, on the 4th of July 1873, Nunnoo Lall died intestate, leaving him surviving the plaintiff Dhunnoo Lall, an infant then of about the age of three months, his only heir and representative. The plaintiffs then set out correspondence with the Administrator-General asking him for an account, and conclude by praying that they might be declared to be entitled as the heirs of Thakoor Doss Baboo to his estate; that an account may be taken by the Court of the said estate in the hands of the Administrator-General of Bengal, and that the Administrator-General of Bengal may be directed to pay to the plaintiffs such sum as may be found payable by him on such account being taken; and that the plaintiffs may have such further or other relief as the nature of the case requires.

In their written statement the plaintiffs alleged that, since the filing of their plaint, they had discovered that the defendant Chotay Lall is, and was, at the time of the death of Luckhee Bibee, a leper, and they submitted that, as such, he was disqualified from taking property by inheritance.

The defendant Chotay Lall admitted in his written statement the facts set out in the plaint regarding Thakoor Doss's arrival in Calcutta and death there on the date stated, intestate, and without leaving any male issue or widow, but leaving him surviving an only daughter and heiress, according to Hindoo Law, Luckhee Bibee, then five years old; that the estate was in the hands of the Administrator-General; that this defendant married Luckhee Bibee on the date mentioned, and that she died at Arrah in September 1872, without issue, leaving this defendant surviving.

The defendant then went on to state that, the 21st of March 1873, he applied for d obtained, on notice to the Administrator-eneral of Bengal, a certificate of adminis-tion to the estate of Luckhee Bibee from the dge's Court at Arrah; and he submitted t Thakoor Doss was, and the plaintiffs and defendant are, governed by the Mitakshara w of Inheritance which obtains at Behar the North-Western Provinces of India.

He admitted that the plaintiff Chunnoo l is the grandson of the brother of akoor Doss Baboo, deceased, and the infant intiff the great-grandson of the brother of Thakoor Doss Baboo, but he submitted , under the Mitakshara Law, Luckhee ee inherited the moveable properties of her her Thakoor Doss absolutely, and as her dhun, and that he, as her husband, is tled to succeed to the moveable estate reference to the plaintiffs; and he prayed he might be declared entitled as the of Luckhee Bibee to the estate which died possessed of, and to so much them as were in the hands of the ministrator-General; that an account may aken by the Court of the said estate; and the Administrator-General may be ted to pay to him such sum as may be d payable by him on such account being ; and that the plaintiff's suit may be ssed with costs.

e written statement of the Administrator-ral of Bengal admitted that he had n out letters of administration to the e of Thakoor Doss on the 20th of August , and stated that he had duly adminis-d the estate, and after payment of all and liabilities had invested the surplus thereof in Government securities, which, her with cash, amounted to Rs. 44,006 as accounts, to which he craved reference; hat he had paid maintenance to Luckhee , the daughter of Thakoor Doss, out e interest of the estate, such payments made latterly under an order of Court.

the original hearing before Pontifex, J., Court laid down the following issues, —

Was Thakoor Doss a Jain?

If so, what is the law of succession able to Jains?

Is the defendant Chotay Lall dis-ed to inherit on account of leprosy?

Court then proceeded to try the case, delivered the following judgment:—

this case the plaintiffs are brothers, dsons of one Thakoor Doss Baboo, who was admittedly a native of the North-Western Provinces, and who, having come down to Calcutta, acquired the property which is in dispute in this suit, and died at Calcutta in February 1860 intestate, without having relinquished the law of his birth-place.

The said Thakoor Doss left a daughter, Luckhee Bibee, aged five years at his decease, who subsequently intermarried with the defendant Chotay Lall, and died in September 1872 without issue.

Thakoor Doss also left at his decease a brother's son named Inder Chand, who died in May 1871 intestate, leaving the plaintiffs his only sons and heirs. The above-stated facts are admitted by all parties.

The plaintiffs insist, but the defendants do not admit, that Thakoor Doss was a Jain, and they assert that, according to the laws of inheritance governing the Jains, Luckhee Bibee only took the same qualified estate as a widow takes, and that on her death they, as heirs of her father, became entitled.

The plaintiffs also assert that, before Luckhee Bibee's death, the defendant Chotay Lall became, and has since continued to be, a leper, and is therefore disqualified from inheriting to his deceased wife. If, therefore, under the law applying generally to the North-Western Provinces, the Court should determine that the plaintiffs are not entitled to take the property on Luckhee Bibee's death as heirs of her father, it would become necessary to try the following issues: —

1. Was Thakoor Doss a Jain?

2. If so, what is the law of succession applicable to Jains? and

3. Is the defendant Chotay Lall disqualified to inherit on account of leprosy?

But Mr. Kennedy, on behalf of the plaintiffs, insists that, under the Mitakshara Law, apart from any peculiar law of inheritance affecting the succession to property among Jains, the deceased Luckhee Bibee took only a qualified interest in the property in dispute, which interest was not transmissible to her heirs; but upon her death the property reverted to the next heirs of her father, and it was not disputed on behalf of the defendants that the plaintiffs would be entitled to the property in question in this suit if it was established that, under the Mitakshara Law, a daughter does only take a qualified estate in her father's descended property, similar to the qualified estate of a widow. Mr. Evans, on behalf of the defendants, nevertheless insisting that, under the Mitakshara Law, the daughter takes an absolute interest in property descending to her from her father,

which interest on her death descends to her own heirs, and not to the heirs of her father.

Under the circumstances of the case, I considered it right that the question of inheritance, under the Mitakshara Law, should be argued before trying the issues above referred to.

The argument on each side, which was exceedingly able, disclosed the distracted state of the authorities on the quest on.

At the root of the subject for my decision is the 2nd paragraph of section 11 of Chapter II. of the Mitakshara. That paragraph deals with gifts by the father, mother, husband, or brother, and also with acquisitions by inheritance; in each case the subject-matter is called woman's property, and the object of section 11, is to point out the line of devolution of "woman's property."

The language of paragraph 2 is general, and on the ordinary principles of construction everything which a woman inherited would, under it, become her separate property.

It is almost impossible, indeed, to give any meaning whatever to the word "inheritance," unless it applies to succession from a father.

It is true that a woman may inherit from her son, grandson, or great-grandson, but in those cases she does not take as a separate heir, being only a preferential heir to her husband, but in the same degree with him, and only taking before in the first instance (Mitakshara, Chapter II., section 11, paragraphs 2 and 3). That a mother does, in fact, as successor to her son, take only a qualified estate has been decided: 6 Bombay H. C. R. 215; and 2 Madras H. C. R. 402.

It has further been decided, and is now beyond controversy, that the estate which a widow takes in succession to her husband is only a qualified estate, being in fact a continuance of her deceased husband's estate rather than an inheritance from him.

Nor, it would seem, can a woman inherit property from her mother as separate property, because, for a daughter to inherit from a mother, it must have been the mother's own separate property, and having *once devolved* as separate property, it ceases to be ranked as such.

It seems doubtful whether a sister can inherit to a brother (2 Strange 244) except in Bombay, where it has been decided that she can: 6 Bombay H. C. 1; and 9 Moore's I. A. 516.

If she cannot inherit from a brother (except in Bombay), then the only predecessor to whom the word inheritance could apply in paragraph 2 of section 11 of Chapter II. of the Mitakshara would seem to be a father.

It appears to me, therefore, that, if this case was uncovered by authority, property taken by inheritance by a woman from her father would be her separate property, unless the words "acquired by inheritance" are altogether rejected from the text.

The Judicial Committee, at page 513 of 11 Moore's I. A.,* seem to have thought that some meaning must be given to the words, for they say: "This is intelligible if the words 'property which she may have acquired by inheritance' in the second clause are considered to be property inherited in her husband's lifetime or from some persons other than him."

The following are the direct authorities on the point:—

Sir M. Sausse, in 1859, in a case reported at page 130 of 1 Bombay H. C. Reports, held (see page 133) that a daughter takes absolutely when inheriting from her father.

In a case reported in 6 Bombay H. C. Reports, page 1, decided in January 1869 by Sir Joseph Arnould, the headnote states that all property acquired by a married woman by inheritance (except from her husband) classes as *stridhun*, and descends accordingly. But this case is founded exclusively on the case in 1 Bombay H. C. R. 130.

On the other hand, the decisions of the Madras Court restrict the estate of a daughter inheriting from a father to a qualified interest only.

In 3 Madras H. C. Reports 312, the headnote lays down broadly that property acquired by a woman by inheritance is not to be classed as *stridhun*.

But in that case it is to be observed that the property is assumed to have been the mother's *stridhun*, and having once devolved as such it would cease to be ranked as *stridhun*; and, moreover, one reason for the decision was that, even if the property had descended to the daughters as *stridhun*, the defendant, the surviving daughter, would take in preference to the plaintiff.

But, in 6 Madras H. C. Reports 510, although the decision of the question before me was not strictly a question to be determined in the case, both Chief Justice Scotland and Mr. Justice Holloway carefully considered it, and decided that a daughter inheriting from her father takes only a qualified estate.

* 9 W. R. (P. C.) 31.

The Chief Justice says, page 331: "There "is no doubt, I apprehend, that as to the estate "which daughters take by succession when "there is a son to inherit, the view of the law "presented by the positions advanced on both "sides is correct. It appears to me also that "the law is the same when there is no grand-"son, as put on behalf of the respondents, but "that is not a point which it is necessary to con-"sider." Again at page 333: "With respect to "the second question raised by the appellant's "objection to the declaration of the plaintiff's "right, whether the zemindaree is the *stridha-"nam* property of the first defendant, I need "not add anything, as my conclusion on the "first question is obviously decisive of it." And at page 334: "The fundamental principle of "the Law of Succession, too, is adverse to the "contention of the appellants, for if paternal "property passing to a daughter were to "become her *stridhanam*, the succession would "pass away from those who were the nearest "heirs by virtue of their capacity to offer "oblations to the last male owner."

Mr. Justice Holloway comes apparently to the same conclusion (page 336) upon "the principles of the law, and more especially upon the principle upon which daughters inherit at all." I must observe, however, that the case reported in 6 Bombay H. C. Reports, page 1, was not cited in the Madras Court.

In addition to these authorities are the cases in 6 Select Reports 301, and in the S. D. A. Reports of 1862, 192, both of which were on Mitakshara Law. The first of these cases is, however, not very satisfactory, because it seems to have been assumed that what is there called "ancestral property" could not be *stridhun*, which was in fact the question to be decided; and in the second case, Sir T. Strange's book was not quoted. But this omission seems now immaterial, as the authority of Sir T. Strange's book must yield to the decisions of the Madras Court.

Upon the whole, therefore, I think I am bound by the greater weight of the authorities to decide that in this case Luckhee Bibee's estate was only a qualified estate, and that upon her decease the plaintiffs, as the heirs of her father, became entitled to the property in dispute.

Though I must confess that, speaking for myself, if the case had been untouched by authority, I should have felt compelled to give a plain meaning to the plain and unqualified words of the Mitakshara, rather than explain them away, or in effect reject them, by the application of principles of which after all we have only a hazy and doubtful knowledge.

Under the circumstances of the case, I think all parties should have their costs on scale No. 2 out of the estate, the suit closely approaching the nature of an administration suit, and the defendant being brought before the Court by the suit of the plaintiff.

The defendant Chotay Lall appealed from this decision on the following grounds:—

That the learned Judge held that when a daughter, under Mitakshara law, inherits the separately acquired property of her father, who is separate from his own family, she does not take the same absolutely, and that in so holding he was wrong in law.

For that the learned Judge held that, under the circumstances aforesaid, the daughter takes an estate similar to a widow's estate, and that he was wrong in law in so holding.

For that the learned Judge held that upon the death of a daughter who had so inherited her father's separate estate, the same passed to the heirs of the father, and not to the heirs of the daughter.

For that the property in suit being moveable, the learned Judge's decree makes no distinction between moveable and immoveable property.

For that, under the circumstances of this case, the learned Judge ought to have found that the husband was a preferential heir to the father's brother's grandsons.

For that the learned Judge gave a decree in favour of the plaintiffs, whereas he ought to have dismissed their suit.

This appeal came on for hearing before Couch, C.J., and Macpherson, J., when the Appellate Bench, before the conclusion of the argument for the appellant, on discovering that all the issues laid down in the original Court had not been tried by that Court, remanded the case for determination of such of the issues as had not been decided, and directed that Court to return its finding with the evidence to the Appellate Court. On the remand, the plaintiff abandoned the issue as to Chotay Lall being a leper, and on the other issue, Pontifex, J., after taking evidence, passed the following judgment:—

In this case the intestate Thakoor Doss was a Jain, and came from the North-Western Provinces to Calcutta fifty years before his death, resided in Calcutta until his death, and married in Calcutta a wife from the North-Western Provinces. While in Calcutta, he

worshipped at a Thakoorbaree, dedicated to the God Paresnauth, at which only Jains worshipped, and at which the worship was conducted by North-Western Provinces Brahmins.

His religious ceremonies were always performed by Brahmins from the North-Western Provinces, and never by Bengalee Brahmins. I think it clear from the evidence taken in this case, and from the authorities collected and followed in the case of Bhagwandas Tejmal *vs.* Rajmal *alias* Hiralal Lachimandas, at page 241 of 10 Bombay High Court Reports, that the Jains are Hindoos, differing, indeed, from the main body of Hindoos in certain of their religious beliefs, and not observing all their ceremonies, but having religious beliefs and ceremonies in common, and intermarrying with the other Hindoos. This being so, I can see nothing to take this case out of the general rule that succession is governed by the personal law of the intestate. In this case the law generally applicable to Hindoos in the North-Western Provinces was originally the personal law of Thakoor Doss. When the intestate came to Calcutta, he showed his intention to retain that personal law by continuing to have all his ceremonies performed by Brahmins from the North-Western Provinces only. I therefore find that this case is governed by the law of the Mitakshara. With this finding I leave the costs of trying this issue to be dealt with by the Appellate Court. The costs of the Administrator-General on scale No. 2 will, however, come out of the estate.

Mr. Montriou for the appellant.—Mr. Justice Pontifex felt the force of the text of the Mitakshara, but he yielded to an apparent uniformity of precedent, in which the authority and plain import of that text have been overlooked or disregarded.

The latest Bombay case* has since been published; and this is, at least, an excuse for the present appeal.

There is no ambiguity in the Mitakshara text. It is an amplification of the text of Yajnavalkya, which may certainly be treated as ambiguous, and is, in its concluding portion, paraphrased rather than translated by Colebrooke.† A closer translation is given by Dr. Röer.‡ In this the Sanscrit supplementary term *adi* is rendered 'and such like.' It is amplified and fully explained by the commentator, *viz.*, "by the word "*adya* [is meant, property] obtained by heri-"tage, buying, partition, acceptance, find-"ing: this [description of] *stridhana* is men-"tioned by Manu and the other sages."*

In the Madras cases, which will be relied on, that Court has rejected the plain import of the commentator's words, and has deduced, from an assumed theory of the ground and character of the daughter's succession, a strained interpretation—one that assimilates the character of property which a daughter inherits, in the Peninsular and Benares Schools, to the Bengal doctrine. This is an unsafe and unauthorized analogy. The Dayabhaga, it is notorious, differs essentially in important particulars from the expositions of Vijnyaneswara. We have only to turn to the chapter on Daughters' Succession in the Mitaksnara in order to discover how inapplicable is the reasoning in the Madras judgments beyond the Dayabhaga School. In the Mitakshara, the daughter bears an independent, individual character; her right is not vicarious or representative; it is in no way linked with her son, possible or actual. Preference of one daughter to another is determined by the greater need of provision in the one preferred.

Whatever may be inferred or argued from the vicarious and qualified character of a widow's succession, that cannot apply to a daughter who is, in many respects, received as a son.

The widow but continues or supplements her husband's existence: she lives as a relict to fulfil a task and duty. It is not necessary to examine her position, or how far it is defined and affected by the text we have now to deal with. It is clear that the author of the Mitakshara takes an entirely different view of the female heritage to that taken by Jimuta Vahana. The terms in which a daughter's inheritance is alluded to by the former throughout indicate the character of her estate, and its continued succession, *viz*, to the daughter's heir. Her estate does not, in this commentator's opinion, continue as of her parent,

* 8 B. H. C. R., p. 244.

† Mitak., Ch. II., sec. 11, para. 1.

‡ Published in 1859 in Calcutta.

* This translation was for the purpose of the argument: the original is—

आद्य शब्देन रिक्थक्रयसंविभाग परिग्रहाधिगमन प्राप्तम् एतत् स्त्रीधनं मन्वादिभिरुक्तं ।

It is observable that the passage of Yajnavalkya here annotated is differently quoted in the Dayabhaga, where, instead of *vedanika adyam cha stridhonam* (as in the Mitakshara) we find, *vedanikam cha eva stridhanam*. See as to this, Mitak., Colebr., Ch. II., sec. 11, No. 1.

assing to the next taker from him upon er decease, her own life-occupation or nfruct being in that view a mere accidental terruption to the agnatic succession. To e plain and obvious construction of the takshara no objection, no dogma, is pose d, unless such be borrowed from the en Bengal School. Moreover, we have r the advantage of an elaborate and haustive treatment of the question, cisely as here presented, in Mr Justice eat's judgment. (Mr. Montriou here read d commented upon this judgment.)* It y be said that the Bombay Court has n guided in the interpretation of the law the Vyavahara Mayukha, which is not authority on this side of India. No bt, that is the special book for Western dia, and it confirms our reading of the akshara text; but the words of this text lt governed the construction by the mbay Judges, which is the simple and ous one. So far as the Mayukha plemented and supported that construc-, this accident is balanced by the equally ng and emphatic support given in the amitradaya, the guiding Benares com-tary.† The Viramitradaya is in Court riginal, and the passages can be read explained, if required. They entirely ort the appellant's contention.

ganatha in his Digest, although a l lawyer, thus speaks of the Daya-a doctrine, that, where a daughter its property from her father, it as upon her decease to her father's and family: "What then is the rule respect of an estate devolving on her m her father, or other relative, on ure of male heirs? It should not be swered, she is subject to the control of r husband, even in respect of this estate, cause it is not included in the six-fold perty of women. Since the eventual of her father and the rest is, at a bsequent time, sole heir of wealth which devolved on her from her ancestors, it ntradicts common sense that this should subject to the control of her husband. the question thus proposed, the answer is subject to his control so long only it remains in the possession of his fe; afterwards, it shall be received by e legal heir of her father and the rest. the opinion of those who acknowledge ownership of her husband in wealth "acquired by his wife, not simple control "over it, how can the legal heirs of her "father succeed on the death of the wife, "since her husband's title is not divested so "long as he lives? In truth, Jimuta Vahana "alone contends for the succession of her "father's heirs, after the death of the "daughter, to the patrimony which devolved "on her by the failure of male issue; and "he does not acknowledge the property of "the husband in the wealth of his wife; "but those who do not acknowledge the "husband's claim must not admit the "succession of her father's heirs to the "patrimony which has devolved on the "daughter; for no text nor reasoning shows "it." And the learned commentator then proceeds to refute the supposed analogy between the case of a daughter taking from a father and a widow from her husband.*

Mr. Kennedy for the respondent contended that, when a daughter succeeds to the estate of her father, who leaves him surviving no male issue nor widow, the daughter only takes a qualified estate. She has no absolute power over the property, she cannot alienate it by gift or otherwise, and after her death the property descends to the nearest heir of her father. In this case, moreover, the property which descended to the daughter was ancestral property, and she could not therefore dispose of it. In the case of Mussummut Syan Koowar and Jaya Koowar *vs.* Dookhurn Singh and Debee Dutt, 4 Sel. Rep. 330, the marginal note says: "By the Hindoo Law a daughter "has no power to alienate by gift her ances-"tral property to the detriment of the other "heirs of her father." At page 332 of the same case the judgment of the Court is as follows: "Now, it appears from the decree "of the Sudder Dewanny Adawlut, dated "6th October 1814, that the property in "question is ancestral, and not Gyan Koo-"war's peculiar property (*stridhun*), and also "it seems from the deed of gift that such "gift was not made for religious purposes. "According, therefore, to the law as current "both in Mithila and the West, the deed "is invalid; such being the case, the pro-"perty will go, after her (the daughter's) "death, to the nearest heir of her father, "Kenur Singh, then living. For, as in the "case of the widow, the property goes on her

* 8 Bom. H. C. Rep. 259.
† See Colebrooke's Preface.

* *Digest*, B. V., Ch. IX., sec. 1.
For further decisions of the Bombay High Court on the question at issue, *vide* 1 Bom. H. C. Rep. 130; 1 Bom H. C. Rep. 209; 6 Bom. H. C. Rep., O. C. J., 1; and 6 Bom. H. C. Rep. 244.

"decease, not to her heir, but to the nearest "heir of her husband, who may be then "living, so the same rule is to be observed "*à fortiori* as regards the daughter."

In the case of Sheo Sehai Singh and others *vs* Mussamut Omed Koowar, 6 Sel. Rep. 301, where a Hindoo woman of Behar, who had inherited the entire estate of her father, died leaving a sister's son's sons and a daughter, it was held "that the former should succeed, and that *per capita*, and not *per stirpes*." The Court at page 302 said: "There "is no doubt that the sister's son's sons "were very distant indeed in the order of "succession, and in fact are not included "among the heirs by almost the whole of "the Hindoo legal authorities. As, however, "under no circumstances can the daughter "succeed to ancestral property inherited by "her mother, the Court considered, under the "Vyavasthas of the Pundits, that the plaint-"iffs had the better right to the estate of "Kehur Singh, the common ancestor of the "parties."

In the case of Ram Sevaruth Pandey and others *vs.* Baboo Basdeo Singh, 2 Agra H. C. Rep. 168, the Court held that, "according "to Hindoo law current at Benares, the "daughter's sons inherit in default of a quali-"fied daughter, and that, if there be sons of "more than one daughter, they take *per* "*capita*, and not *per stirpes*. The widow was "incompetent to modify the terms or the "original transaction injuriously to the "reversioners."

In the case of Mussumat Ramdan *vs.* Beharee Lall, 1 Allahabad H. C. Rep., part 7, p. 200, the Court held that "according to "Hindoo Law a deceased daughter's son has "no right of inheritance to the estate of his "maternal grandfather during the life of "any one of his mother's sisters."

In the case of Punchanund Ojhah and others *vs.* Lalshan Misser and others, 3 W. R., O. C. J, 140, the Court held that, "according "to the Mitakshara and the Vivada Chinta-"mani, *all* property that a woman inherits "does not thereby become *stridhun*, so as after "her death to descend to her heirs. Im-"moveable property, which, in default of "other intervening heirs, has been inherited "by a mother from her son, descends on the "mother's death, not to her heirs, but to the "heirs of the son from whom the mother "inherited it."

In the case of Mussumut Thakoor Deyhee *vs.* Rai Baluk Ram and others, 1 Moore's Ind. App., p. 139.* the Privy Council held that "by the Hindoo Law, as laid down in "the Benares or Western Schools, although "a widow may have power of disposing of "moveable property inherited from her hus-"band, which she has not, under the law of "Bengal, yet she is by both laws restricted "from alienating any immoveable property "which she has so inherited; and on her "death the immoveable property and the "moveable, if she has not otherwise dis-"posed of it, will pass to the next heirs of "her deceased husband. There is no dis-"tinction with respect to such alienation "between ancestral and acquired property. "The devolution of *stridhun* or wife's "peculiar property, from a childless widow, "is regulated by the nature of her marriage. "If her marriage was according to one of "the four approved forms, at her death her "husband's collateral heirs succeed to it."

In the case of Sengamalathammal *vs.* Valaynda Mudali, 3 Madras H. C. Rep., App Juris., 312, the Court held that, "accord-"ing to Hindoo Law, property acquired by a "woman by inheritance is not to be classed "as *stridhanam*."

In the case of Bachiraju *vs.* Venkatappadu, 2 Madras H. C. R., App. Juris., 402, the Court held that, "according to Hindoo Law, "a mother inheriting from her son has not "an absolute property in the estate, but "merely a life-interest, without power of "alienation." *Vide* also 6 Madras H. C. Rep., App. Juris., 311.

In the case of Deo Pershad *vs.* Lujoo Roy, 20 W. R. 102, the Court held that, "where a daughter takes her father's pro-"perty on the death of the widow in default "of a son, she takes the inheritance with a "qualified power as regards alienation, in "respect of which she is in no better situ-"ation than the widow. On the death of "such daughter, the heir of her father "succeeds as his heir, not as her heir." *Vide* also 3 W. R. 140; 9 W. R. 509; and 22 W. R. 55.

It appears, therefore, from the cases cited, that there is a current of uniform decisions of the Sudder Courts here, and also of the Madras High Court upon the law bearing upon the present question at issue; and though there are a few decisions of the Bombay High Court which are at variance to the decisions of the Courts in Bengal, yet the present Bench ought to follow the current decisions of these Courts here, and

* 10 W. R. (P. C.) 3.

ought to affirm the decision of Mr. Justice Pontifex, and dismiss the present appeal.

Mr. Montriou, in reply, contended that none of the cases cited displaced his argument upon the construction and effect of the Mitakshara text. The decisions to the contrary did not come under the category of a constant and consistent current of decisions which had authoritatively settled the law. The contention had been from time to time repeated, and the reasoning of the judgments relied on was neither complete nor conclusive. On the other hand, the recently published Bombay judgment was in no way refuted or met. There certainly should not be two adverse constructions of this law in Calcutta and in Bombay. There could rightly be but one.

The Court took time to consider its judgment, which was afterwards delivered as follows:—

Couch, C.J.—The plaintiffs in this suit are the grandsons of Thakoor Doss, who was admitted to be a native of the North-Western Provinces, and had come down to Calcutta and acquired the property which is in dispute. He died in Calcutta in February 1860 intestate, and without having relinquished the law of his birth-place. He left a daughter, Luckhee Bibee, who was five years old at the time of his death, and subsequently intermarried with the defendant, Chotay Lall, and died in September 1872 without issue. He also left a brother's son named Inder Chand, who died in May 1871 intestate, leaving the plaintiffs his only sons and heirs. Mr. Justice Pontifex, by whom the case was heard, held that the estate which the daughter Luckhee Bibee took on the death of her father was only a qualified one, and that on her death the plaintiffs, as heirs of her father, became entitled to the property in dispute. And upon the case being sent back by me and Mr. Justice Macpherson, before whom it came in the first instance, to try the issues which had been raised—the first of which was: Was Thakoor Doss a Jain? and the second: If so, what is the law of succession applicable to Jains?—the learned Judge found that the case should be decided according to the law of the North-Western Provinces. We have, therefore, to determine whether, according to that law, the decision of the learned Judge is right.

The first authority on the subject that I am aware of is in the fourth volume of the Select Reports, p. 330, in which it was held that by the Hindoo Law (it being a case from Behar) a daughter had no power to alienate by gift her ancestral property to the detriment of the other heirs of her father. The reply of the Hindoo Law Officers of the Court who were asked to declare, according to the Mithila and Western Schools of Law, whether Gyan Koowur (the daughter) "was competent to bestow the estate in gift on Jaga Koowur; and, if not, who was entitled to the estate on her decease"—which is the very question in this case—was: "When a person dies, leaving no male issue, the widow who succeeds to his estate has no right to alienate any part of it, except for religious purposes; and, therefore, the daughter, whose right of inheritance is weaker, that is, who only succeeds on the failure of the widow, *à fortiori* can have no such right. Now, it appears from the decree of the Sudder Dewanny Adawlut, dated 6th of October 1814" (this is the part which applies particularly to the present case) "that the property in question is ancestral, and not Gyan Koowur's peculiar property (*stridhun*), and also it seems from the deed of gift that such gift was not made for religious purposes. According, therefore, to the law as current both in Mithila and the West, the deed is invalid; such being the case, the property will go, after her death, to the nearest heir of her father, Kehur Singh, then living. For, as in the case of the widow, the property goes, on her decease, not to her heir, but to the nearest heir of her husband who may be then living, so the same rule is to be observed *à fortiori* as regards the daughter."

The next decision on the subject is in the 6th volume of the Select Reports, p. 301, in a suit relating to the same property. It was held that there being a sister's son's son and a daughter, the former succeeded, and that *per capita*, and not *per stirpes*.

The Court in their remarks say: "There is no doubt that the sister's son's sons were very distant indeed in the order of succession, and in fact are not included among the heirs by almost the whole of the Hindoo legal authorities. As, however, under no circumstances can the daughter succeed to ancestral property inherited by her mother, the Court considered, under the Vyvasthas of the Pundits, that the plaintiffs had the better right to the estate of Kehur Singh, the common ancestor of the parties."

We have next a decision of the Sudder Court, reported in the decisions of 1862, at page 190; where it was held that the estate of a Hindoo proprietor having devolved on his

three daughters qualified to succeed him, they held the property during lifetime only, and not as their *stridhun;* that so long as any one of the daughters survived, no daughter's son could inherit; and that as no son survived when all the three daughters died, the plaintiff, as heir of the deceased proprietor, succeeded to the estate.

The decision in this case appears to have been founded upon a passage in Sir William Macnaghten's work, page 23, where he says: "But though the Schools differ on these "points, they concur in opinion as to the manner in which such property devolves on the "daughter's death, in default of issue male "According to the law as received in Benares "and elsewhere, it does not go, as her "*stridhun*, to her husband or other heir; and "according to the law of Bengal also, it "reverts to her father's heirs."

The two decisions in the North-Western Provinces—reported, one in the 2nd volume of the Agra High Court Reports, page 166, and the other in the 1st volume of the Allahabad Reports, page 200—do not seem to me to be in point on this question; but in volume 3 of the Weekly Reporter, page 140, we have a decision of this Court in the case of a mother inheriting from her son. The learned Judges held that, on the death of the mother, the property went to the heirs of the son, and they said that the rule was the same in the case of a woman inheriting from her father.

More recently there are two decisions in this Court, one of them by Mr. Justice Phear and Mr. Justice Ainslie, and another by Mr. Justice Phear and Mr. Justice Morris —the first in 20 W. R. 102, and the second in 22 W. R. 54—in which the same law is laid down.

In the High Court at Madras the same question as we have before us arose in a case in 6 Madras High Court Reports 310. There the Chief Justice and Mr. Justice Holloway held that the daughters of the first defendant (that is, the person who had inherited from her father, the suit being brought in her lifetime for a declaration of title) were not her rightful successors to the zemindaree, and that the plaintiff, as the eldest grandson of the istimrar zemindar, was entitled to be, preferably to the second defendant, declared reversionary heir to the zemindaree on the death of the first defendant. Sir Colley Scotland, the Chief Justice, said:— "With reference to the second question raised "by the appellant's objection to the declaration "of the plaintiff's right, whether the zemindaree is the *stridhanam* property of the first "defendant, I need not add anything, as my "conclusion on the first question is obviously "decisive of it. But I ought perhaps to say with "reference to the arguments (contradictory "to those on the first question) advanced on "behalf of the appellants, that the authorities "do not, I think, present any ground for them. "There are some texts and comments recognizing as *stridhanam* paternal property devolving on a daughter, but they appear to me to "relate only to an *appointed* daughter who "was declared to become by the appointment "the third description of son. . . . The "fundamental principle of the law of succession, too, is adverse to the contention of the "appellants; for, if paternal property passing "to a daughter were to become her *stridhanam*, "the succession would pass away from those "who were the nearest heirs by virtue of their "capacity to offer oblations to the last male "owner."

Mr. Justice Holloway rested his judgments upon the same grounds. Towards the end of it he said: "On the question "whether property coming to woman by "inheritance is *stridhanam* or not, I do not "consider it of the least consequence for the "decision of this case to determine. By calling it *stridhanam*, we should not be in the "least assisted to the solution of the order of "its transmission, for the various sorts of "*stridhanam* are transmitted in very various "ways. I will shortly sum up the grounds "upon which I come to the conclusion that "the decree of the Civil Judge ought to be "affirmed." The learned Judge then states the grounds to be:—

"1. The principle of the law is to determine the descent by the nearness or remoteness of connection with the offering; there "is no taking by or through or by virtue of "any individual; the only effect of relationship is to connect with that offering; the "very name *Sapinda* is the clearest etymological proof of the predominant notion;

"2. That this principle is the reason for "the daughters taking at all;

"3. That neither in this, nor in any "other case, has, what is called vesting, the "slightest influence; the very notion of "heritable blood is, as applied to Hindoo "law, meaningless;

"4. The principle of the law is the only "safe ground for deducing a rule of descent; "the attempt to argue from subordinate "propositions will, as the cases show, lead "to a departure wider and wider from the "real reason of the law."

As far as the law in that part of India is the same as in the North-Western Provinces, this is an express authority upon the question before us.

On the other hand, there are certain cases in the High Court at Bombay which were relied upon as being opposed to the doctrine which appears to have been consistently held both by this Court and the High Court at Madras. One of them is in 1 Bombay High Court Reports 130, and is known by the name of Devkuvarbai's case. It appears to have been there laid down by the Supreme Court at Bombay that a widow is entitled to the moveable property absolutely, and to the immoveable property for life; and subject to the widow's interest, the moveable property descends to the daughters absolutely.

It appears from the judgment of the Chief Justice, Sir Matthew Sausse, and Sir Joseph Arnould, in Vinayak Anandrav *vs.* Lakshmibai in the same volume, page 117, that this decision was based mainly on the authority of the Mayukha—an authority in that part of India. The judgment in the latter case, which seems to have been written by Sir Matthew Sausse to be forwarded to the Privy Council, contains this passage, page 124: "In Devkuvarbai's case, this Court in 1859 held that the widow of an intestate, childless, and separated brother takes the moveable property absolutely, and the immoveable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the Law of Usage to control the letter of that portion of the written law which was in favour of the widow. In the Mitakshara on Inheritance (C. II., sec. 1), entitled 'Right of the widow to inherit the estate of one who leaves no male issue,' the commentator, after declaring the order of succession (see para. 2), in words quoted from Yajnavalkya, and after discussing various interpretations and opinions, states the conclusion (para. 39) as follows:" The learned Chief Justice then quotes the passage. He is speaking of his own judgment in the former case, and says that he based it on the authority of the Mayukha.

The next case at Bombay is Navalram Atmaram *vs.* Nandkishor Shivnarayan, 1 Bombay High Court Reports 209. There three of the learned Judges of that Court held that, according to the Hindoo Law of Inheritance as received in the Bombay Presidency, immoveable property inherited by a married woman from her father, whether or not it be strictly entitled to the name of *stridhun*, descends on her death to her own heirs, and not to her father's descendants, according to what is called the "melancholy succession;" and that an inheritance descending on a married woman from her father classes as *stridhun*, and descends accordingly. It is to be remarked upon this decision that the learned Judges considered the text of Menu and the opinions of the commentators and other authorities on Hindoo Law, but they do not appear to have been aware of (at least they do not notice) any of the decisions of the Courts on this side of India on the subject; and in considering whether we should treat this case as an authority, this is very material. We may fairly say that a judgment of another High Court in which no notice was taken of the decisions of this Court upon the point ought not to receive the same respect from us as it would receive if the learned Judges had considered the decisions on this side of India.

The next case is in 6 Bombay High Court Reports, O. J., p. 1, in which Sir Joseph Arnould, who was one of the Judges in the former case, sat alone. He held that the property acquired by a married woman by inheritance, with the exception of property inherited by a widow from her husband, classes as *stridhun*, and descends accordingly. He appears to have held this upon the authority of Vinayek Anandrav *vs.* Lakshmibai. He says: "Mr. Marriott's position that, upon the estate "vesting in Lakshmi, as sister of Vithal, her "son, Ramji Krishnaji, and his son, Mahadao "Ramji, thereupon became jointly interested "therein as co-partners with Lakshmi, must, "in my opinion, be regarded as untenable; it "seems opposed to the principles established in "Hindoo Law regarding property coming by "inheritance to woman, and is inconsistent "with the position already adverted to as estab-"lished by the case of Vinayek Anandrav *vs.* "Lakshmibai that the sister takes absolutely." But the learned Judge proceeds to notice the decision of the Judicial Committee of the Privy Council and the text of Catayana, and allows that, in the case of inheritance by a widow from a husband, the rule laid down in the Mitakshara does not apply. So far he departs from what had been previously decided, and it will be seen that in this he differs from the judgment I am about to notice, of Mr. Justice West, who gives as his opinion that the passage in the Mitakshara applies to the case of a widow inheriting from her husband just as much as to that of a daughter inheriting from her father. The case is reported in 8 Bombay High Court Reports 244, O. C. J.—

Vijiarangam and another *vs.* Lakshuman and another.

Now, the decision in that case is founded upon the Mayukha. The Chief Justice says: "The question of Hindoo Law arising from "these facts is a difficult one, but looking (as "I think we are in this island bound to do) "to the Mayukha, for the law to regulate this "case, Thamabai must be regarded as the "legal representative of Yesubai in respect of "the property in question in this suit, and not "the plaintiffs." And Mr. Justice West says: "We must fall back either on the Mayukha, "which is equally inconsistent with a current "of decisions derived from the analogies of "the Bengal Law, or else on the Bengal Law "itself." But the learned Judge took the opportunity of this case coming before him to discuss at considerable length and with much ability the meaning of the passage in the Mitakshara, and to comment upon the authorities. He, too, does not appear to have noticed any of the decisions on this side of India, and what I have already said with regard to the decision in 1 Bombay High Court Reports will apply to this part of his judgment. He lays down that the Mitakshara includes in *stridhun* all property acquired by women by inheritance—which is contrary, as I have already said—to what had been laid down by Sir Joseph Arnould in the case in 6 Bombay High Court Reports, and contrary also to the decision of the Privy Council in Bhugwandeen Doobey *vs.* Myna Baee, 11 Moore's Indian Appeals, p. 487.* He argues, as I understand him, that this case was not rightly decided. It appears to me that what Mr. Justice Holloway said, which I have read, applies very much to this judgment of Mr. Justice West. Certainly, when we have the various decisions of the Sudder Court here upon the law which is applicable in this suit, and the decision of the High Court at Madras upon a similar law, in which no substantial difference can be pointed out with reference to this question, we ought not to unsettle the law which appears to have been received on this side of India for the last fifty years, on account of the opinion of a Judge of the High Court at Bombay, however learned he may be. The consequences at the present time would be most serious. Courts ought, always, to bear in mind that it is no light matter to reverse a series of decisions which must have been acted upon for many years, and have been regarded as declaring what was the law.

* 9 W. R. (P. C.) 23.

It appears to me that the conclusion which Mr. Justice Pontifex arrived at in this case is the right one, and that his decision ought to be affirmed. The costs of the hearing on remand, in which the appellant really was successful, ought to be regarded as part of the costs of the original hearing, and should be allowed in the same way as those costs were allowed, *viz.*, out of the estate. The appellant must pay the costs of this appeal on scale No. 2.

The 1st September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree—Right to Injunction to stop Execution.

Case No. 2464 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 1st August 1873, affirming the decision of the Subordinate Judge of that District, dated the 18th December 1872.

Mussamut Rohimunnissa (Defendant), *Appellant,*

versus

Nowab Leakut Ali Khan and others (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Appellant.

Moonshee Abdool Baree for Respondents.

The purchaser of a share of a decree, who has failed in the endeavour to get the Court executing it to put him upon the record for the purpose of obtaining the benefit of the decree, has no right to an injunction to prevent the decree-holder from executing the whole decree without regard to the sale, even if the purchase is made on behalf of the judgment-debtor; he could only get a right to an injunction of the kind, if the sale amounted to a release from the decree-holder to the judgment-debtor from his liability under the decree.

Phear, J.—THE facts of this case, as they appear to have been found and acted upon by the Court below, are as follow:—

On the 29th December 1868, one Rajah Hossein Buksh obtained a decree in the Civil Court against Leakut Ali and his two daughters and Shah Ameenooddeen and his daughter for mesne-profits and costs. On the 9th February of the following year, Rajah Hossein Buksh sold this decree to his wife Rohimunnissa for a sum of Rupees 4,000. And, on the 29th March of the same year, Rohimunnissa sold a certain share

(which need not be more particularly specified at present) of this decree to one Feda Hossein. The present suit is brought by Feda Hossein, Leakut Ali, and his two daughters against Rohimunnissa, and asks for an injunction restraining her from taking steps to execute this decree against Leakut Ali and his daughters.

The plaint says that, after Rohimunnissa had, in March 1869, sold the share of the decree to Feda Hossein, he endeavoured to get his name placed upon the record of the suit in conjunction with hers for the purpose of execution; but that the Court refused his application. And it goes on to say that Rohimunnissa was proceeding to execute the whole decree against Leakut Ali and his daughters without any regard to this sale of March 1869 to Feda Hossein. And on this ground the injunction is sought.

Now, it is quite plain that, unless some other fact is added to those which have been just now mentioned, the plaint discloses no right on the part of either Feda Hossein or on the part of Leakut Ali and his daughters to an injunction against Rohimunnissa. As regards Feda Hossein, he had, on the footing of his purchase in March 1869, endeavoured to get the Court, which was charged with the execution of the decree, to put him upon the record for the purpose of his obtaining in that manner the benefit of that decree. And he had failed in his object. This did not give him any right to prevent Rohimunnissa from realizing the decree if the Court would allow her to do so. In other words, it gave him no right to obtain an injunction from the Civil Court against Rohimunnissa in the matter of this decree. If she took proceedings for the execution of the decree, and obtained satisfaction of it, then it might be that, under his purchase of March 1869, he would have a right, notwithstanding that he had failed to induce the Court to put him on the record, to recover from Rohimunnissa his share of the proceeds of the decree. However this might be, he had no right to have Rohimunnissa restrained from realizing the decree.

Then as to Leakut Ali and his daughters, on the bare facts which have been stated, they have no right of any sort against Rohimunnissa. But it is said in addition thereto that the purchase which Feda Hossein made from Rohimunnissa was in reality a purchase made on behalf of Leakut Ali. Still this fact alone would not give Leakut Ali a right to have Rohimunnissa restrained from executing the decree against him. He could only get a right to an injunction of this kind if the sale of March 1869 from Rohimunnissa amounted to a release from Rohimunnissa to Leakut Ali of his liability to discharge the decree; and that question plainly depended upon whether or not the sale-transaction of March 1869 was made with Leakut Ali to the knowledge of Rohimunnissa. The Judge says that the sale was really made to the judgment-debtor Leakut Ali is admitted. That may be so. It may be that, as between Leakut Ali and Feda Hossein, neither Rohimunnissa nor any one else wished to dispute that the benefit of the transaction was intended to be for Leakut Ali. But this is a very different thing from saying that Rohimunnissa had released to Leakut Ali his liability to discharge the decree of December 1868. That result could only come about by reason of Rohimunnissa having intentionally sold the share which she did sell nominally to Feda Hossein—intentionally sold that share to Leakut Ali. And as to that it seems that there is not a particle of evidence upon the record. The plaintiff has not thought it necessary to prove, probably he was not in a position to prove, that Rohimunnissa, when she sold the share of the decree to Feda Hossein in March 1869, knew that she was dealing with Leakut Ali. The presumption is certainly against him on this point, because, if Leakut Ali wanted to deal directly with Rohimunnissa, why should he have used the intervention of the third person? It seems, upon the facts which are disclosed, as if the intervention of Feda Hossein was used rather for the purpose of concealing from Rohimunnissa that the plaintiff was the real purchaser than for any other purpose. And, in this state of the facts, it seems to us that the plaint taken as a whole has not shown any right to have an injunction against Rohimunnissa. It is quite plain that Feda Hossein has no such right. And Leakut Ali and his daughters cannot have the right unless they prove to the satisfaction of the Court that the sale of March 1869 amounted to a release to them from Rohimunnissa of all liability under the decree of December 1868; and this they have not done.

We are, therefore, of opinion that, on the state of the facts found by the Lower Appellate Court, the plaintiff ought not to succeed in this suit. And we may also add that, if the Civil Courts and parties who are concerned in the execution of decrees would only pay some little regard to the provisions.

of the Civil Procedure Code. a suit of this kind and litigation upon a foundation such as that which this suit rests upon would be quite impossible.

We reverse the decree of the Lower Appellate Court, and dismiss the plaintiff's suit with costs.

The 1st September 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Measurement under Act VI. (B.C.) of 1862, s. 10—Rights of Intervenors.

Case No. 87 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 30th December 1873, reversing a decision of the Moonsiff of Pubna, dated the 30th November 1872.

Mudhoo Soodun Shaha and another (Plaintiffs), *Appellants,*

versus

Gopal Shaikh and others (Defendants), *Respondents.*

The Advocate-General and *Baboos Shoshee Bhoosun Dutt* and *Radhika Churn Mitter* for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondents.

The fact of a measurement and *jummabundee* having been effected under the provisions of Act VI. (B. C.) of 1862, s. 10, cannot deprive an intermediate tenant of the right of intervening under Act X. of 1859, s. 77, nor is the intervenor deprived of that protection, even though Act X. no longer exists.

THE plaintiffs are the special appellants in this case. This is another case which, in my opinion, affords an apt illustration of the impolicy of placing any money-limitation upon the right of special appeal. This is a case in which the plaintiffs are the zemindars. There are two plaintiffs, one claiming an 11-anna share, and the other a 5-anna share. They state in their plaint that they acquired their title—8 annas by purchase of the zemindaree right and 8 annas as putneedars. The suit is for three years' rent, and the amount sued for is only Rs. 10-4-6, but the points involved in this case are of very great importance to the parties, of importance to the zemindar, inasmuch as if the *jummabundee*, which has been made by the Collector according to the provisions of section 10, Act VI. (B. C.) of 1862, is not to bind the ryot, the zemindar's labour and expense in having that *jummabundee* made by the Collector has been thrown away, while, on the other hand, if the ryot is to be bound by that *jummabundee* he will have to pay a considerably enhanced rent over and above that which he has hitherto paid. I need not say anything further as to how very important these points are to the parties, and therefore, in this case, the valuation of the suit is no index whatever of its importance.

To return to the case. The plaintiffs alleging that they have an 8-anna share in the zemindaree, and another 8-anna share in putnee, sue for the rent of the three years 1275, 1276, and 1277, alleging that, under the provisions of section 10, Act VI. (B. C.) of 1862, they made a special application to the Collector for a measurement and *jummabundee* of their estate. The section says that on the special application of the proprietor or other person aforesaid, the "other person aforesaid" being a party entitled to receive the rents, making a special application (but not otherwise), the Collector "shall proceed "to ascertain, determine, and record the "tenures and under-tenures, the rates of rent "payable in respect of such lands, and the "persons by whom respectively the rents are "payable." Now I do not think that the law meant that the Collector was to ascertain the rents hitherto paid by the ryots, but that he was to ascertain, determine, and record the rents payable at the time the *jummabundee* is made. Then the law goes on to say that, "if any person, within fifteen days "after the Collector shall have recorded the "name of such person as being in occupation "of such land or any part thereof, or shall "have declared a tenure to have lapsed, shall "appear and show good and sufficient cause

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"for his previous non-appearance, and shall "satisfy the Collector that there has been a "failure of justice, the Collector may, upon "such terms or conditions as he may think "proper, alter or rescind his declaration "according to the justice of the case. Save "as aforesaid, the decision of the Collector "on all matters enquired into and determined "by him under this or the last preceding "section, shall be final, unless the same shall "be reversed on appeal therefrom to the "Civil Court." And then the section says that "such appeals shall lie to the Zillah Judge "or to the Sudder Court," subject to the provisions and conditions contained in certain sections of Act X. of 1859.

Now, in this case, the defendant, the ryot, special respondent, denied the relationship of landlord and tenant as between him and the plaintiffs; he alleged that he was not aware of the proceedings under section 10, Act VI. (B.C.) of 1862; that these proceedings were *ex parte;* that he has never paid rent to the plaintiffs; and that he has all along paid his rent to Bejoy Gobind Chowdhry and others, who hold a kyemee mourasee tenure intermediate between the zemindar and the immediate cultivators of the soil.

The Moonsiff has held that the facts of the measurement and *jummabundee* prove the existence of the relationship of landlord and tenant between the parties, and that that *jummabundee* and measurement having been approved of by the revenue authorities, and not questioned until the present suit by the defendant, the ryot, such measurement and *jummabundee* are binding on the defendant, and that in the absence of any illegality in the proceedings of the Collector, the tenant could not now question his liability. Then, with reference to the plea of the tenant that he was paying rent to Bejoy Gobind Chowdhry, the Moonsiff held that, inasmuch as neither the defendant nor Bejoy Chowdhry took any steps to question the proceedings of the Collector before that officer, the present intervention of Bejoy Gobind Chowdhry could not be entertained.

The Judge has reversed that decision. He is of opinion that the suit must be remanded for the disposal of two questions—1st, that after making Bejoy Gobind Chowdhry and Obhoy Chowdhry parties to the suit, an issue should be tried whether the defendant holds the land directly under plaintiffs, or whether there is an intermediate tenure held by Bejoy Chowdhry and Obhoy Chowdhry between the zemindar and the ryot; that if it be decided in the affirmative as to the defendant holding under Bejoy Chowdhry and Obhoy Chowdhry, the plaintiffs' suit must be dismissed, notwithstanding the proceedings in the Revenue Court; but that if it be found that the lands are not included in any such intermediate tenure, then the defendant must be considered as holding directly from the landlords, and the proceedings in the Revenue Court, if otherwise regularly conducted, would bind him.

Therefore the point at issue in this appeal is whether the Judge was right in remanding the case, and whether the question raised by the defendant in his answer that he was the tenant of Bejoy Chowdhry and Obhoy Chowdhry, and that he paid rent to them and not to the plaintiffs, ought to be tried or not in this case. Now, under the provisions of section 10 of Act VI. already quoted, Bejoy and Obhoy could not possibly have intervened or made any objections before the Collector, for that section does not provide for any objections on the part of any other persons but parties whose names have been recorded by him as being in the occupation of the land. Now, it is admitted in this case that the party whose name was recorded as in the occupation of the land was the defendant, the ryot, and therefore Bejoy Chowdhry and Obhoy Chowdhry could not have made any objections to the proceedings of the Collector under section 10, Act VI. of 1862 (B. C.). Therefore it remains to be determined whether they cannot now, when the question has been raised by the defendant that he is their tenant, and that they have been in the enjoyment of the rent hitherto, and not the plaintiffs, have that question decided in their presence. The Judge has held that it ought to be so, and I think that his decision can be maintained with reference to the ruling to be found in Volume XVI., Weekly Reporter, page 51. In that case the learned Judges, Justices Loch and Dwarkanath Mitter, observe that whether the third party, the intervenor, did or did not appear at the time of the measurement and *jummabundee*, was a matter of very little consequence as far as the case before them was concerned. That was also a suit for rent. Then they go on to say that there is nothing in that section, namely, section 10 of Act VI., by which the Collector is empowered to try and determine whether the land belongs to any particular estate or not, as there was nothing in that section which would entitle the intervenor to appear before the Collector and ask that officer to try a question of title between him and the zemindar, when the latter applies for a

measurement and *jummabundee* under that section.

Then the learned Judges go on to say that they do not think that because the land could be measured under the provisions of section 10, Act VI. (B. C.) of 1862, therefore the third party cannot, in a suit for rent, be allowed to intervene under the provisions of section 77, Act X. of 1859; and that it appeared to them that it was never intended by the provisions of section 10, Act VI. (B. C.) of 1862, to take away the right which the law has given to parties to intervene under section 77, Act X. of 1859, or to take away the protection which it was intended to give to intermediate tenants under that section. Now, it is true that section 77, Act X. of 1859, no longer exists, and that this suit has been brought under Act VIII. (B. C.) of 1869, but under section 34 of the latter Act it is provided that "suits of every description brought for any "cause of action arising under this Act and "all proceedings therein shall be regulated "by the Code of Civil Procedure passed by the "Governor-General in Council, being Act "VIII. of 1859, and by such further and "other enactments of the Governor-General "in Council in relation to civil procedure "as now are, or from time to time may be, in "force, and all the provisions of the said "Act and of all such other enactments shall "apply to such suits."

Now, in this case the third parties, Bejoy Gobind Chowdhry and Obhoy Chowdhry, aver that the defendant, the ryot, has been paying rent to them all along and not to the plaintiffs, and that they, the intervenors, have been all along in the enjoyment of the rent. The ryot-defendant also makes the same defence in his answer to the suit of the zemindar for rent. I therefore think that the Judge was right, under section 73, Act VIII. of 1859, in remanding the case, and directing the Moonsiff to make Bejoy Gobind Chowdhry and Obhoy Chowdhry parties to the suit. It cannot be said that they are not interested in the result of the suit, inasmuch as the question at issue is whether the defendant, the ryot, has been paying rent hitherto to them as kyemee mirasdars, or whether he has been paying direct to the zemindars and putneedars, the plaintiffs in this case.

The special appeal is, therefore, dismissed with costs. Pleaders' fees, one gold mohur.

The 1st September 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Suit for Khas Possession—Onus probandi.

Case No. 95 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 24th October 1873, reversing a decision of the Moonsiff of Futtickcherry, dated the 30th July 1873.

Ram Sebuk Dey and another (Plaintiffs), *Appellants,*

versus

Chundee Churn Dey and others (Defendants), *Respondents.*

Baboo Aukhil Chunder Sen for Appellants.

Baboo Sreenath Banerjee for Respondents.

In a suit by a landlord to obtain khas possession where plaintiff's case is that defendant is holding under a lease whose term has expired, the *onus* is on the plaintiff to prove the determination of the tenure by efflux of time.

THE plaintiff is the special appellant in this case. He sued alleging that he obtained a dur-itmamee pottah from the defendant No. 1; that the defendant No. 2, who is a jotedar and a tenant-at-will, was holding the land in suit for a term of one year under a kubooleut; that that term had expired, and therefore the plaintiff had a right to take khas possession. The defendant No. 1 admits the dur-itmamee title of the plaintiff. The defendant No. 2 pleaded limitation. This, however, was not pressed in the first Court. He further pleaded a right of occupancy under a pottah of the 23rd Bysack 1215. The first Court found that the plaintiff's kubooleut was proved, that the defendant's pottah of the 23rd Bysack 1215 was not proved, and that the plaintiff was entitled to eject him and obtain khas possession. On appeal the Subordinate Judge has reversed this decision. The Subordinate Judge says that the plaintiff has not proved his dur-itmamee title, but I do not think there is any thing in that part of the decision of the Subordinate Judge, as that title was admitted by the itmamdar; but the Subordinate Judge, on the case put by the plaintiff himself in the Court below, namely, that the defendant was a tenant-at-will, that he was holding under a one year's lease, that that term had expired, and that he, the plaintiff, had a

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right to obtain khas possession, held that the kubooleut filed by the plaintiff was not proved. I think that the *onus* was on the plaintiff to prove that the defendant was holding under a tenure which had been determined by efflux of time, and that he had a right to obtain khas possession. If he had brought his suit on the allegation that the defendant had no right of occupancy, of course that would have been another matter; but he came into Court basing his suit on a kubooleut on the expiry of the term of which he claimed the right to eject the defendant. Not being able to prove that kubooleut, his suit has been rightly dismissed, and the appeal must be dismissed with costs. Pleaders' fees, one gold mohur.

The 2nd September 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Bastoo (homestead) Land—Act X. of 1859—Act VIII. (B. C.) of 1869.

Case No. 2574 of 1873.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 30th June 1873, reversing a decision of the Additional Moonsiff of Nassirnuggur, dated the 28th January 1873.

W. G. N. Pogose and another (Plaintiffs), *Appellants,*

versus

Rajoo Dhopee (Defendant), *Respondent.*

Baboos Doorga Mohun Doss and *Bussunt Coomar Bose* for Appellants.

Moulvie Abdool Baree for Respondent.

Where the rent for *bastoo* lands was paid by the ryots to their landlord separately from the rent paid for the cultivated lands, but the tenure of the *bastoo* lands was a ryotwaree tenure, it was held that, as a matter of law, the distinction in the mode of paying the rent did not exclude those lands from the operation of Act X. of 1859 or Act VIII. (B.C.) of 1869.

Markby, J.—It appears that in this case the lands to which the suit relates and in which the defendant claims a right of occupancy are what are called *bastoo* lands; that is to say, they are lands upon which houses stand, inhabited by persons engaged in agriculture; and they are adjacent to the lands which the ryots who inhabit those houses cultivate. It further appears that they are held of the same landlord as the lands which are cultivated. Now, a distinction has frequently been drawn between the houses in a town and what are called homestead lands of ryots engaged in agriculture; and the general rule laid down is that although Act X. of 1859 does not apply to the former, yet it applies to the latter. The only reason why it is said that Act X. of 1859 (Act VIII. of 1869, B. C) should not apply in this case is that the rent which was paid for the *bastoo* lands was paid by the ryots to their landlord separately from the rent which was paid for the cultivated lands. But the Lower Appellate Court has found as a fact that the tenure of these *bastoo* lands was a ryotwaree tenure, and the only question therefore for us will be whether as a matter of law that distinction in the mode of paying the rent excludes these *bastoo* lands entirely from the operation of the Act. We think that it does not do so, and that they may still be considered as homestead lands of ryots within the operation of the Act, notwithstanding the fact that the rent for them was paid separately from the rent for the lands occupied by the tenants as agricultural lands. The special appeal will be dismissed with costs.

The 4th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Case No. 192 of 1874.

Rent Law—Ejectment—Damages.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 10th April 1874, affirming an order of the Moonsiff of that District, dated the 8th January 1874.

Heeramun Roy and another (Judgment-debtors), *Appellants,*

versus

Jhuboo Singh and others (Decree-holders), *Respondents.*

Baboos Tarucknath Sen and *Doorga Dass Dutt* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

In the spirit of the rent law, a decree for ejectment operates in some degree as an award of damages.

Does a Court exercise a wise discretion in making a decree for damages in addition to a decree for arrears of

rent at the same time that it also gives a decree for ejectment?

Phear, J.—THE confused wording of the decree, which is now before the Court for execution, has given rise to this litigation. But on consideration we think there can be no reasonable doubt that the decree conformed substantially to section 52 of the present rent law, and directed that the defendant should be relieved from the decree for ejectment provided he paid the arrears within 15 days from the date of the decree. No doubt, it is open to question whether the Court exercised a wise discretion in making a decree for damages in addition to the decree for arrears of rent, at the same time that it also gave a decree for ejectment. It would seem as if in the spirit of the rent law the decree for ejectment operates in some degree as an award of damages. But we see nothing illegal in the decree. And the defendant could, if he had chosen, by tendering the arrears of rent which was specified in the decree within the period of 15 days, have saved himself from the ejectment. He did not do so or any thing nearly approaching that. He thus lost the advantage which diligence in tendering the amount might have given him.

We dismiss the appeal with costs.

The 7th September 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Case No. 169 of 1874.

Execution—Limitation—Act IX. of 1871—Government.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 28th March 1874, affirming an order of the Moonsiff of Soory, dated the 20th December 1873.

The Collector of Beerbhoom on behalf of Government (Decree-holder), *Appellant,*

versus

Sreehurry Chuckerbutty (Judgment-debtor), *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Luckhee Churn Bose for Respondent.

Under Act IX. of 1871, Government is bound to make an application for execution within the same time as any other person.

Markby, J.—WE think that the decision of the Court below is right. The Government having taken this proceeding in execution, and no reservation in favour of the Government being contained in the present law of limitation (Act IX. of 1871), they are bound to make the application within the same time as any other person. The appeal is dismissed with costs.

The 7th September 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, Louis S. Jackson, W. Markby and W. Ainslie, *Judges.*

Limitation—Bona fides—Act IX. of 1871, Sch. II., art. 167—Act VIII. of 1869, s. 216.

Case No. 77 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Dacca, dated the 29th December 1873, reversing an order of the Moonsiff of Bhangah, dated the 15th April 1873.

Eshan Chunder Bose (Decree-holder), *Appellant,*

versus

Prannath Nag (Judgment-debtor), *Respondent.*

Baboo Kumolah Kant Sen for Appellant.

Baboo Probodh Chunder Mitter for Respondent.

A decree-holder applying for the execution of a decree is entitled, under Act IX. of 1871, to have such execution upon his showing that his application is made within three years next following a previous application to the Court to enforce the same decree, or from the date of issuing notice under Act VIII. of 1859, s. 216, in the same matter.

This case was referred to the Full Bench on the 11th June 1874 by Jackson and McDonell, JJ., with the following remarks:—

Jackson, J.—THE question raised in the present special appeal is one of very considerable importance. It is whether a decree-holder applying for the execution of his decree is entitled, under the existing law, to have such execution upon his showing that his application is made within three years

next following a previous application to the Court to enforce the same decree, or from the date of issuing notice under section 216 in the same matter. Under the Law of Limitation which governed these matters before Act IX. of 1871 came into force, the Courts were held to be bound to ascertain that, within three years next preceding such application, some proceeding, that is, some *bond-fide* and not colourable proceeding, had been taken to enforce the judgment; and it was held to be a question of fact whether or not the lodging of an application or the issuing of a notice under section 216 had been a proceeding *bond fide* intended for such purpose, or merely a colourable proceeding. By the now existing Act IX. of 1871, it was declared that, "subject to the provisions contained in sections 5 to 26, every "suit instituted, appeal presented, and "application made after the period of limit-"ation prescribed therefor by the second "schedule hereto annexed, shall be dismissed, "although limitation has not been set up as a "defence," and the period of limitation prescribed for execution of decree or order of Civil Court in general, is that contained in No. 167 of the second schedule, *viz.*, from the date of the decree or order; or, where there is an application made, from the date of applying to the Court to enforce or keep in force the decree or order; or, where there is a notice issued, from the date of issuing the notice under the Code of Civil Procedure, section 216.

Now, it seems to have been assumed that, because the law requires that every application made after the period of limitation is to be dismissed, the converse is to hold good, and every application made within that period must necessarily be considered to be good. That is the contention of the special appellant, and that has been adopted in a recent case decided by Mr. Justice Markby and Mr. Justice Romesh Chunder Mitter in Miscellaneous Regular Appeal No. 49 of 1874, decided on the 12th May 1874.* In that case the learned Judges undoubtedly held that all questions of *bona fides* are now excluded, and a decree-holder is absolutely entitled to have his decree executed, provided he comes within the period specified in clause 167. If that be a true construction of the Act, it would follow that a plaintiff who obtains a decree for a sum of money with interest, perhaps at a large rate, say, on the 1st of January 1870, may put in an application on the 1st of January 1873; another, on the 1st of January 1876; and so on, taking care only to renew the applications once in three years without taking any further step whatever, without any intention to obtain satisfaction of his decree at the end of three years, and he would be entitled to recover the principal sum and the accumulated interest thereon at that large rate after the lapse of, say, 20 or 30 years; although his debtor or the remote descendants of his debtor may have had no notice whatever of any of those applications, and they may have been ignorant of the existence of their liability. It would also follow that a judgment-creditor who has lodged an application more than one year after the passing of the decree, in which circumstance the Court is bound to issue a notice under section 216, may have omitted or refused to lodge the tullubana for the service of such notice, and the Court might, therefore, have been disabled from serving the notice; and yet, notwithstanding this clear indication of *mala fides* on the part of the decree-holder, the Court would be bound to proceed upon an application made within three years from the date of the first application. We cannot bring ourselves to believe that the Legislature intended any such result. We cannot at this present moment recall to mind any section or provision of the Code of Civil Procedure in which express provision is made for a second application to execute a decree except, perhaps, the case of inability to obtain satisfaction in the district or in the Court where the decree was made, and, in consequence, necessity of an application to execute it in another jurisdiction. We cannot help thinking that, where that is so, the granting of a second application to execute must be, to say the least of it, a matter of discretion with the Court, and it appears to us that the granting or withholding of permission to execute, under particular circumstances, is a matter quite separate from the limiting of the time within which application must be made; and it, by no means, follows that, because an application is not to be entertained after the lapse of the time specified, it must, under all circumstances, be entertained if made within that time. It appears to us that, if we are to admit that, the whole doctrine of the Courts in these provinces, as carefully elaborated within the past ten years, is swept away merely by the substitution of a new period or newly-defined period of limitation, and most disastrous consequences in regard to execution of

* *Ante*, p. 154.

decrees will follow. There is nothing shown to lead us to say that that was the intention of the Legislature. We think, therefore, that this very important question, on which we feel at present unable to concur in the decision of the Division Bench, should be referred for opinion to a Full Bench.

Before the Full Bench, Baboo Kumola Kant Sen for the appellant contended that the application of the appellant for execution of his decree, being within three years, is not barred by the Statute of Limitation. The decree which is sought to be enforced is dated the 17th November 1865, and the last application for execution was made on the 17th January 1873. The old Law of Limitation, therefore (Act XIV. of 1859), would govern this case; the 20th section of which says: "No process of execution shall issue from any Court "not established by Royal Charter to enforce "any judgment, decree, or order of such "Court, unless some proceeding shall have "been taken to enforce such judgment, "decree, or order, *or to keep the same in "force within three years next preceding "the application for such execution.*" Now, the decision of the Appellate Court in this case is dated 13th December 1866, and the first application for the execution of the decree was made two years after the decision of the Appellate Court, *viz.*, on the 2nd April 1868. This application for execution was, however, struck off on the 27th April 1868, subsequent to the service of notice on the debtor. On the 4th February 1869, a fresh application was made for reviving the execution, when the properties of the debtor were attached and sale-proclamation was issued. Subsequently, the sale was stayed on the application of the debtor, and execution-proceedings were struck off on the 26th April 1869. On the 10th February 1872, *i. e*, within three years, execution was revived, but it was again struck off on the 18th March 1872. It was again revived on the 3rd July 1872, and struck off on the 31st July 1872. It was again revived on the 23rd August 1872, and struck off on the 12th November 1872. The last application was made on the 17th January 1873. It appears, therefore, from these facts, that every application of the appellant for execution of his decree was within the three years mentioned under section 20 of Act XIV. of 1859. The Subordinate Judge of Dacca was, therefore, wrong in holding that the appellant is barred from executing his decree of the 17th November 1865. Now it has been contended that, as the appellant in this case did not take steps to enforce his decree, his applications to enforce it cannot be considered to be *bonâ fide*. But questions of *bona fides* are totally foreign to the present inquiry. All that the appellant had to do in this case was to have made an application within the period of limitation prescribed by section 20 of Act XIV. of 1859, and the application would then be held to be good. Moreover, under section 15 of Act XXIII. of 1861, if the application is admitted, the Court is bound to issue execution; and the Court cannot refuse to receive the application if it is made within the period of limitation. In the case decided on the 12th May 1874 by Mr. Justice Markby and Mr. Justice Romesh Chunder Mitter, in Miscellaneous Regular Appeal No. 49 of 1874,* both the learned Judges held that "all questions of *bona fides* are "now excluded, and a decree-holder is absolutely entitled to have his decree executed, "provided he comes within the period specified in clause 167." Clause 167, 2nd schedule of Act IX. of 1871, prescribes three years for applications made from "the date of the decree or order." This clause corresponds with section 20 of Act XIV. of 1859. Besides, the Judges could have investigated the case and seen if the proceedings were *bonâ-fide* or colourable—6 W. R. (F. B.,) page 184. Again, section 20 not only says "No process of execution shall issue "from any Court . . . . to enforce "any judgment, decree," &c., but also "*to "keep the same in force* within three years "next preceding the application for such "execution." The words "*to keep the same in force*" show clearly that the Legislature intended that the decree-holder might keep his decree in force as long as he thinks fit. This answers the case mentioned in the reference by Mr. Justice Jackson. Moreover it is always the duty of the debtor to find out his creditor, and pay the debt due to him.

Baboo Probodh Chunder Mitter for the respondent contended that the appellant is barred from executing his decree of the 17th November 1865. The question which the Court will have to decide is whether the application of the appellant to revive his decree is such a "*proceeding*" as is contemplated under section 20 of Act XIV. of 1859. The words of the section are: "No "process of execution shall issue from any

* *Ante*, p. 154.

"Court . . . . to enforce any judg-"ment, decree . . . . *unless some "proceeding shall have been taken to "enforce such judgment, decree,"* &c. Now, it is quite clear that the numerous applications of the appellant were not "proceedings to enforce his decree." In fact, the appellant never attempted to enforce his decree, but simply made applications to revive it. Is this bare *application* then to be regarded as a *proceeding?* If it is, then in the words of Mr. Justice Jackson, "most disastrous conse-"quences in regard to execution of decrees "will follow," because if a decree-holder has the power of reviving his decree to an indefinite period, and of charging interest at the same time under the decree, the consequences will certainly be most disastrous to the debtor. But the true construction of the words of section 20 repel such a presumption. It is clear that the Legislature intended that the application for reviving the decree should be followed by "*some proceeding*" to enforce the decree. Besides, under section 221 of the Civil Procedure Code, the Court has a discretionary power given to it to issue or not to issue warrants for the execution of a decree. When the Court finds that the decree-holder does not intend to execute his decree, it has, within the meaning of section 221 of the Civil Procedure Code, the discretionary power of refusing not only "to issue warrants for the "execution of the decree, but also to grant "a second application for reviving the decree." The words of section 207 of the Civil Procedure Code are: "When any party, in "whose favour a decree has been made, "*is desirous* of enforcing the same, he shall "apply to the Court whose duty it is to "execute the decree," &c. The words "*is "desirous of enforcing the same*" prove clearly that the Legislature intended that the application of the decree-holder to enforce the decree should be *bonâ-fide*. When the Court is satisfied that the application is *bonâ-fide*, then its duty will be to execute the decree; but, if the Court is not satisfied that the application is *bonâ fide*, it would then be equally its duty to refuse to execute the decree. Moreover in this case, as so many applications were made by the appellant, the Court ought, before it granted the subsequent applications, to have insisted upon hearing from the appellant as to what steps he had previously taken to enforce his decree. If no steps had been taken, the Court ought to refuse to grant the other applications, as it was through his own fault that the decree was not executed. In the case of Byjnath Pundit *vs.* Kunhya Pundit, 9 W. R., p. 527, Mr. Justice Phear held that, "under the Code of Civil Pro-"cedure, a Court is not bound to grant, as "a matter of course, a second application "of a judgment-creditor for execution, but "ought always to require him to show why "the steps previously taken did not lead to a "full discharge of the debt, and ought not to "grant its process a second time unless "satisfied that the failure was not attribut-"able to the applicant's own fault."

It was said by Baboo Kumola Kant Sen that the debtor is bound to find his creditor. But it is not always that a creditor is to be found. Take, for instance, a person who dies suddenly, leaving his estate in great confusion and disorder. His representatives are unable in consequence to find out who the creditors are, or where they reside, or to what extent the ancestor is liable. Hence it follows that the debtor's power of finding out his creditor is only to a limited extent possible. Under the circumstances of this case, therefore, the appeal ought to be dismissed.

The following are the judgments of the Full Bench:—

Couch, C.J.—The question upon which this special appeal was referred to the Full Bench is whether a decree-holder, applying for the execution of his decree, is entitled, under the existing law, to have such execution upon his showing that his application is made within three years next following a previous application to the Court to enforce the same decree, or from the date of issuing notice under section 216 in the same matter. I think the question must be answered in the affirmative. Act IX. of 1871 (the new Limitation Act) clearly recognizes a right on the part of a decree-holder to make such an application. No. 167 of the first schedule provides for this case as far as the Law of Limitation applies. And it says that "an application for the execu-"tion of a decree or order of any Civil Court "not provided for by No. 169, which is "intended for Courts established by Royal "Charter, is to be made within three years "from the date of the decree or order; or, "where there has been an appeal, the date "of the final decree or order of the Appellate "Court; or, where there has been a review "of judgment, the date of the decision passed "on the review; or" (this is the part which is "material upon the present occasion), "where "the application next hereinafter mentioned "has been made, the date of applying to the "Court to enforce or keep in force the

"decree or order; or, where the notice "next hereinafter made has been issued, the "date of issuing the notice under the Code "of Civil Procedure, section 216."

These words clearly give to the person who has a decree the power, so far as regards the Law of Limitation, of applying for the execution of it within three years from its date, or within three years from the date of the application to the Court to enforce or keep it in force. There is no restriction as to the second or third, or any subsequent, application. So far then, as regards this Act, the decree-holder is not restricted. All that appears necessary for him to do is to take care that the application is within three years from the date of applying to enforce the decree or keep it in force; and he is at liberty, within three years from that date, to apply again for execution.

The Code of Civil Procedure recognizes there being more than one application to execute a decree. Section 216, which provides for the issuing of notice, says at the end: "Provided further that no such notice shall "be necessary in consequence of the appli-"cation being against an heir or representa-"tive, if, upon a previous application for "execution against the same person, the "Court shall have ordered execution to issue "against him." Section 15 of Act XXIII. of 1861, which is substituted for the provision in Act VIII., says that "the Court, on "receiving any application for execution of a "decree containing the particulars mentioned "in section 212 of Act VIII. of 1859, or "such of them as may be applicable to the "case, shall enter a note of the application "and the date on which it was made in the "register of the suit. If it shall be shown "to the Court that the particulars do not "correspond with the original decree, the "Court shall either return the application for "correction to the person making it, or shall, "with the consent of such person, cause the "necessary correction to be made. If the "application be admitted, the Court shall "order execution of the decree according to "the nature of the application." Now, it is true that, in section 221 of Act VIII. of 1859, it is said that, when all the necessary preliminary measures have been taken where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree. But what is intended by "*cause to the contrary*" does not appear in any part of Act VIII., and it might be difficult to say what would be "*cause to the contrary*" within the meaning of section 221. In a case in 8 Weekly Reporter, page 284, Sir Barnes Peacock, speaking of this section, says: "Looking to the previous sections, we do not "think it was the intention of the Legislature "to control by those words the option of the "judgment-creditor. It would be very "inconsistent if the Court, under section 15, "Act XXIII. of 1861, were bound to order "the execution, and were not bound, under "section 221, Act VIII. of 1859, to issue the "warrant." The learned Chief Justice appears to have been of opinion that the words of section 15 of Act XXIII. did not leave to the Court a discretion, provided all the previous requisites in the application had been complied with. And in the absence of any further indication in Act VIII. of 1859 of what was the intention of the Legislature in using the words "unless it see cause to the contrary," it appears to me that the Courts have not a discretion of granting or refusing a second application for execution. I do not say that this is a desirable state of the law. Indeed, I am far from thinking that it is so. But we have to determine what are the provisions of the Code of Civil Procedure, and not what should be the law. And this leads me to remark that the case in 9 Weekly Reporter, page 527, in which Mr. Justice Phear, after deciding the question before him, expressed his opinion that the Court should not grant the second application as a matter of course, and that the Court should satisfy itself that the failure of the previous execution-proceedings is not attributable to the fault of the decree-holder—an opinion in which Sir Charles Hobhouse appears to have been careful not to express his concurrence—is in my judgment a statement rather of what the law ought to be than what it is. We cannot regard that opinion as authority for the practice in cases of this kind; and it appears to me to be somewhat opposed to the opinion of the late Chief Justice, which I have quoted.

I therefore think that we must answer the question in the affirmative. At the same time I think this is not a satisfactory state of law for the execution of decrees, because it may enable a decree-holder to keep the decree alive for very many years, when he ought not to be allowed to do so.

The decree of the Subordinate Judge will be reversed, and the decree of the Moonsiff will stand.

Kemp, J.—I concur.

Jackson, J.—I have felt myself bound to assent to the conclusion just announced by

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the Chief Justice, but, inasmuch as with the concurrence of Mr. Justice McDonell I referred this question for consideration of a Full Bench, and inasmuch also as I was a party to the decision of the Full Bench in 6 Weekly Reporter and to several other decisions about that time and subsequently in which the question of *bona fides* was very much discussed, I think I ought to say a few words upon this question. I am bound to say, that I do not feel very much pressed by the difference in language between the present Law of Limitation and Act XIV. of 1859, because it seems to me that the doctrine by which the terms of section 20 of Act XIV. of 1859 were explained, the words in that Act being "some proceeding taken to enforce a judgment, decree, or order," might equally well apply to the terms of article 167 of the new Limitation Act, because, if the Court were actuated by the same opinion as was expressed at the time of the case in 6 Weekly Reporter, the words "applying to the Court to enforce or keep in force the decree or order" might well have been interpreted to mean applying to the Court *bona fide* for the purpose of enforcing the decree or order, or keeping the same in force, and not a mere colourable application for the purpose of keeping the decree alive; but, inasmuch as this Act has been passed several years after the decision in 6 Weekly Reporter and the following decisions, and as the Legislature must be supposed to have been aware of those decisions, and, as I suppose, designedly omitted to incorporate in the Act the principle of those decisions, I think we ought now to abstain from qualifying the precise terms of the Act by any such doctrine as that introduced in the decision in 6 Weekly Reporter. In deference, therefore, to the opinion of the Chief Justice and my other learned colleagues, I assent to the interpretation now put upon the Act. I said in the course of the remarks which I made in referring this case that I could not recall to mind any section or provision of the Code of Civil Procedure in which express provision is made for a second application for executing a decree. I ought, no doubt, to have referred to the terms of section 216, though that rather alludes to the making of a second application, because it is impossible to shut one's eyes to the fact that the Code of Civil Procedure and the Limitation Act do expressly recognize, though they omit to regulate, the right of a decree-holder to make second and further applications for execution. I still think, and I think more strongly than ever, that the consequences, to which I referred in my remarks, of removing absolutely all checks to applications for executing decrees, are likely to follow; but at the same time I also think it is better that those consequences should be exposed by actual examples, and brought to notice in judgments of the Courts, and the remedy left to the Legislature which can properly and effectually deal with them, than that the Courts should, by a forced construction, endeavour to mitigate by their own authority the action and rigour of the law. I therefore concur in the judgment of the learned Chief Justice, and I hope that these cases and the probable consequences may attract the notice of the Legislature, and may lead to some proper and effectual remedy being applied.

Markby and *Ainslie, JJ.*—We concur in the judgment delivered by the Chief Justice.

The 8th September 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. F. McDonell, *Judge*.

Agreements having reference to Social and Religious Customs—Jurisdiction—Public Policy.

Case No. 47 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 3rd November 1873, reversing a decision of the Moonsiff of Nattore, dated the 18th November 1872.

Huronath Pattur and others (Plaintiffs), *Appellants*,

versus

Nitto Paramanick and others (Defendants), *Respondents*.

Baboos Sreenath Dass and *Bhoyrub Chunder Banerjee* for Appellants.

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Respondents.

A Court cannot take notice of an agreement (*e. g.*, in the way of awarding damages for breach thereof), which has reference to social and religious customs, and which cannot be enforced by a Civil Court.

An agreement between members of different *somajes* to have social intercourse with each other, and to intermarry, is not opposed to public policy, but rather in accordance therewith.

Couch, C.J.—THE facts of this case are stated in the judgment of the Moonsiff to be

that the plaintiffs and the defendants are of one and the same caste; that the defendants are divided into six *somajes*, and the plaintiffs into three; that formerly marriages used to take place between these nine *somajes*, and they ate with one another, and had social intercourse and dealings, which were subsequently stopped; that at the present time the number of persons belonging to the three *somajes* of the plaintiffs having become thin (few, we suppose he means) great difficulty was felt in the way of marriages, &c.; that, according to the prayer and request of the plaintiffs, the defendants promised to unite the nine *somajes*, and accordingly ate one *puka follar* and rice feasts for five days and took clothes in token of respect from the plaintiffs; that subsequently the defendants did not eat together and hold social intercourse with the members of the three *somajes* of the plaintiffs on the occasion of the *sradh* ceremony of the father of the defendant Madhub as promised by them, and thus violated the contract; and that the plaintiffs have therefore brought this suit to enforce the terms of the contract, or to recover as damages the sum of Rs. 274 as the value of clothes, and Rs. 390-6-5, the amount expended in preparing feasts for the entertainment of the defendants.

The Moonsiff found that the contract alleged by the plaintiffs had been proved to his satisfaction. He held, and we think rightly, that he could not make a decree obliging the parties to eat together and to have social intercourse, and to allow marriages to take place between them. And he further held that it was fit and expedient for him to award a decree against the contracting defendants for damages. He accordingly deducted from the amount which had been expended by the plaintiffs in preparing the feasts, one-third, which he considered had been incurred by the plaintiffs in feeding the members of their own *somajes*, saying that the plaintiffs were entitled to reap the reward of those expenses in a future life. He has deducted Rs. 130-2 from Rs. 390 claimed by the plaintiffs, and awarded them the balance together with the sum which had been expended for clothes.

Now, as we have already said, the Moonsiff was right in holding that this was not a contract of which a Court could decree a specific performance. It was of a peculiar nature. No Court could compel the parties to eat together, or to join in social intercourse, or contract marriages with each other. But the Moonsiff was wrong in holding that the plaintiffs were entitled, in consequence of the breach of contract which they alleged, and which he found there had been, to a refund of the money which they had expended. They stated the breach of contract to be their not being invited to the *sradh* ceremony of the father of the defendant Madhub, which was a single breach. Although they might be fearful that this might be followed by other breaches of the contract, yet this did not entitle the parties to recover the money which they had paid as a consideration for the promise. The persons to whom a promise is made are not, merely because the promise is broken on one occasion, entitled to get back the money they have paid. There are, no doubt, cases where a promise has entirely failed, and the consideration for it may be recovered. And it is recovered as the estimated amount of the damages sustained. But what the plaintiffs became entitled to on the breach of the contract by the defendants is the damage which they sustained by that breach. Now, here, the agreement or contract, supposing a contract, which, looking at the nature of the transaction, is doubtful, is of such a nature that a Court cannot say what damages the plaintiffs sustained by not being invited to the *sradh* ceremony on the occasion referred to. It appears to us to be one of those agreements of which a Court cannot take notice. It has reference to social and religious customs, and cannot be enforced by a Court. We know of no instance of a contract of this nature being enforced. Therefore the decision of the Moonsiff awarding damages was wrong.

There was an appeal which was heard by the Subordinate Judge; and he reversed the decree of the Moonsiff as regards all the defendants except Ameer, who had not appealed. We cannot approve of the reasons for which the Subordinate Judge reversed the Moonsiff's decree. He appears to have seen that it was a case in which the plaintiffs were not entitled to a decree, and to have felt a difficulty in giving reasons for his decision. He says: "Such a contract seems opposed to public policy, and the same can be said to be unlawful under the provisions of the new law." We see nothing opposed to public policy in agreements of this kind between members of different *somajes* to have social intercourse with each other. Instead of being opposed to public policy, it is rather in accordance with it to encourage such a state of things, to enlarge the sphere of the exclusiveness of a caste or society rather than to contract it. Again, he says that "this contract can in an indirect way be called to

be a contract for restraint in the way of marriages, &c., for it was agreed that the defendants would have marriages with the plaintiffs. Hence, this must be said to have been a restraint of marriage." We fail to see how the agreement of the defendants to have marriages with the societies of the plaintiff can be a restraint of marriage. It is enlarging the sphere within which marriages might be contracted. Instead of being a restraint of marriage, it would operate the other way.

The Subordinate Judge seems to have misapplied the passage in Story's Equity Jurisprudence* which he quotes. Where there is an agreement restraining a person from marrying any body except a particular person, the other person not being under an obligation to marry, the agreement may operate as an agreement not to marry at all. That is quite a different case from the present. The reasons which the Subordinate Judge has given do not appear to be sound. But so far as he has reversed the Moonsiff's decree against all the defendants except Ameer, he is right. We must however go further. The ground upon which the suit is dismissed applies to all the defendants; and therefore we must have it dismissed against the defendant Ameer as well as against the others.

The decree of the Subordinate Judge will be altered by making it a decree reversing the decree of the Moonsiff entirely and as against all the defendants.

The defendants will have the costs throughout, including the costs of this appeal.

The 8th September 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Special Appeal—Admissions—Thakbust Map—Ameen's Report—Evidence—Act I. of 1872, s. 63.

Case No 225 of 1874.

Special Appeal from a decision passed by the Additional Subordinate Judge of Tipperah, dated the 13th November 1873, modifying a decision of the Moonsiff of Noornuggur, dated the 30th November 1872.

Ramutoollah Khadim and another (Plaintiffs), *Appellants,*

versus

Ummut Ali Khadim and others (Defendants), *Respondents.*

Baboos Grish Chunder Ghose and *Bharut Chunder Dutt* for Appellants.

Baboo Nullit Chunder Sen and *Moonshee Serajul Islam* for Respondents.

Where a Lower Appellate Court misconstrued the evidence of witnesses, acted contrary to s. 83, Act I. of 1872, in not presuming the accuracy of a Thakbust map, and passed no opinion on an Ameen's inquiry on which the first Court had laid stress, its decision was reversed in special appeal.

A defendant's admission, if taken at all, must be taken as a whole; but it cannot bind co-defendants.

THERE are two appeals in this case—one on the part of the plaintiffs, and one on the part of the defendants. The plaintiffs appeal against that portion of the decision of the Subordinate Judge which modifies the decree of the first Court; and the special respondents say that the Subordinate Judge ought to have dismissed the whole case. The plaintiffs sued for possession of 1 kanee 5 gundas of land from which they allege that they were dispossessed in three different years, 1277, 1278, and 1279; they assert that the lands in dispute belong to the Doorgao Cheragee lands of Mouzah Khurumpore, and that they, the plaintiffs, were in possession all along until dispossessed by the defendants. The defendants say that the lands belong to Mouzah Akhoorah, and that they are comprised in two plots—one of 10 gundas on the north, and one of 15 gundas on the south. And it is further stated in the plaint that the plaintiffs were in possession of the northern portion of the land by erecting thereon a gowchala with the permission of the defendants.

The first Court decreed the whole case, the Moonsiff being of opinion that the plaintiffs had proved their case by the evidence of witnesses, by the Thakbust map, and by the Ameen's inquiry on the spot.

The second Court has given the plaintiffs a modified decree. The Subordinate Judge, from what evidence I am unable to understand, has assumed that there are two plots, and has given the plaintiffs a decree for the plot to the north, and dismissed their claim with reference to the plot to the south, though, as already stated, the witnesses say that there are not two separate plots.

The grounds taken in special appeal are that the Lower Appellate Court has misconstrued the depositions of the witnesses adduced by the plaintiffs in holding that the entire portion of the disputed lands to the

* Para. 274.

south was khilla land; 2nd, that the lower Court was wrong in not paying any attention to the survey-map, and drawing inferences against its *bona fides* upon conjectural grounds; 3rd, that the Subordinate Judge was wrong in not passing its opinion upon the Ameen's reports and inquiry, more particularly as the first Court relied upon that inquiry.

I think with reference to the first objection that the decision of the Subordinate Judge is open to the objection taken by the special appellant in this Court. The Subordinate Judge says: "নালিশী ভূমির দক্ষিণ খণ্ড চিরকালিয় খিল থাকা বাদিগণের সাক্ষ্য বাক্য দ্বারা প্রকাশ." The Subordinate Judge is clearly wrong in saying this, because the witnesses do not say that the whole of the southern portion of the land was for a long time "kheel," or uncultivated. Some of them do not say that it was "kheel" at all, and others say that only half of it was "kheel." Then, with reference to the Thakbust map, I think the reasons given by the Subordinate Judge for setting it aside are very weak indeed. He admits that the disputed lands were surveyed as part of Khurumpore, but he says that they are but a small portion of land situated on the confines of the two mouzahs, and that it may be that at the time of the survey the plaintiffs may have managed to have that land surveyed as part of Khurumpore. This is not the proper way to dispose of a Thakbust map, the accuracy of which must be presumed under section 83 of the new Evidence Act. Then I also find that the Subordinate Judge passes no opinion whatever with reference to the Ameen's inquiry upon which the first Court laid stress. I therefore think that the Subordinate Judge's decision is wrong, and that it must be reversed, the decision of the Moonsiff restored and affirmed, and the special appeal decreed with costs. Pleaders' fees, one gold mohur.

With reference to the cross-appeal taken by the defendants, I think that it must be dismissed. It is true that the Subordinate Judge refers to an admission by Nezah Chowdhry, one of the defendants. That admission must be taken as a whole, and would not bind the other co-defendants; but besides this so-called admission, I find that the Subordinate Judge holds that the plaintiffs have proved by other evidence their possession of the northern portion of the disputed land. The cross-appeal must therefore be dismissed.

The 8th September 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Malikana—Zemindaree Rights—Limitation—Settlements.

Case No. 317 of 1874.

Special Appeal from a decision passed by the Second Subordinate Judge of Mymensingh, dated the 9th December 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 21st March 1872.

Kristo Chunder Sandel Chowdhry (one of the Defendants), *Appellant,*

versus

Shama Soonduree Debia Chowdhrain and another (Plaintiffs), *Respondents.*

Baboos Hem Chunder Banerjee and *Nil Madhub Sen* for Appellant.

Baboos Mohinee Mohun Roy and *Nullil Chunder Sen* for Respondents.

Where malikana is in deposit with the Collector on behalf of proprietors who have refused settlement, the proprietors lose their right to recover it if they do not claim it for more than twelve years.

Zemindaree rights are not extinguished, but are only in abeyance during periods of temporary settlement; and possession under a permanent settlement is adverse from the date on which the permanent settlement is made.

THE daughters of the late Anund Chunder Acharjee Chowdhry, a zemindar of Zillah Mymensingh, are the special respondents in this case, and were the plaintiffs in the Court below. The suit was for a joint settlement with the defendants of a certain chur, called Poonya, in the District of Mymensingh, which was resumed some time in 1835, and of which settlements from time to time were made with different parties; and subsequently, on the 24th of June 1867, a permanent settlement was made with the defendant at a jumma of Rs. 117-2. The plaintiffs set forth their title briefly in this way: That Ram Chunder Acharjee Chowdhry and Anund Chunder Acharjee Chowdhry, who were two brothers, purchased a share of 5 gundas from Hur Chunder Chowdhry; that Anund Chunder Acharjee Chowdhry, the father of the plaintiffs, by a will, dated Bysack 1268, bequeathed his 2 gundas 2 cowries share of the zemindaree to the plaintiffs, his daughters; that the malikana,

which was payable to the zemindars, who had refused to accept the settlement, was in deposit in the Collectorate, and had not been paid away to any parties entitled thereto; that the defendant, special appellant, Kristo Chunder Sandel Chowdhry, obtained a permanent settlement without the knowledge of the plaintiffs; and that that gave rise to their cause of action in the present suit. In this case, both the Courts below have concurred in opinion. The Moonsiff's decision is a very able and careful decision, and the Subordinate Judge has not added much to that decision beyond concurring with it.

The points taken in the Court below were that the suit had been undervalued; that the date of the cause of action was not stated; that the suit was barred under the special Law of Limitation, not having been brought within three years of the Collector's order, and that it was barred also under the general Law of Limitation; that the Chur Poonya appeared in the form of an island, and not as an accretion to the zemindaree of the plaintiffs; and that the plaintiffs have no title to the chur under the will of Anund Chunder Acharjee Chowdhry. The defendants in the Court below went still further, and stated that the allegation of a will was not true. As already stated, both Courts found for the plaintiffs.

The points which have been taken in special appeal are two, namely, that the suit of the plaintiffs was barred; and, *2ndly*, that no right in the chur was conveyed to the plaintiffs under the terms of the will. The gist of the argument of the pleader who appeared for the special appellant is this: He contends that, as the right to malikana was lost by non-enjoyment for a period of more than twelve years, it follows that the right to settlement is lost too. He further contends that the right of a malik to malikana is not a subordinate right, but is co-ordinate and co-existent with the proprietary or zemindaree right. Then, with reference to the second point, the pleader contends that the chur in question existed prior to the date of the will or from 1835, the will being dated Bysack 1268, and that it was for the plaintiffs to show that they obtained the zemindaree with all its appurtenances, including the chur in question. During the course of the argument, the following cases were referred to—by the pleader for the appellant, a case to be found in Volume XIX., Weekly Reporter, page 75; and by the pleader for the special respondent, a case to be found in the Gap Number of Sutherland's Reports, page 149; a case in the 17 Weekly Reporter, page 145; and two cases decided by the Agra Court. Now, taking the case referred to by the pleader for the special appellant first, I find that that was a case coming from the same district of Mymensingh, in which the claim was for malikana; and Mr. Justice Glover said that the only question that had to be determined in that case was whether the plaintiff, special appellant in that case, had lost his right to recover malikana by reason of his not having claimed it for more than twelve years; and he held that, at the date of the purchase by plaintiff's father, there was malikana in deposit with the Collector on behalf of the proprietors who had refused settlement, and from that date the purchaser was entitled to and could have received it; that more than twelve years had elapsed since that date; and the learned Judge held that, in the face of the decisions quoted, the Court could not do otherwise than say that the plaintiff has, by his own neglect to sue, lost his title to malikana.

In Volume XVII., page 145, and in the Gap Number, page 149, are two decisions in which it has been held that the rights of parties—zemindaree rights—are not extinguished but are only in abeyance during periods of temporary settlements, and that the possession of a party under the permanent settlement is not adverse to the zemindar, but from the date on which the permanent settlement is made. Now, in this case, the permanent settlement was made in June 1867, and therefore the plaintiffs' cause of action arose on that date, and the suit has been brought well within time from the date on which the cause of action accrued to the plaintiffs. I therefore entirely concur in the decisions of the Courts below on the question of limitation.

Then with reference to the second point. This point was not at all pressed in the Courts below; but, as it has been taken in special appeal, and as the will has been referred to, I am of opinion that, under the terms of that will, these ladies, the heirs and daughters of the testator, took, under that will, the share devised to them by their father with all its appurtenances. The words in the will are "আমার অংশ ও সত্বাধিকার সমন্ধে" that is, my share and all rights appertaining to that share; and the accretion having been found by the Courts below to be an accretion to the zemindaree, and not an

island, and the defendants having wholly failed to prove that allegation, and that point not having been pressed in special appeal, it follows as a matter of course that, under the will, these ladies, who succeed to the share left to them by their father, succeeded also under the words quoted above to all appurtenances of the zemindaree in the shape of accretions.

I therefore dismiss the special appeal with costs. Pleaders' fees, one gold mohur.

The 10th September 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Right to Easements—Execution-sale.

Cases Nos. 1350 to 1352 of 1873.

Special Appeals from a decision passed by the Officiating Judge of Hooghly, dated the 2nd June 1873, modifying a decision of the First Subordinate Judge of that District, dated the 10th October 1871.

Huree Madhub Lahiree (one of the Defendants), *Appellant*,

versus

Hem Chunder Gossamee and another (Plaintiffs), *Respondents*.

Mr. C. Jackson and *Baboos Obhoy Churn Bose* and *Mohendro Lall Mitter* for Appellant.

Baboos Hem Chunder Banerjee and *Rash Beharee Ghose* for Respondents.

The rule, that the right to easements goes with the property when sold by the owner himself, applies also when the property is sold by the Court in execution of a decree against him.

Couch, C.J.—I THINK the judgment of the Lower Appellate Court is right. If this had been a sale by the owner of the entire property, the rule that I referred to giving a right to easements in consequence of the disposition by the owner of the property whilst it was in his possession would apply, and there would be no doubt that the person who bought the property which included the cook-house would acquire with it such a right as is contended for. The only question in this case seems to be whether there is any difference in the application of the rule when the sale of the property is not by the owner himself, but is by the Court in execution of a decree against him. I think that the sale by the Court, so far as regards any question of the title and any liability which might arise against the owner of the property, is the same as if it were a sale by the owner himself. It is in effect a compulsory sale of the property effected by the Court. I do not see on principle that it should make any difference in a question of this kind. We must consider that the Court has sold what the owner could have sold, and has sold it in the same manner as the owner would have sold it. And there is this also to be said that the reason for this rule as to easements going with the property is that the disposition of the property by the owner is supposed to have been made with reference to the best way of enjoying it, and certainly the best way of selling the property and realizing the full value of it is to sell it with such rights as the owner thought should be attached to particular parts of it. For this reason I think we should hold that there is no difference between a sale in execution of decree and a sale by the owner himself. All the three appeals are, therefore, dismissed with costs.

Jackson, J.—I concur.

The 10th September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges*.

High Court Act, s. 15.

In the Matter of

Radha Mohun Roy and others, *Petitioners*,

versus

Raj Chunder Shah and another, *Opposite Party*.

Mr. C. Jackson and *Baboos Hem Chunder Banerjee* and *Issur Chunder Chuckerbutty* for Petitioners.

Baboo Mohinee Mohun Roy for Opposite Party.

The Court refused to extend assistance by the exercise of its extraordinary powers under the High Court Act.

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s. 15, to parties who were chargeable with great and unexplained delay.

Jackson, J.—We are of opinion that the conduct of the petitioners themselves in this matter precludes us from making any order in their favour. They applied to us, under section 15 of the High Courts Act, to require the Moonsiff to exercise jurisdiction under section 326 of the Code of Civil Procedure. It appears that the petitioners and some other parties, having matters of difference between them, agreed to refer those matters to arbitration. It is said, with what truth we cannot at present say, that the consent to refer these matters did not include all the parties interested. However that may be, delay took place in the proceedings of the arbitrators appointed, and before the arbitrators had come to any conclusion, application was made to the Moonsiff to have the reference filed. The Moonsiff considered that there was no ground for the application. We have been referred to a case in 12 Moore's Indian Appeal Cases (Pestonjee Nusseerwanjee against Manockjee & Co.), page 112,* in which the Judicial Committee expressed an opinion that such a case fell within the provisions of section 326; but what is material in this matter is that this Court has always declared that it will not extend assistance by the exercise of its extraordinary powers under section 15 to parties who are not diligent in applying for it. The Moonsiff in this case refused to interfere under section 326 on the 7th August 1873. An application was made to the Moonsiff for review of judgment on the 27th September. The application so made was eventually heard by a different Moonsiff, and was not disposed of until the 3rd March 1874, when it was rejected, and, upon such refusal, the parties took no further steps until the 21st July last, about five months after, and this delay remains wholly unexplained. It is suggested that the parties offered terms to each other, and correspondence took place, but nothing definite is stated, and the suggestion is not supported by affidavit, nor is it made in such manner as that the Court can act upon it. We think that, in such circumstances as these, this Court ought not to interfere, more especially as it is not certain that the parties have no remedy by suit. We think, therefore, that this rule must be discharged, but, as the conduct of both the parties in this case has been dilatory, we make no order as to costs.

* 10 W. R. (P. C.) 151.

The 10th September 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Jungle Lands—Timber Trees—Rights of Government.

Case No. 183 of 1873.

Regular Appeal from a decision passed by the Officiating Judge of Sylhet, dated the 14th May 1873.

Rotun Ram Doss (Plaintiff), *Appellant,*

versus

The Collector of Sylhet on behalf of Government (Defendant), *Respondent.*

Baboo Joy Gobind Shome for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where jungle land was let by Government to a tenant for the express purpose of being brought into cultivation, and the lease contained no reservation of the rights of the Government in respect of the cutting of timber trees, the Court held that the parties contemplated that the cutting of such trees by the tenant would be necessary for carrying out the purposes of the lease.

Markby, J.—It appears that in this case the plaintiff, by the permission of one Brojo Kishore, who was in possession of a large tract of jungle land, cut down certain trees, and removed them and stored them at a convenient place at the banks of a river at some distance in the district of Sylhet; and, whilst they were there, the officers of Government seized them, and took them into their possession, sold a greater part appropriating the money to themselves, and retained the remainder. The plaintiff thereupon brings his suit to recover the value of the trees so seized by the Government, alleging them to be his property. Now, it appears that the place where the trees were cut down is land belonging to Government, and that this land was granted in the year 1865 to Brojo Kishore. This, however, was not the first time that the lease was granted, for the lease which has now been produced speaks of a former grant to the same lessee, and contemplates a renewal to him at the expiration of the term therein specified. Now, there has been nothing whatever to show that the plaintiff acted otherwise than perfectly *bonâ fide* in the matter; he had bought the trees in

good faith from the person in possession of the land, and it seems to us that the officers of Government having taken the law into their own hands, and seized property which was peaceably in the possession of the plaintiff, must show that they were entitled to do so. They have now produced the lease, and we find that the land was jungle land granted to Brojo Kishore from the year 1265 for ten years to be brought into cultivation either by himself or by means of ryots. He was bound under that lease to bring the whole of the land into cultivation. The question which we have to determine is whether, under that lease, Brojo Kishore had a right to cut these trees. We think it must be taken as admitted that they are timber trees, and it also appears that there was no express prohibition against cutting trees of this description. Now, it may be that, in some parts of the country at any rate, if not in all, a tenant who holds under a terminable lease is not at liberty to cut timber trees, whether prohibited by his lease or not. But this case is wholly distinguishable from an ordinary tenancy, and stands upon its own circumstances. The whole of the land let with a very insignificant exception was jungle land, and it was let to the tenant for the express purpose of bringing it into cultivation; and it seems to us, in the absence of any evidence to the contrary, that it must be presumed that, in order to carry out the purposes for which the lease was granted, it must have been necessary to cut down trees of all descriptions to some extent. It is impossible, therefore, to read this lease, as Government have contended that it ought to be read, as creating a relation between the parties under which the tenant would be prohibited from cutting trees altogether. Therefore that entirely distinguishes this case from ordinary relation of zemindar and ryot holding under a terminable lease, such as that we have referred to. Taking, therefore, as we think we must take it, that the parties contemplated that cutting of timber trees would be necessary for carrying out the purposes of the lease, and, inasmuch as the lease contains no reservation of the rights of the Government in this respect, the only construction we can put upon that lease is that the tenant was wholly unrestricted. The terms of the lease do not expressly restrict him; and the general rule of law that a tenant cannot cut any timber trees whatever could not possibly be applied to this case, as it would defeat the very object of the lease itself.

The District Judge has, no doubt, taken a different view of this matter, but we think he was misled by not considering exactly what the situation of the parties was. If it had appeared that the trees were, as he seems to think, trees of great value to the Government as they stood, no doubt, looking to the very small rent reserved in this lease, we might have hesitated before coming to the conclusion that property of such value was surrendered to the tenant. But the value of these trees to the Government is not the value stated in the plaint, and of which the witnesses speak. That is the value which they now have in store on the banks of the Longie river. The value of these trees to the Government was only that which they had when they stood in the forest, and that appears by the evidence to have ranged from six annas to one rupee a tree. Therefore only about a twentieth part of the value which the trees now have represents the real interest of the Government in the matter, and nearly the whole of their present value is due to the labor and the money expended by the plaintiff in cutting down these trees, and transferring them to the place where they were sold; and what the plaintiff is now seeking to recover substantially is only the fruits of his own labor and expense. Being of opinion, as we are, that under the lease the lessee had a right to cut timber, it is quite clear that the trees were the property of the plaintiff, and the officers of Government were not entitled to seize them. Therefore the plaintiff ought to recover their value in this suit.

There was another point raised in the course of the argument which we ought to mention, namely, that the permission which was granted by Brojo Kishore to the plaintiff to cut trees in this case was not granted until the year 1869, when the tenancy had expired. But, as the tenant was holding over after the expiration of his former lease, and specially as the lease contemplates a renewal, we think we ought to hold that he was continuing his tenancy upon the same terms as those upon which he had been hitherto holding the tenure.

The result will be that the judgment of the lower Court will be set aside, and the plaintiff will get a decree for the sum of Rs. 580 with six per cent. interest from the date of suit to the date of realization, and the costs of this Court and of the Court below.

The 10th September 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Minors—Act XL. of 1858, s. 3.

Case No. 377 of 1874.

ecial Appeal from a decision passed by the First Subordinate Judge of Chittagong, dated the 10th December 1873, reversing a decision of the Moonsiff of Hathazaree, dated the 25th August 1873.

Aukhil Chunder (Plaintiff), *Appellant,*

versus

ipoora Soonduree and others (Defendants), *Respondents.*

aboo Aukhil Chunder Sen for Appellant.

Baboo Grish Chunder Ghose for Respondents.

Where a suit on behalf of minors was decreed, HELD the mere fact of the formal order under Act XL. of , granting permission to their representative to ear for them, not having been drawn up, was not nd sufficient to dismiss the suit; the inference being the Court which admitted the plaint intended to the permission.

arkby, J.—We think that the Subordi- Judge was clearly wrong in dismissing suit with costs against the minors upon ground taken by him. The ground is there was no special order granting the mission of the Court under section 3 of XL. of 1858, allowing the plaintiff hil Chunder to appear for his minor hers without a certificate. The plaint , however, been admitted by the Moonsiff, , although we think it would be more ular and very desirable to have a formal er granting the permission under the Act, must take it that, having admitted the nt without a certificate, the Moonsiff did nd to grant that permission. No doubt, had been brought to his notice that a cial order was necessary for that purpose, would have drawn out that order. Under circumstances it could not be right, when minors had obtained a decree in the Court, to dismiss the suit with costs rely on the ground that that formal order not been drawn up.

The appeal will, therefore, be remanded the Lower Appellate Court to be heard d determined. Costs will abide the result.

The 11th September 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Execution of Decrees—Interest—Rule of Calculation.

Case No. 144 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 24th January 1874, affirming an order of the Additional Moonsiff of that District, dated the 23rd August 1873.

Gooroo Doss Dutt (Decree-holder), *Appellant,*

versus

Ooma Churn Roy (Judgment-debtor), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Bhyrub Chunder Doss for Respondent.

The rule as to making up an account of interest in mortgage cases, *viz.*, that, when a payment is made, it is to be deducted from the interest, and not from the principal, extended to the execution of ordinary decrees. The balance of interest is never added to the principal so as to produce compound interest.

Markby, J.—In this case the only question which we have to consider is as to the mode in which the account of interest should be made out. The practice between the parties had been to deduct the various payments made on account of the decree from the interest which had accrued under the decree. That had been done on several occasions previously. But the Courts below have thought that the proper way of making up the account was to deduct the amount paid from the principal. We think, however, that the practice which had been adopted by the parties up to this time was a right one, and that it is according to the rule usually adopted in this country as the mode of making up such an account as this, namely, that, when a sum is realized on account of a decree, that amount is to be deducted from the interest and not from the principal. The balance of interest is never added to the principal so as to produce compound interest; but the practice appears to us to be that the payment so made is to be appropriated to the interest that has accrued. We believe that to be the established practice in cases of

mortgage, and we see no reason why that practice should not be followed in the execution of ordinary decrees.

The result will be that the decisions of the lower Courts will be reversed, and the account will be made up according to the principle we have stated. The decree-holder will be entitled to his costs in this Court and in the Courts below.

The 11th September 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Rent-suit by Co-sharer—Colourable Suit under Act VIII. (B. C.) of 1869—Act VIII. of 1859, s. 7.

Case No. 452 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 26th November 1873, reversing a decision of the Moonsiff of Moonsheegunge, dated the 30th August 1873.

Bykunt Kyburto Doss and another (two of the Defendants), *Appellants,*

versus

Shushee Mohun Paul Chowdhry and another (Plaintiffs), *Respondents.*

Mr. C. Piffard and *Baboos Nullit Chunder Sen* and *Bykuntnath Doss* for Appellants.

Baboos Rash Beharee Ghose, Doorga Mohun Doss, and *Bhoobun Mohun Doss* for Respondents.

A suit by a co-sharer against ryots for rent in proportion to his share will not lie where plaintiff has never been in receipt of the rent from any ryot separately in proportion to such share.

A suit under Act VIII. (B.C.) of 1869 is not maintainable, if brought with the view of bringing in a third party, and of having tried, under colour of a rent-suit, a question of title between the plaintiff and that party; such a proceeding being opposed to the principle laid down in Act VIII. of 1859, s. 7.

THIS suit was instituted by the plaintiff on a 4-anna stamp to recover rent from the defendants Nos. 1 and 2, Gobind Doss Kyburto and Bykunt, the sons of Nittye Doss, for the years 1276, 1277, and 1278, the amount claimed with interest being Rs. 2 6 annas 6 gundas. The plaintiff alleges that a 5 annas 6 gundas 2 cowries 2 krants share in kharija talook Kristo Chunder Doss, No. 2604, was mortgaged to him by Huro Chunder Ghose; that the plaintiff foreclosed the mortgage and obtained a decree for possession. In executing that decree an Ameen was deputed to calculate the wassilat. The Ameen's proceedings with reference to wassilat ranged over a period from the year 1269 to 1273, and in the wassilat papers which were filed by the plaintiff there is an entry No. 66 "নিত্যই বৈকবন্তের পুত্র বৈকণ্ঠ বৈকবন্ত দাষ" *i.e.*, Bykunt son of Nittye, which shows that a total sum of Rs. 7 12 annas 5 gundas was due, namely, for the year 1269 5 annas 5 gundas, for the year 1270 Rs. 2, for the year 1271 Rs. 1, for the year 1272 Rs. 2, and for the year 1273 Rs. 1-7 annas.

Gooroo Pershad Dey and six others, namely, Kalee Nath Dey, Juggut Chunder Dey, Goluck Chunder Dey, Tarinee Churn Dey, Kashee Chunder Dey, and Mohima Chunder Dey, intervened in this case. The defendants Nos. 1 and 2 alleged that they were not the tenants of the plaintiff; that they had never paid rent either to the plaintiff or to his mortgagor, Huro Chunder Ghose; that they paid their rent to the maliks of howla Satooram Gopal *samileh* howlah Ram Tarun Dey, which is the property of Tarinee Churn Dey and others, intervenors; that the disputed land was within that howla; that the rent formerly payable by them to the maliks of that howla was Rs. 1-12; and that the rent from the year 1273 is Rs. 2 annas 3 per annum.

Tarinee Churn Dey and others, intervenors, supported the defence of the ryots, defendants Nos. 1 and 2; they denied the relationship of landlord and tenant as between the plaintiff and the defendants Nos. 1 and 2; they alleged that the defendants Nos. 1 and 2 had paid their rents which were for bastu lands to the intervenors and their co-sharers for a very long time; that the land in suit is not in the plaintiff's decreed talook, but in their *poytrick* or ancestral purchased howla Satooram Gopal *samileh* howla Ram Tarun Dey; that they are not in any way bound by the Ameen's wassilat proceedings to which they were no parties. Then they say that previous to this suit the defendant No. 1 had for some time not been heard of, and that the defendant No. 2 has left the country; that is, the defendant Bykunt. However, be that as it may, Bykunt does appear in the case, and does defend the suit. Then they say that there is enmity between them and the plaintiff, and that the plaintiff has brought this suit for the purpose of destroying their title in the howla.

The plaintiff with his plaint filed the hittahs of 1266, the kubooleut of Nittye, lated 3rd Kartick 1260, and a copy of the *stefsar* or statement of Anund Chunder Chuckerbutty, mookhtar, dated the 7th of anuary 1867.

Bykunt, the ryot defendant No. 2, with his written statement which entirely supports he statement of Tarinee Churn and his co-harers, files *salianas* of the years 1276, 1277, and 1278, signed by Tarakant Dey, tmamdar.

The case was first taken up by the Moonsiff, who decreed the plaintiff's suit. On appeal here was a remand by the very Subordinate Judge who has decided the present case. The remand order laid down certain issues for rial, but in that order of remand the Subor-linate Judge says (and this is important because he seems to have changed his opinion subsequently without giving any reasons for so doing) that it is clear that a howla Satooram Gopal exists in the talook *amileh* howla Ram Tarun Dey. The Moonsiff after remand, another Moonsiff, Baboo Chunder Coomar Sen, dismissed the plaintiff's suit. He was of opinion that the plaintiff had altogether failed to prove that the defendants Nos. 1 and 2 were his ryots, and that he or his mortgagor had ever received rent from them; that the land in dispute was within howla Satooram Gopal *amileh* howla Ram Tarun Dey; and that the defendants Nos. 1 and 2 have been all along paying their rents to the intervenors, defendants. He, therefore, dismissed the suit. On appeal that decision has been reversed by the Subordinate Judge. After giving a history of the case, the Subordinate Judge says that the Moonsiff was quite unwarranted in saying that the plaintiff has not been able to show that his predecessor in interest—I suppose by that he means the mortgagor—ever realized the rent of this land. Then he relies very much upon the wassilat papers as proving that the predecessors of the defendants Nos. 1 and 2 were paying rent to the mortgagor, Huro Chunder Ghose. Then with reference to the howladaree title which he says the defendants set up, he was of opinion that the deed of conveyance did not show that any howla of the name of Satooram Gopal passed under that deed. Then he says that the mookhtar, who was examined in the wassilat case, did not admit the existence of the howla in question, but, on the contrary, it appeared to the Subordinate Judge that the said mookhtar emphatically denied the existence of howla Ram Tarun Dey. He therefore gave the plaintiff a decree reversing the decision of the Moonsiff.

In special appeal the main points taken are that this being a suit brought by the plaintiff, who is admittedly only a sharer in the talook to the extent of one-third, the talook being joint or ijmalee, the suit against the ryots for rent in proportion to the plaintiff's share will not lie, the plaintiff not having been able to prove that the defendants have hitherto been paying that jumma separately to him in proportion to the share he held in the talook.

The next point mainly relied upon was that this was a suit on a small stamp—namely, a 4-anna stamp—for rent, brought with the view of having a question of title decided as between the plaintiff and the intervenors in a rent suit.

As I am of opinion that the decision of the Subordinate Judge cannot be sustained in this case, I wish to enter into a few particulars of the facts of the case which have escaped the notice of the Subordinate Judge. Now I do not find that there is any evidence on the record to the fact that Nittye was the ancestor of the defendants Nos. 1 and 2; but even assuming that he was, I find from the report of the wassilat Ameen that that Ameen distinctly says that he filed a *hissab* of the different ryots in occupation of the three talooks, and that he had entered Nittye's name in that *hissab*, but as it had been shown to him subsequently that Nittye was not a ryot of the three talooks, therefore Nittye's "উপসত্ত" I suppose he meant by that the rent payable by Nittye, must be deducted; and he therefore filed a second *hissab* "নিতাইর জমা বাদে," that is, deducting the rent payable by Nittye, amounting to Rs. 2-10-4; and these proceedings of the Ameen were confirmed by the Court in the presence of the plaintiff and his mortgagor. Therefore, assuming that Bykunt is the son of Nittye, we have the fact that at the time the wassilat proceedings were held in the mofussil, it was found that Nittye was not a ryot of the decreed talook.

Then in this case an objection was taken by the learned Counsel for the special appellants that the suit will not lie, inasmuch as this is a suit by a co-sharer of an ijmalee talook. I may observe with reference to this objection that, although the co-sharers of the plaintiff have been made parties to the suit, the plaintiff has wholly failed to show that he has been hitherto in receipt of the rent of his share

separately. There is a decision which was handed up to the Bench during the course of the argument, dated the 3rd of July 1874, which has not been published yet, by the Chief Justice and Mr. Justice Ainslie. This decision was passed after the Full Bench decision to be found in Volume XXI., Weekly Reporter. In that case a co-sharer sued for rent in proportion to his share, and the learned Judges held that when rent is due by a tenant, it constitutes a debt from the tenant to the landlords jointly, and that no one of those landlords has a right to treat a part of the rent as a separate debt due to him. Now in this case there is no evidence whatever that the plaintiff has ever been in receipt of the rent from any ryot separately in proportion to his share. I therefore think on the first ground of special appeal that this suit ought to have been dismissed.

On the second ground of special appeal, it also appears to me very clear that this is a suit which has been brought with the view of bringing in a third party and of having tried, under colour of a rent suit, a question of title between the plaintiff and that party. Now such a proceeding is opposed to the principle laid down in section 7, Act VIII. of 1859, and a case will be found in Volume XVI., Weekly Reporter, commencing at page 235, in which it was ruled by a Bench of this Court, Justices Kemp and Ainslie, that such a suit is not maintainable. There is also a case in Volume XXI., Weekly Reporter, page 88, before Justices L. S. Jackson and the late Justice Dwarkanath Mitter, in which those learned Judges observe that "the effect of the transfer of jurisdiction as "to rent suits from the Revenue Courts to "the ordinary Civil Courts was not to enable "plaintiffs to expand the provisions of the "law relating to them and the intervenors, "which merely referred to the previous "enjoyment of the rent, into a trial on an "entirely new and complicated issue between "the plaintiff and some other person claiming "title to the estate; but that a suit for rent "as authorized by Act VIII. of 1869, B.C., "to be tried in the Civil Courts must be a "*bonâ-fide* suit for rent, and is not to be a "trial on a wholly different issue between "parties advancing conflicting claims to the "ownership of the estate."

Therefore, being of opinion, first, that the plaintiff has wholly failed to prove that either his mortgagor, Huro Chunder Ghose, or he himself has at any time received rent from the defendants Nos. 1 and 2, Gobind Doss and Bykunt Doss; and secondly, that if Bykunt is, as alleged by the plaintiff, the heir of Nittye, it was clearly found by the wassilat Ameen whose proceedings were confirmed by the Court that Nittye's tenure was not within the talook for which the plaintiff obtained a decree after foreclosing his mortgage; and thirdly, that the holding of the defendants Nos. 1 and 2 being in kismut Akyardhoho and talook Futeek Chunder Doss, the howla Satooram Gopal being included in that kismut and talook, and having passed under the denomination of *samileh* howla Ram Tarun Dey to the intervenors, the plaintiff's suit must be dismissed, the decree of the Lower Appellate Court reversed, and this appeal decreed with costs. Pleaders' fees, one gold mohur.

The 11th September 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Rent Suit—Act VIII. of 1859, s. 23.

Case No. 939 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 16th January 1874, reversing a decision of the Assistant Commissioner of Lohardugga, dated the 23rd August 1873.

Kashee Ram Dobey (Plaintiff), *Appellant,*

versus

Dheera Ooraon (Defendant), *Respondent.*

Moonshee Abdool Baree for Appellant.

Baboo Tarucknath Sen for Respondent.

In a suit for arrear of rent under Act VIII. of 1859, s. 23, a plaintiff can only succeed by proving his title to recover under a contract, expressed or implied.

I THINK that this special appeal ought to be dismissed.

The principal ground urged against the judgment of the Judicial Commissioner is this, *viz.*, that it was for the defendant to make out that the bhooyari lands are not subject to any rent. I do not think that this contention is correct. This was a suit for arrears of rent under section 23, Act VIII. of 1859, and the plaintiff can only succeed by proving that under a contract, either expressed or implied, he is entitled to recover the rent claimed.

In this view of the case it was for the plaintiff to prove the amount of rent which the defendant is liable to pay. The Judicial Commissioner has held that the plaintiff has failed to produce the necessary evidence to establish his case.

For these reasons I think that this contention in special appeal fails. The other grounds urged are simply questions of fact. The special appeal therefore is dismissed with costs.

The 11th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Voiding a Contract—Fraud—Damages.

Cases Nos. 2660 and 2661 of 1873.

Special Appeals from a decision passed by the Officiating Judge of Purneah, dated the 18th August 1873, affirming a decision of the Officiating Subordinate Judge of that District, dated the 26th May 1873.

Syud Taleb Hossein (Plaintiff), *Appellant,*

versus

Shaikh Ameer Buksh and others (Defendants), *Respondents.*

Mr. M. L. Sandel for Appellant.

Baboos Sreenath Doss and *Chunder Madhub Ghose* for Respondents.

One who repudiates a contract, and asks to have it treated as void, is bound to take steps for this purpose at the earliest moment without avoidable delay.

Although one of the parties to a contract was induced to enter into it by fraud of the other, he is nevertheless bound by the contract until he repudiates it; and this he cannot do when he has allowed that to occur on the footing, or in view, of the contract, which renders it impossible that the parties should be put *in statu quo.* In such circumstances his proper remedy is by an action for damages.

Phear, J.—In the suit out of which the special appeal No. 2661 arises, the plaintiff seeks to recover from the defendant a sum of Rs. 1,500, being that part of the consideration which he paid to the defendant in respect of a contract which he says is void on the ground of his having been induced to enter into it by the exercise of undue influence and fraud on the part of the defendant. But it is admitted by the learned pleader who has appeared on behalf of the appellant that the plaintiff has himself taken some benefit of this contract. The contract was a contract for the purchase of a decree. And the day after the contract was made he got his name entered on the records of the suit as decree-holder; and the day after that again he caused a sale of some portion of the judgment-debtor's property, and bought it in his own name. It is said that, although these steps were taken by him, still they have been in a manner infructuous, and that the plaintiff has got no pecuniary advantage out of them. It is therefore argued that he may even now repudiate the original contract.

In addition to the facts which have just been mentioned, it must also be observed that the plaintiff has allowed as much as three years to go by since this contract was made, without taking any material step towards setting aside or recovering the money which he says he paid as part consideration for this void contract, and he has not, until the date of this suit, complained in any way (so it is found by the lower Courts) of the illegal conduct of the defendant in compelling him to enter into this contract.

Now, in the first place, it is incumbent on one who repudiates a contract, and asks to have it treated as void, to take steps for this purpose at the earliest possible moment without any but unavoidable delay; and, secondly, it is a rule of law that a contract, although one of the contracting parties was induced to enter into it by fraud of the other, is nevertheless binding upon him until he repudiates it. And he cannot repudiate it when he has allowed that to occur on the footing, or in view, of the contract which renders it impossible that the parties should be put *in statu quo.* He can only avoid the contract, can claim to have the contract reckoned as void and of no force, when the repayment of the consideration on the one hand, and return of the subject-matter or other undoing of the contract on the other, will place the parties in their original relative situations as if no contract had ever been entered into. This, for the reason which has already been mentioned, is impossible in the present case. If the plaintiff has any good ground to complain of that conduct of the defendant which led him, as he says, to enter into this contract, then his proper remedy is by an action for damages, and in such an action he will be bound to prove, not only the illegal and improper conduct of the plaintiff, but also to prove the amount of damages which he has sustained as a consequence of being induced to enter into the

certain tenure stood in the name of one Asudoollah; of this the plaintiff was entitled to 4 annas, and at the time when certain decrees which will be presently spoken of were put into execution, and previously thereto, the defendants were the remaining shareholders by right of purchase from Asudoollah; the tenure was, however, still kept in the zemindar's serishta in the name of Asudoollah. In this state of things, arrears of rent become due for the years 1275 and 1276 F. S., and the zemindar obtained two decrees therefor against Asudoollah nominally, because his was the name in which the tenure stood. In the course of the proceedings which the zemindar, decree-holder, found it necessary to take for obtaining satisfaction of these two decrees, he attached and advertised for sale the entire 16 anna of the tenure. The plaintiff says that in order to save his 4-anna share from being sold and lost to him, he was obliged to pay the whole arrears of rent; but that a 12-anna share of this sum was, in fact, due from and properly payable by the other defendants, because it was arrears of rent accrued at dates within the period during which they had been part shareholders in possession of the tenure together with the plaintiff by virtue of purchase from Asudoollah.

The defence set up by the persons sued was that although they had bought the rights and interests of Asudoollah in the tenure as the plaintiff alleged, yet they had never been able to get any possession or enjoyment of the subject of their purchase, that is, Asudoollah's share in the tenure, mainly in consequence of the wrongful conduct of Asudoollah and the plaintiff.

Both the lower Courts have dismissed the plaintiff's suit on the ground that he had no right to sue the defendants for contribution, but ought to have proceeded against Asudoollah; and that Asudoollah might, if he chose, and if the facts were as the plaintiff alleged, recover again from the defendant.

But this view seems to us incorrect. If the facts alleged by the plaintiff are true, then the defendants were liable to pay the rents which accrued due after they had bought Asudoollah's share, and had entered, as he says they had entered, into the possession and enjoyment of it. The decree, therefore, for the rents was a decree which they were bound to satisfy, even though it was a decree nominally against Asudoollah alone. The defendants, no doubt, said that they had not obtained possession of Asudoollah's share, although they had purchased it as the plaintiff alleged. And thus an issue of fact, upon which the fate of the case turns, was raised between the parties to the suit; but unfortunately this issue has not been tried by either of the lower Courts. The Moonsiff in the beginning of his judgment says: "It appears that the decrees in question had been passed against one Asudoollah, *who was then in possession of the villages;*" but it is plain that in making this statement, the Moonsiff did not express a judicial conclusion of fact derived from the evidence before him. We think that the issue ought to be tried, and that the case ought to go back for that purpose.

We, therefore, reverse the decision of the Lower Appellate Court, and remand the case to that Court in order that it may send it to the first Court for trial of this issue, namely, whether or not the defendants or any of them, after the date of their respective purchases from Asudoollah, entered upon the possession and enjoyment of Asudoollah's share of the tenure, as is alleged in the plaint, or any portion of it.

The costs of this appeal will abide the event.

The 14th September 1874.

Present:

The Hon'ble F. B. Kemp and Romesh Chunder Mitter, *Judges.*

Mortgage—Misjoinder.

Case No. 906 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 20th January 1874, affirming a decision of the Sudder Moonsiff of that District, dated the 11th June 1873.

Bal Kishen Mahapattur (Plaintiff), *Appellant,*

versus

Bistoo Churn and others (Defendants), *Respondents.*

Baboo Mohendro Lall Mitter for Appellant.

Baboos Aubinash Chunder Banerjee and *Juggut Chunder Banerjee* for Respondents.

In a suit by a mortgagee for possession of the mortgaged property, on the allegation that some of the defendants under subsequent mortgages and purchases

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had opposed him in obtaining possession, and to have it declared that the said mortgages and purchases were inoperative:

HELD that the plaintiff had but one cause of action upon his mortgage-deed, and was right in joining all the defendants in this suit.

Kemp, J.—THE Judge of Cuttack has dismissed the plaintiff's suit, holding that there has been a clear misjoinder of causes of action, not against the same, but against different parties. The Judge observes "that this is not allowable by any law that he knows of, and, although the provisions of the Procedure Code have been over and over again violated owing to the objection of misjoinder not being taken, there can be no doubt as to what they mean; the suit was therefore rightly dismissed on the ground of misjoinder, and it is not necessary to enter into the other issues." The appeal is that both Courts were wrong in law in holding that there had been a misjoinder of the causes of action and in dismissing the suit upon that ground. The plaintiff's suit is based upon a conditional deed of sale, dated the 5th February 1864. Under the terms of that deed the right of entry would be on the 5th February 1865, and the plaintiff's right would accrue immediately after the default, and he would have no new cause of action arising upon the foreclosure-proceedings taken by him. This suit is brought alleging that the defendants Nos. 1 and 2 mortgaged the property to the plaintiff on the 5th February 1864, and that it was stipulated that, if the money was not paid within one year, the sale would become absolute, and the plaintiff would institute proceedings to foreclose the mortgage. He alleges that the defendants in this case, under subsequent mortgages and purchases of the 16th July 1868 and 29th June 1870, opposed him in obtaining possession. He therefore sues for possession of the mortgaged premises, and to have it declared that the defendants' mortgages and purchases are inoperative and without fruit. These are the words used in the plaint.

Now, it appears to me that the plaintiff has but one cause of action upon his mortgage-deed, and that he was right in joining all the defendants in the present suit. The case must, therefore, be remanded for the trial of the remaining issues.

Costs to follow the result.

Mitter, J.—I concur in this order of remand. Whether the cause of action of the plaintiff accrued on the day the default was made in payment by the defendant No. 1 or when the foreclosure-proceedings were completed, it is only one cause of action upon which the present suit is based. The defendants Nos. 3 to 6 have been made parties to the suit, because, subsequently to the plaintiff's mortgage, they have become variously interested in the property in dispute.

The 14th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree—Interest—Execution.

Case No. 136 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 12th February 1874.

Mahomed Yakoob (Judgment-debtor), *Appellant,*

versus

Mahomed Zuhoorul Huq (Decree-holder), *Respondent.*

Mr. C. Gregory for Appellant.

Moonshee Mahomed Yusuf for Respondent.

Where a decree awarding mesne-profits is silent on the point of interest, interest cannot be given in execution.

Phear, J.—THIS case is an exemplary instance of the mischief that is caused by the passing of an unintelligent decree. The plaintiff sued to recover certain property and to obtain mesne-profits for the period of time during which he had been dispossessed therefrom, making upwards of 100 persons, we are told, defendants—fathers, mothers, and children—simultaneously, and without the smallest discrimination. And the decision of the Court which was given in favour of the plaintiff not only decreed that he was entitled to recover the property from the defendants, but also directed that all the defendants should jointly and severally pay the plaintiff mesne-profits which should be assessed in the execution of the decree. A more unintelligent decree than this, we take leave to say, could not well be passed. Amongst the 100 and odd persons was the child or youth Yakoob Ali, who, the Judge of the lower Court says, was charged with merely being a trespasser, and he is ordered to pay solely, if the others do not join with him in doing so, an enormous

sum of money. And the consequence of such a decree as this has been that. from the date of the decree in November 1861 down to the present time, there has been nothing but litigation and counter-litigation between the different parties concerned in this suit. The present application is an application made to obtain satisfaction of so much of the money payable under the decree, which was passed in November 1861, as is not now paid off by the attachment and sale of the property belonging to the present appellant Yakoob Ali. The petition for execution says that 20,000 and odd rupees remain due for mesne-profits and interest under the decree. And this is the sum which is now sought to be recovered from the appellant Yakoob by the attachment and sale of his property. And it is noteworthy, as was just now mentioned, that Yakoob was, at the time when the suit was brought and even when the decree was passed, a youth—certainly a minor—and was sued jointly with his father and mother as well as others.

One of the objections made to this application for execution is that the original decree was silent on the point of interest, and therefore the lower Court had no power to grant interest on mesne-profits. And upon referring to the decree of which execution is now sought, we find that, although the petition says that 20,000 and odd rupees are due for mesne-profits and interest, the decree, as the appellant alleges, is entirely silent as to interest. But the judgment-creditor says that, although this is so, a decree by way of review or something of that sort was passed on the 20th December 1862, by which interest was added to the terms of the decree of the 29th November 1861. Whether this be so or not, is perhaps not necessary for us now to inquire, because the petitioner does not ask to obtain execution of the decree passed in review on the 20th December 1862, but asks merely to have execution of the decree of the 29th November 1861. And if the judgment-creditor had asked for the execution of the decree as altered by the order of the 20th December 1862, he would have been bound to show that the minor Yakoob, who was then a minor, but has since become a major, was affected by that order. We have inquired whether there are materials on the record upon which this could be made out. And we have not been certified upon it. It is enough now for us to say that the application for execution which has been made must be rejected, because it is admitted by the applicant himself that, if interest on the wassilat be omitted, the amount which has been received in satisfaction of the decree is sufficient to cover the principal amount of wassilat which was assessed. We understand that to be so. If it is not so, the applicant ought to show it.

We think the order of the lower Court should be reversed, and the application for execution dismissed with costs.

The 14th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Interest—Review—Appeal.

Case No. 137 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 12th February 1874.

Enayet Ali (Judgment-debtor), *Appellant,*

versus

Mahomed Zuhoorul Huq (Decree-holder), *Respondent.*

Mr. C. Gregory for Appellant.

Moonshee Mahomed Yusuf for Respondent.

An application for execution having been refused as barred by lapse of time, the applicant appealed to the High Court which made an order for the issue of execution, with this qualification that, as the decree did not give interest, the judgment-creditor could not have interest:

HELD that the judg ent-creditor was taken at a disadvantage by that order, he could apply for a review; but the order could not be set aside by a miscellaneous appeal after a second application in the same matter.

Phear, J.—THIS, too, is an application for execution of the decree which was passed on the 29th November 1861. But in this instance the appellant is one of the defendants who was an adult at the date of the decree—in fact, he is the father of the last defendant. The same answer to the application as was just now given applies in the present case; but it is strengthened by the fact that a former application against the same defendant was before made for execution of this same decree. That application was refused by the Court of first instance upon the ground that it was barred by lapse of time. And against that decision of the Court of first instance an appeal was preferred to this Court. And on that appeal this Court being of opinion that the application was not barred, made the requisite order

for the issue of execution, but coupled it with this qualification that, inasmuch as the decree of which execution was sought did not give interest, no order would be made for interest. In other words, it was an order to the effect that the judgment-creditor was entitled to execute that decree as he asked it with the exception of the term for interest. If the judgment-creditor was in any way taken at a disadvantage by this order being made upon that appeal, he could have got it rectified by a proper application for review. But nothing of this kind has been done. The order of this Court still stands as it was passed, and it would be entirely inconsistent therewith if the Court now upon the present appeal held that the judgment-creditor was entitled to execute that decree with the term for interest.

We are of opinion that the decision of the lower Court must be reversed, and the application for execution dismissed with costs. We assume in this case that the omission of interest disposes of the application.

The 14th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Assignee—Champertous Contracts—Specific performance—Suit against third Parties.

Case No. 2496 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 25th July 1873, reversing a decision of the Moonsiff of Jamoee, dated the 13th March 1873.

Boodhun Singh and others (some of the Defendants), *Appellants,*

versus

Mussamut Luteefun (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondent.

An assignee of property is not entitled to recover against his assignor on the footing of a champertous contract.

An assignee of property whose assignor was not in possession when the assignment was made, can only recover even from the hands of third persons, upon showing that he would have a right to enforce specific performance of his contract against his assignor if the property were come back to the hands of the assignor.

Phear, J.—In this case the plaintiff sues to recover a share of certain property which he says belonged to one Saheb Hossein, and was conveyed to him by the terms of a certain shurakutnama. The plaint says, that Meer Hossein was the heir of one Khidmut Ali; and that he, upon Khidmut Ali's death, obtained possession of the property, and so continued in possession until some years ago he was dispossessed by the defendants, who purchased it at an auction sale, held in satisfaction of a decree which had been passed against Khidmut Ali.

Thus it appears that at the time when the shurakutnama was executed, Meer Hossein was not in possession of the property of which the deed purported to convey a share to the plaintiff.

The terms of this deed are very remarkable. After reciting the principal facts which have been just now mentioned, the assignor says this: "As now I cannot obtain "direct possession without instituting a suit "against the purchasers, and supply costs "owing to my poverty and for want of "money, I, the declarant, of my free will "and accord, make Mussamut Luteefun ". . . (who is the plaintiff in the present "suit) as my partner in respect of 3 "annas 4 pies out of 9 annas 4 pies, my right "and interest in Mouzah Bykuntpore, main "and hamlet, pergunnah Amurthoo; Mus-"samut Luteefun . . . as my partner in "respect of one-anna share; and Meer "Muzhur Hossein, *alias* Kobun, as my part-"ner in respect of one-anna share (namely), "I make them my partners in respect of "5 annas 4 pies share, and mesne profits in "proportion to the said 5 annas 4 pies share "from the time of dispossession up to date "of recovery of possession, in order that "they may supply costs that shall be "incurred in the institution of suits and in "the passing of decrees; and I do accord-"ingly agree and give in writing that the "said partners, their heirs and representatives, "by recovering the said 5 annas 4 pies share "in partnership, and 4 annas share belonging "to me, the declarant, at their own "expenses, either by instituting civil action "or through any other possible means by "virtue of this deed of partnership and "enter on possession of the same, and get "me, the declarant, restored to possession of "my share; and they realize mesne-profits

"of the entire share, and out of that they "take the same in proportion to the share in "partnership, and give me to the extent of "my 4 annas share. I, the declarant, or my "heir or representatives neither have nor "shall have any objection or contention," and so on. Then it provides that "the "partners will, at all times, be at liberty, or "it will be optional with them, to institute "suits on their own behalf without making "me a plaintiff therein, or institute suits on "my behalf without joining themselves with "me, or institute suits on my part and on the "part of themselves jointly; and I, the "declarant, or my heirs or representatives, "neither have nor shall have any objection "to it."

It is plain on the face of this document that the contract entered into between the parties was of a highly champertous character. The persons who are made partners with Meer Hossein undertook to institute and carry on a suit for the recovery of his property at their expense, upon the consideration of receiving a portion of that property for themselves when it should be recovered. That contracts of this kind are pernicious and detrimental to the best interests of society, and contrary to public policy, has been pointed out in more than one case both in this Court and in other High Courts of India, in particular in the case of Bama Soonduree, both in the Court of first instance, and on appeal which is reported in IV. Bengal Law Reports,* and the case of Jafardi, which is in the 7th volume of the Madras High Court Reports; and a late decision of this Court, which is reported in the 20th volume of the Weekly Reporter, page 446, follows out the principles which were acted upon in the just mentioned earlier cases. There can be no doubt that, if the question stood alone, whether or not the present plaintiff was entitled to recover against his assignor upon the footing of this contract, it must have been determined in the negative upon the authority of the cases which have just been referred to.

The present suit, however, is a suit brought against persons who are strangers to the contract, and the plaintiff seeks to recover as of his own right from the defendants a certain share of the property which he says has been assigned to him by Meer Hossein in such a way as to give him a good title to sue a wrong-doer. and in this particular perhaps the present case differs from two of those which have now been referred to. It falls, however, within the scope of the Privy Council's decision, which is reported in the XI. Bengal Law Reports, page 36,† and a decision of this Court reported in XXI. Weekly Reporter, page 101. Those decisions went on the ground that an assignee of property whose assignor was not in possession of the property at the time when the assignment was made, can only recover the property from the hands even of third persons if he first show that he would have a right to enforce specific performance of his contract against his assignor, if the property were come back to his hands. Now, independently of the champertous character of the contract, it is also clear upon this shurakutnama and the admitted facts of the case that the present plaintiff could not come into a Court of equity upon the footing of this document, and claim specific performance from Meer Hossein. It is true that, according to the very terms of the document, the parties are at liberty, so far as Meer Hossein is concerned, to sue for the recovery of their own individual shares of the property under this shurakutnama. And this stipulation or provision may prevent Meer Hossein from being heard in opposition to the present suit. But it is clear on the contract that if the plaintiff sues only for his own share and does not ultimately recover from the defendants the share of Meer Hossein as well, then no consideration of any sort will have proceeded from the plaintiff to Meer Hossein: each one of the shareholders bringing a suit of this kind, if they all succeeded in getting each his own share, they would in the end leave Meer Hossein in just as bad a condition as he was before the contract was made, that is, without any return of the property to himself. He gets nothing whatever, unless the shareholders, as he terms them, institute and carry out a suit for the recovery of the whole of the property, including his share as well as theirs, and then, in obedience to the stipulation of this contract, hand over his share to him. The consideration for his making them shareholders in his property is that they should be at the expense of recovering his property for him. It would be impossible for a Court of equity to enforce a one-sided contract like this. The present suit then could not be maintained even in the guise of a suit for specific performance against Meer Hossein, had he recovered the property without the aid of the plaintiff,

* 12 W. R., Original Side, Appeals, 13.

† 18 W. R. 140.

And that being so, we think that it cannot be maintained against a third person, even though Meer Hossein has been made a party to it in the character of defendant.

On the whole, then, we are of opinion that the plaintiff's suit is bad and ought to fail. Accordingly, we reverse the decision of the Lower Appellate Court, and dismiss the plaintiff's suit with costs in all the Courts.

The 16th September 1874.

Present:

The Hon'ble F. B. Kemp and G. G. Morris, *Judges.*

Ex-parte Decision in Appeal—Act VIII. of 1859, s. 119.

Case No. 196 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 17th April 1874, affirming an order of the Subordinate Judge of that District, dated the 11th June 1873.

Zimutunnissa Bibee and others (Judgment-debtors), *Appellants,*

versus

Muddun Mohun Pal (Decree-holder), *Respondent.*

Baboo Protap Chunder Mozoomdar for Appellants.

Baboo Kishen Dyal Roy for Respondent.

M sued A and others on a bond-debt, and obtained a decree against A alone. He appealed to the District Judge, who passed a decree declaring all parties to be liable jointly. On the decree-holder taking out execution, two of the defendants applied to the Subordinate Judge under Act VIII. of 1859, s. 119; and their application being rejected, they applied to the District Judge, who referred them to the High Court:

HELD that the Subordinate Judge had no jurisdiction, but the proper course for the parties was to apply to the District Judge under s. 119.

Kemp, J.—THE circumstances of this case are somewhat peculiar. Muddun Mohun Pal, the special respondent before us, sued five parties, and amongst them the present special appellants, on a bond-debt, and he obtained a decree against Abdool Hukeem alone. The present special appellants, Zimutunnissa Bibee and Kureemunnissa Bibee, were parties to the suit, but there was no decree passed against them. The plaintiff appealed, and the Appellate Court, the Judge of the District, passed a decree declaring all parties, including the special appellants, to be liable jointly. On this, one of the defendants in the original suit, Golam Sobhan, preferred a special appeal to this Court, and he was absolved from liability. On the decree-holder taking out execution, the special appellants before us applied to the Subordinate Judge under section 119 of Act VIII. of 1859. The Subordinate Judge held that the decree in his Court was not an *ex-parte* decree against the special appellants; on the contrary, that the special appellants were absolved from liability by the decree of the first Court, and their liability declared by the decree of the Zillah Court, the District Judge, with which he could not interfere, and he therefore rejected the application of the special appellants. On this, the special appellants appealed to the Judge, and the Judge has held that the only remedy open to the appellants seemed to lie in the powers possessed by the High Court, or in a regular suit. The Judge in his judgment refers to a judgment in Volume VII., Weekly Reporter, in which a reference was made by the Deputy Registrar of this Court. That reference was brought before Justice L. S. Jackson, who held that, "as at present advised, it appeared to him that section 119 of Act VIII. of 1859 will not apply to a decision passed on appeal against a respondent *ex parte*, but that it appeared to him that the petitioner ought to allege the circumstances stated as cause against the decree being executed at all in the Court below, and if the Court below should, notwithstanding the fact being represented, order the decree to be executed, the petitioner would then have an appeal." The learned Judge passed no decision in the matter.

In special appeal it has been contended that the Judge is wrong in holding that the provisions of section 119 of Act VIII. of 1859 do not apply to this case, and in the course of the argument the pleader for the special appellants referred to a decision to be found in Volume III., Madras Reports, page 109. We think, in this case, that the Judge was right in dismissing the appeal against the decision of the Subordinate Judge, as the Subordinate Judge rightly held that he had no jurisdiction in the matter, and was not competent to inquire into the case under section 119 of Act VIII. of 1859, inasmuch as he had passed no *ex-parte* decree against the petitioners. But we think that the Judge ought to have directed the special appellants to apply to him under the provisions of

section 119 of Act VIII. of 1859, the Judge being the Court who passed the decree. The ruling quoted by the pleader, to be found in Volume III., Madras Reports, appears to us to be applicable to the circumstances of this case.

We therefore dismiss this appeal, but direct the Judge to entertain the application on the part of the judgment-debtors, special appellants before us, under the provisions of section 119 of Act VIII. of 1859, to inquire into the allegations of the petitioners under that section, and pass proper orders.

Each party to pay his own costs of this appeal.

The 16th September 1874.

Present:

The Hon'ble F. B. Kemp and G. G. Morris, *Judges.*

Judgment in another Suit—Evidence.

Case No. 1907 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 31st May 1873, reversing a decision of the Additional Subordinate Judge of that District, dated the 11th April 1871.

Anund Mohun Ghuttuck and others (Defendants), *Appellants,*

versus

Soorjo Kant Acharje Chowdhry (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Respondent.

Plaintiff instituted two suits—one against S, and the other against present defendant. The suits were tried together by the Subordinate Judge, and dismissed. The one against S came up in regular appeal to the High Court; the other (the present one) was heard in appeal by the District Judge, who applied the judgment of the High Court in the case of S as evidence against the present defendants:

HELD that this was wrong, and that the Judge ought to have decided the case upon the evidence on the record.

Kemp, J.—THE defendants are the special appellants in this case. The plaintiff sued claiming the lands in suit as accretions to Juggutpora, alleging that he was ousted in 1270-1271. The defendants' case was that they were a re-formation on the uslee lands of their Mouzah Taltolah, and also accretions thereto. They also pleaded that the plaintiff's suit was barred, inasmuch as the formation took place 15 or 16 years before the suit was brought.

The first Court, the Subordinate Judge, dismissed the suit, holding that the plaintiff's claim was barred, and finding also on the merits that the lands in dispute were, as alleged by the defendants, formations to the uslee lands of Taltolah and also accretions thereto. On appeal to the Judge, the Judge has decided the case with reference to a decision of this Court in Regular Appeal No. 132 of 1871, that is the original number of the suit of Soorjo Kant Acharje *vs.* Ranee Soorut Soonduree and others.

In special appeal, it is contended that the special appellants were co-defendants with the plaintiff in the present suit, in the suit instituted by Ranee Soorut Soonduree, and they were not parties to the suit of Brojo Nath Poddar; that the judgments passed in these suits were based on evidence other than the evidence in the present suit, and that they are not binding upon the special appellants; that the oral evidence in this case is wholly different from the oral evidence in the other cases; that the position of the disputed land is different; that the village is different, the features of the country entirely different; and that the Lower Appellate Court ought to have tried the plaintiff's appeal on the evidence in this case, wholly irrespective of the evidence in the appeal before this Court. Then there is also another ground, that the Judge has not decided the question of limitation.

It appears that the plaintiff instituted two suits—one against Ranee Soorut Soonduree, and the other against the present defendant, special appellant. These suits were both tried together, and both suits were dismissed by the Subordinate Judge, namely, on the ground of limitation, although he did also enter into the merits; one came up on regular appeal to this Court, namely, the one of the plaintiff *vs.* Ranee Soorut Soonduree. The other, the present suit, was heard on appeal by the District Judge. The Judge has applied the judgment of this Court in the case of Ranee Soorut Soonduree as evidence against the defendants in the present suit, and has decreed the plaintiff's suit referring to the judgment of this Court in the regular appeal in the case of the plaintiff *vs.* Ranee Soorut Soonduree Dossee. It is obvious that this is wrong: the Judge ought to have decided this case upon the evidence on the record.

We therefore remand the case for a trial, first, upon the question of limitation, and then on the merits, if necessary.

Costs to follow the result.

The 17th September 1874.

Present:

The Hon'ble F. B. Kemp and G. G. Morris, *Judges.*

Foreclosure—Mesne-profits.

Case No. 2250 of 1873.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 23rd June 1873, modifying a decision of the Subordinate Judge of that District, dated the 6th December 1871.

Suroop Chunder Roy (Plaintiff), *Appellant,*

versus

Mohender Chunder Roy and others (Defendants), *Respondents.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboos Juggadanund Mookerjee and *Rash Beharee Ghose* for Respondents.

Where a mortgagee, after obtaining a decree for foreclosure, sued for possession and mesne-profits, and the mortgagor did not prove that he had given plaintiff possession, or directed his lessee to pay rent to the plaintiff:

HELD that the mortgagor (defendant) was liable for wassilat from the date of foreclosure, so far as it was not barred by limitation.

Kemp, J.—PLAINTIFF is the special appellant.

There are two defendants—Mohender Chunder Roy, defendant No. 1, and Gunga Gobind Sen, defendant No. 2.

It is alleged that in Bysack 1265, Mohender Chunder Roy, defendant No. 1, gave a lease to defendant No. 2 for fourteen years. That lease expired in April 1872. In Magh 1268, some three years after this lease had been granted, the defendant No. 1 mortgaged his share to the plaintiff. Subsequently, the money not having been repaid, plaintiff took steps to foreclose his mortgage; and on the 20th August 1864 the mortgage was foreclosed. Plaintiff now sues, alleging that the defendant No. 1 did not give up possession; he therefore sues for possession as landlord during the term which the lease granted by the defendant No. 1 to the defendant No. 2 has still at the time of institution of the suit to run, and after the expiry of the lease, for khas possession. He also sues for mesne-profits for the years 1272 to 1277, *i.e.*, for mesne-profits for six years previous to suit.

The first Court, the Subordinate Judge, decreed the plaintiff's suit in this way—that he was to obtain from the defendant No. 2 the rent which the defendant No. 2 would be liable under the lease to pay to defendant No. 1, during the term of the lease which had not expired from the date of the decree; and that he was to obtain khas possession after expiry of the lease; the plaintiff to recover wassilat from defendant No. 1.

There were three appeals from this decision to the Judge:—

The ijaradar, the defendant No. 2, appealed on the question of costs alone; the defendant No. 1, on the ground that he was not liable for wassilat, as he has not received the rents from the lessee, the defendant No. 2; and the plaintiff preferred a cross-appeal with reference to that part of the decision of the Subordinate Judge which declared the defendant No. 1 to be alone liable for wassilat.

That cross-appeal was withdrawn, and the Judge held that the defendant No. 1 was not liable for wassilat, and, therefore, modified the decision of the Subordinate Judge, and gave the plaintiff a decree for possession only, observing that, had the plaintiff followed the proper course and taken out possession at once, as he could easily have done, there would have been no necessity for either of the defendants appearing. He also saddled the plaintiff with costs of both the defendants, as well as his own, in both Courts.

The grounds taken in special appeal are that the Lower Appellate Court was wrong to hold that plaintiff is not entitled to any wassilat at all; that the foreclosure-proceedings of the 20th August 1864 perfected the plaintiff's title to obtain possession, and that the plaintiff having obtained a decree for possession is entitled to mesne-profits for the period which is not barred by limitation; that plaintiff is entitled either to mesne-profits from Mohender Chunder Roy, defendant No. 1, or from Gunga Gobind Sen

in the shape of rent; that the claim cannot be dismissed as against both of them. Then, that the Lower Appellate Court has given no reasons in its judgment for setting aside that part of the decree of the first Court which ordered the defendant No. 2 to pay to plaintiff the rent which he was liable to pay to defendant No. 1 under the lease, for the term the lease had to run when the decree of the lower Court was passed; and that the decree of the Lower Appellate Court ought not to withhold or omit the same. Then there is a last ground on the question of costs.

The main point to be considered in this special appeal is whether the defendant No. 1 is liable for the wassilat. The plaintiff having withdrawn his cross-appeal with reference to the liability of defendant No. 2, the lessee, for wassilat, the question remains whether defendant No. 1 is liable for such wassilat.

We think, after hearing the arguments, that he is liable for wassilat.

In his written statement, the defendant No. 1 says that he did not forbid the plaintiff from collecting the rents; that he asked him repeatedly to take possession; that he never received rent from Gunga Gobind; but the defendant No. 1 did not prove in the Court below that he had given the plaintiff possession as he ought to have done when the foreclosure-proceedings were completed, nor does he prove that he directed his lessee to pay rent to the plaintiff from that date. We, therefore, think that he was liable for the wassilat from the date of the foreclosure-proceedings, or such portion of the wassilat as is not barred by limitation.

Then, with reference to the omission of the Judge in his decretal order to confirm that portion of the decision of the first Court which declares the liability of defendant No. 2 to pay the rent, which would have been payable to the defendant No. 1 during the remaining term of the lease, against which finding there was no appeal by the defendant No. 2, we think that the decree of the Judge must be modified, and that the defendant No. 2 must be declared liable to pay the rent for that term, that is, from the date of the decree of the Court of first instance, *viz.*, from the 6th December 1871 to the 11th April 1872.

The decision of the Judge with reference to defendant No. 1 is reversed with costs of both Courts payable by defendant No. 1.

We shall not interfere with the decision of the Judge with respect to the costs of defendant No. 2.

The 18th September 1874.

Present:

The Hon'ble F. B. Kemp and Romesh Chunder Mitter, *Judges.*

Settlement—Jummabundee—Increase of Rent.

Case No. 630 of 1874.

Special Appeal from a decision passed by the Additional Subordinate Judge of Tipperah, dated the 26th November 1873, reversing a decision of the Additional Moonsiff of Soodharam, dated the 15th July 1873.

Reazooddeen Mahomed and another (Defendants), *Appellants,*

versus

Mr. R. McAlpine (Plaintiff), *Respondent.*

Moulvee Serajul Islam for Appellants.

Mr. J. S. Rochfort for Respondent.

Where increased rent is imposed in the course of settlement-proceedings, the Collector's jummabundee must show the consent of all the ryots before they can be held to be bound by it.

Kemp, J.—The defendants are the special appellants. The plaintiff, as guardian of the minors, sues the defendants for the rents of the years 1276, 1277, 1278, and 1279, after deducting the amount paid. The plaintiff alleges that his previous pottah expired in 1275, that he then obtained a new lease from Government, and that he is now suing the defendants for increased rents according to the increased jummabundee prepared by the Collector.

The first issue raised was whether, "in "the absence of any express stipulation or "assent on the part of the defendants, the "plaintiff is entitled to increased rents on "the mere basis of the Collector's jumma-"bundee."

The first Court found that, according to Circular No. 8 of the Board of Revenue dated January 1868, "when an increased "rent has been imposed in the course of a "settlement, the names of all ryots who "have not recorded their assent to the same "on the jummabundee should be specified in "the settlement-proceedings, with a view to "the proprietor or farmer who may enter "into engagement serving the necessary "notice on them." And then, with reference to the question as to whether the defendants had assented or not, the first Court says that: "From the jummabundee of the Collector"

(which we may observe was put in by the plaintiff along with a petition), "it appears "that the defendants have not recorded their "assent to the rents settled, and the plaintiff "has not in any way been able to prove "that the defendants have given their assent "to the jummas;" and he gave the plaintiff a modified decree, that is to say, according to the former jummas.

The Subordinate Judge, Baboo Nobin Chunder Ghose, has reversed this decision. He says that, although only a few of the ryots have signed the jummabundee, and not all, "the signature of those few will show the consent of all."

In this case there was an issue as to whether the defendants had consented to the jummabundee or not, and the plaintiff had every opportunity given him to prove assent on the part of the defendants. The jummabundee does not show the consent of all the ryots, and they cannot be held to be bound by it.

We therefore decree this appeal, reversing the decision of the Subordinate Judge, and restoring that of the Sudder Moonsiff, with all costs. Pleaders' fees, one gold mohur.

The 18th September 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Act VIII. (B.C.) of 1865, s. 16—Sale of Under-tenure.

*Application for review of judgment passed by the Hon'ble Justices W. Ainslie and W. F. McDonell, on the 11th May 1874, in Special Appeal No. 2216 of 1873.**

Sham Chand Mitter, Plaintiff (Appellant), *Petitioner,*

versus

Juggut Chunder Sircar and others, Defendants (Respondents), *Opposite Party.*

Baboo Sreenath Doss for Petitioner.

No one for Opposite Party.

The right given to a purchaser under Act VIII. (B.C.) of 1865, s. 16, is given to the purchaser of an entire under-tenure, and not to the purchaser of a share of an under-tenure. A sharer with limited interest cannot sell the whole under-tenure under Act VIII. (B. C.) of 1865 for arrears recoverable either under that Act or Act X. of 1859.

Ainslie, J.—THIS application is for review of our judgment in Special Appeal No. 2216.* We are of opinion that the application must be rejected. A purchaser who applies to enforce the stringent provisions of section 16 of Act VIII. (B. C.) of 1865 is bound to show that he has acquired the right given to a purchaser by that section. That right is given to the purchaser of an entire under-tenure, and not to the purchaser of the share of an under-tenure. We have no power to extend the right, and a reference to the provisions of the Rent Law, both Act X. of 1859 and the present law, Act VIII. (B. C.) of 1869, will show that the right has been carefully limited by the Legislature, and that a sharer with limited interest could not, and cannot, sell the whole tenure, under Act VIII. (B. C.) of 1865, for arrears recoverable under either of those Acts. The plaintiff in this case is both a sharer in the superior estate and a person who has caused to be sold, and has purchased, the inferior estate. Under the words of Regulation VIII. of 1819, he fails on both grounds. He is one of the zemindars, not *the* zemindar; and what was sold was the fraction of a talook, not the whole talook. We think, therefore, we are bound to hold that he only purchased the rights and interests of the defaulter. The 6th section of Regulation VIII., though it recognizes sub-division of a tenure made by the tenant with the consent of the zemindar, has no bearing on this case, in which the putnee remains undivided. The zemindars divided the rents between themselves, and took their rents separately. The fact that Mr. Doyle, who had realized the full value of his interest in the property, allowed the zemindars to demand separate rent, and to sell the tenure in fractions, without protesting against the irregularity, is no evidence that the sales were regular sales of entire putnees carved out of the original putnee. It was urged that the sale could only be set aside by the Revenue authorities, and that it must be held that they finally determined that it was a sale properly held, and that their determination cannot now be questioned. The answer to this is that the present defendant was not in a position which enabled him to question the sales by an appeal, and consequently, though against Doyle the sale may be conclusive, it is not so

* *Ante*, p. 50.

* *Ante*, p. 50.

against him. In the absence of distinct proof that the original putnee had been given up, and that Mr. Doyle had accepted two new and distinct putnees in lieu of it, this suit cannot be maintained. The application is rejected.

The 18th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Lessor—Lessee—Eviction.

Case No. 2603 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 25th July 1873, reversing a decision of the Officiating Moonsiff of Begoosarai, dated the 30th April 1873.

Wajed Ali (Defendant), *Appellant,*

versus

Mussamut Chundrabutty Kooeree and others (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Kalee Mohun Dass for Respondents.

If a lessor fails by remissness to do that which he alone can do to protect his lessee in possession, even independently of any protective provision in the lease, he cannot claim rent from the lessee in respect of the portion of the property from which the latter has been evicted.

Phear, J.—In this case the plaintiff sued to recover money due to her by way of rent from the defendant under a ticca lease. The defendant resisted the claim upon two grounds: First, that the amount of rent which was claimed by the plaintiff was in excess of the rent due according to the terms of the lease; and the second ground was that he had been ousted from possession of a portion of the land leased to him, by persons claiming through his lessor.

The Moonsiff gave effect to both these defences. But on appeal the Judge reversed the decision of the Moonsiff upon both points.

The provision by which the amount of rent is fixed is somewhat peculiar. The rent of the mehal is first defined and fixed at Rs. 1,434-15 gross proceeds of the lessor's share in the leased mouzahs. Then the kubooleut goes on to say: "It is "required of me, the said lessee, that I "should enter upon possession of the lease-"hold property, look after and take care of "it, and appropriate its proceeds; that, out "of the gross proceeds aforesaid, I, the "lessee, should take the sum of Rs. 144-8 "my profits at 10 per cent. upon the gross "proceeds, and the sum of Rs. 72 yearly "establishment-charges, and pay to the said "proprietor the remaining sum of Rs. 1,218-7, "rent payable to the said proprietor, year "after year," and so on.

Afterwards, again, it is said: "The said "proprietor shall see the sum of Rs. 1,434-15 "collected in full, as per details of "each of the mouzahs in the first year, "that is, in the year 1275 F. S.; and, "in case there be any deficit in the gross "proceeds of any mouzah, the said pro-"prietor shall allow a deduction in propor-"tion to the said deficit, year after year, "from the sum of Rs. 1,218-7." The effect of this is that, while Rs. 1,434-15 is at the outset taken as the amount of the gross proceeds of the leased mouzahs, and the rent payable by the plaintiff is defined as being that sum less Rs. 144-8 for 10 per cent. profits, and Rs. 72 yearly for establishment-charges, this qualification is added that this Rs. 1,434-15 is here taken merely as a provisional estimate for the purpose of the definition; and the rent which is really to be paid is to be assessed upon the footing of the actual collections in full for the first year; and the said proprietor shall see that this sum of Rs. 1,434-15 is collected in that year. In other words, it seems to be that, whatever be the full amount of the proceeds properly and fairly collected in the presence of the parties in the first year, that shall be taken to be the basis of the calculation upon which the rent was to be paid.

The contention of the defendant in the present case in regard to the amount of the rent is that the full collections in the first year did not amount to Rs. 1,434-15, but to a less sum, and therefore he is entitled to a proportionate reduction.

We think that this contention is just. Moreover, it does not seem to us that the defendant's right to reduction is conditional upon the lessor being actually present to see what was the amount collected. She had the opportunity, if she chose, of being present

d verifying and checking that amount. ut it is open to the defendant in this suit, otwithstanding that the plaintiff did not do at, to show, by the best evidence he can, hat was the amount which was actually llected in the first year.

The facts upon which the other objection ounded are shortly these: Some persons o had obtained a conveyance from the intiff at a date prior to the defendant's se, succeeded, rightly or wrongly, in butrra-proceedings before the Collector, in taining exclusive possession of a portion the mouzahs which were the subject of s lease to the defendant; and in that way defendant was turned out. The defendt says that this is an eviction by persons aiming through his lessor for which he is itled to damages against his lessor, or, in er words, to a proportionate reduction in amount of his rent, and he claims to set t off against his rent. That is the effect his objection. The stipulation in the e which is here applicable is as follows:—

"Should the said proprietor or the repreentatives of the said proprietor in any ay dispossess me, the said lessee, of any rt or whole of the leasehold property, er within the term of this kubooleut, e, the said proprietor, shall pay the dames thereof at the rate of gross proceeds the villages from her person and proty."

was said, on behalf of the plaintiff, that e persons who had so evicted the defendhad, in fact, no title whatever to do so; they were strangers, whom the defendant elf was bound to keep off the property. it seems to be very plain from the racter of the eviction that no one but the ntiff could have effectively interfered in rd to it. The defendant probably had right to appear in the butwarra-proceed. And if the plaintiff by remissness had ed to do that which she alone could do to ect the defendant in his possession, then n, independently of the clause in the lease ch has just been quoted, she could not allowed to claim rent from the defendant respect of the portion of the property n which he had been evicted. We think t the defence founded on this point is d and should be allowed. The Judge, as already been mentioned, differed from Moonsiff on both these points. We efore think that his judgment is wrong, must be reversed.

The defendant will have costs in this rt and in the Court below.

The 18th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mortgage (Bye-bil-wafa)—English Mortgage—Possession—Mortgagor—Cause of Action—Interest.

Case No. 2545 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 19th July 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 11th November 1872.

Mussamut Munkee Kooer (one of the Plaintiffs), *Appellant,*

versus

Shaikh Munnoo (Defendant) and another (Plaintiff), *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Mr. M. L. Sandel for Plaintiff-Respondent.

The transaction of mortgage effected by a *bye-bil-wafa* is, under the Regulations, essentially the same in regard to the relation between the mortgagor and the mortgagee as an English mortgage.

Although the mortgagee has, on the occurrence of the default named in the deed, a cause of action to recover possession, if withheld from him adversely, he has no cause of suit if possession by the mortgagor is from that time held and continued with his permission. And so long as the relation created by the *bye-bil-wafa* can be said to be subsisting, it would probably be right to infer that the possession of the mortgaged property by the mortgagor was had with the permission of the mortgagee, unless some act was done, or claim advanced, by the mortgagor inconsistent with the subsistence of such a relation.

It would be reasonable to infer from the payment of interest that the mortgagor's possession was permissive; but such possession ought not to be treated as adverse, so long as the mortgagor asserts a title to redeem, and advances no other title inconsistent with it.

Phear, J.—THE Moonsiff states the cause of suit as follows: "This suit is instituted for possession of a house under a deed of conditional-sale, dated 20th January 1851, and foreclosure-proceeding, dated 17th February 1870."

The pleas raised by the defendant are as follow:—

"*1st.*—That the plaintiff or his ancestor "was never in possession of the property "claimed, and his suit is barred by limita-"tion.

"*2nd.*—That the plaintiff's deed of condi-"tional-sale is not genuine.

"*3rd.*—That the defendant did not "receive the notice of foreclosure."

"As to the first plea, the limitation "of 12 years is not applicable in the cases "of mortgage. *Vide* Privy Council decision "printed in the Weekly Reporter, Volume "IV., page 37."

And the Moonsiff, after thus overruling the first plea, proceeded to consider the case on the merits, and eventually gave a decision in favour of the plaintiff.

On appeal from the decision of the first Court, the Subordinate Judge says as follows: "The Moonsiff is of opinion that the limit-"ation of 12 years does not apply to cases "of mortgage under the Privy Council "decision published in the Weekly Reporter, "Volume IV., page 37. I differ from him. "The decision cited does not appear to me "to have laid down such a broad ruling as "has been supposed by the Moonsiff. The "only point which it expounds is that "limitation does not stop the suit of a mort-"gagee when the possession is not adverse. "In the case now under consideration, the "possession of the property alleged to have "been mortgaged on the deed of bye-bil-wafa, "has all along been with the mortgagor, "and the question is whether the possession "held by the mortgagor is adverse to the "mortgagee. The deed of conditional-sale "stipulated that the mortgagee was to assume "immediate possession of the mortgaged "premises, and that the loan given by him "was to be repaid on the expiry of three "years from the date on which the deed was "executed. It is obvious that the mort-"gagee's right of entry into possession com-"menced on the date the bye-bil-wafa instru-"ment came into existence, and the act of "the mortgagor in withholding the property "from him after the execution of the deed "was a hostile act, and his possession thence-"forward an adverse possession. It has "been argued on behalf of the plaintiffs "that the possession of the defendant was "merely permissive, but, when it is found "that the retaining of possession by the "mortgagor was in contravention of the "express terms of the document on which "the plaintiff's title is grounded, sufferance "cannot be inferred unless proved by some "unequivocal act or express word of the "mortgagor; no such thing, however, is "established. The plaintiffs have attempted "to show that they received rent from the "defendant for the use and occupation of "the premises in suit, but their failure is "glaring. The only evidence to which they "have referred in support of their allegation "is the testimony of the witness Roton Roy, "but all that this witness deposes is that "some 10 or 11 years ago he brought on one "or two occasions some money by way of "interest due on a bond of Rs. 100 from "the defendant. Even if the single evidence "above alluded to be believed, and it be "supposed that the witness meant by the "bond the deed of conditional-sale, still "nothing is proved which might help the "plaintiffs. Interest is not rent."

In this view the Subordinate Judge held that the plaintiff's suit was barred by limitation, and for that reason he dismissed it.

It is plain that the first question to which we have to address ourselves is this, namely, when did the plaintiff's cause of action first accrue to him? And for the purpose of determining this, it is necessary to see what, under a contract such as that which is the foundation of the plaintiff's suit, is the nature of the mortgagee's right. This matter has been more than once discussed in this Court, and has also been dealt with more than once by the Privy Council; the last case is reported in 14 Moore's Indian Appeals, page 144.* The subject of appeal in that case was a decision passed by the late Chief Justice upon a mortgage which bore the form of an English mortgage-deed. In the judgment of the High Court it was said that the mortgagee's right in the land is the right to possession subject to the right of the mortgagor to redeem on the one hand, and a right on the part of the mortgagee himself to foreclose that right of redemption on the other. It might perhaps have been well added that it is coupled with this restriction, namely, that possession, if obtained before foreclosure, is merely possession by way of lien and without any beneficial interest. Their Lordships of the Privy Council accepted this view of the High Court. and in a judgment of the Privy Council delivered by Lord Kingsdown, in a case which is reported in 7 Moore's Indian Appeals, page 323, and which is the case referred to by both the lower Courts in 4 Weekly Reporter, P. C., page 37, it was said that the transaction of mortgage effected by a bye-bil-wafa was under the Regulations essentially the same in regard to the relations between the mortgagor and mortgagee as an English mortgage. In the case first cited (14 Moore's Indian Appeals, page 144), the Privy Council, however, thought that the judgment of the High Court, although perfectly correct in the decision of the particular case before it, was

* 16 W. R. (P. C.) 33.

couched in terms which were calculated to extend the bar of the Statute of Limitation somewhat too broadly. They say with reference to the manner in which the High Court had applied section 6, Act XIV. of 1859 (the late Limitation Act): "It "may, however, have been deemed necessary "to introduce the exception stated above," *i. e.*, the exception of section 6, "in order to "put mortgages in the English form, when "put in suit in the Supreme Court, which "was generally governed by English Law, "upon the same footing as that in which "English mortgages are under the existing "Statutes of Limitation, and their Lordships, "dealing with suits upon mortgages in the "Native Courts of India, might, in the simple "case of a mortgagee and his mortgagor being "permitted to remain in possession so long as "he paid interest, have found ground for con-"sidering that there was a permissive pos-"session, and that a new cause of action and "right of entry accrued when that permission "ceased."

This precise point, however, did not arise in that case; and consequently the Privy Council's expression of opinion does not perhaps amount to a binding authority. But it still is extremely useful as a guide to the proper determination of the matter which is now before us. The Subordinate Judge said in his judgment that the withholding of the property from the mortgagee after the execution of the deed was a hostile act, and his possession (that is, the mortgagor's possession) thenceforward an adverse possession. But the Privy Council, in the passage just now quoted, said that their Lordships might, to use their own words, "in the simple case of "a mortgagee and his mortgagor being per-"mitted to remain in possession so long as he "paid interest, have found ground for con-"sidering that there was a permissive posses-"sion." Also Lord Kingsdown said in 7 Moore's Indian Appeals, page 353,* that, under the old Regulation Law of Limitation, "it could not be laid down as a rule univer-"sally true that a mortgagee's proceeding "for foreclosure under a mortgage of the "class of bye-bil-wafa cannot be preferred "after 12 years from the expiration of the "time which the instrument fixes as the "period of redemption by payment, and on "the expiration of which the conditional "sale will become absolute, for this indis-"criminating ground of decision would "include alike adverse occupations and those "which had not the semblance even of such "a character, and would establish a bar aris-"ing from simple occupation, and not from "the laches of the demandant or of others "before him." And yet this seems to be what the Subordinate Judge has done with this judgment before him. The true view seems to be that, although the mortgagee has, on the occurrence of the default named in the deed, a cause of action to recover possession of the property, provided it is then withheld from him adversely, he has no cause of suit if the possession of the property by the mortgagor is from that time held and continued with his permission. And so long as the relation between the mortgagor and the mortgagee created by the bye-bil-wafa or mortgage-deed can be said to be subsisting, it would probably be right to infer that the possession of the mortgaged property by the mortgagor, if it be so held, was had with the permission of the mortgagee, unless some act was done by the mortgagor or some claim advanced by him which was inconsistent with the subsistence of that relation.

In the late case which was decided by this Court, and is reported in 22 Weekly Reporter, page 90, it was said: "Now, the "cause of action," in a case of this kind, "would "arise when two things have occurred, that "the plaintiff had a right to possession, and "that the defendant was holding possession, "not permissively and acknowledging the "plaintiff's right, but relying upon his own "right, or adversely as it is called. If the "plaintiff had not a right to immediate posses-"sion, or if, having a right to possession, "the defendants were holding with the "plaintiff's permission, and acknowledging "his right, no suit could be brought; in the "one case, because the right to possession "had not accrued; and in the other, because "it had not been disturbed or denied."

That particular case turned upon another point. And although the foregoing illustration was made in the course of the judgment of the High Court, the decision itself does not furnish any judicial authority with regard to the question which we have to consider.

In the case of Anund Moyee Dossee *vs.* Dhonendro Chunder Mookerjee, decided by the Privy Council, and reported in the 14 Moore's Indian Appeals, page 101,* the plaintiff, mortgagee, was seeking to recover possession of the mortgaged premises from the defendant who had purchased it at auction-sale held in execution of a decree against the mortgagors. And in that case their

* 4 W. R. (P. C.) 37.

* 16 W. R. (P. C.) 19.

Lordships held that, inasmuch as the possession which the purchaser at an auction-sale obtains, is the possession as of an owner, therefore it must be taken, at least *primâ facie*, that, unless the purchaser purchased with notice of the mortgage, from the moment he entered upon the mortgaged premises, his possession was adverse to the mortgagee. And their Lordships expressly said that "the possession of a purchaser, under such circumstances, is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee." And therefore the case was completely distinguished from any case where the mortgagee might be suing the mortgagor for possession.

And in the still earlier case, which is reported in 7 Moore's Indian Appeals 323 (S. C., 4 Weekly Reporter, Privy Council Rulings, page 37), and which has already been more than once referred to—a case very much resembling the present—their Lordships of the Privy Council said: "But, if the transaction be viewed as it should now be regarded under the Regulations, as one of mortgage, redeemable at any time by the mortgagor, or those claiming under him, in privity with his title as mortgagor, then, as no difference between the law prevalent in India and the law prevalent here, as to the relation between mortgagor and mortgagee on this point, has been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem, and advance no other title inconsistent with it, must, *primâ facie* at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may, from various causes, be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality."

These last observations are pregnant with exceedingly important matter of consideration. In all cases where the mortgagee has good reason to trust his creditor, it can be very well understood that he may be reluctant to take actual possession of the property which in itself can be no pecuniary benefit to himself, but possession of which has the effect of placing upon his shoulders the burden of keeping the accounts of rents and profits and disbursements, together with the liability to account at any time for all sums received. And it is quite easy to conceive in cases of this kind, where the mortgagee has little occasion to doubt the honesty of his debtor, he would readily leave the mortgagor in possession of the property over which he retains his lien in equity. The possession which the mortgagor would, in this way, have released to him and retain, notwithstanding that no express words might pass between the parties, would be strictly speaking possession enjoyed by the permission of the mortgagee. The two parties thus situated entirely understand their mutual relation, and it surely would not be reasonable, when once an occupation had commenced in this manner, to say afterwards at any particular point that it had ceased to be permissive, and had become adverse, unless something had occurred between the parties to change that mutual relation. In the judgment of the Privy Council which was first referred to, the opinion was expressed that it would be reasonable to infer from the payment of interest that the possession on behalf of the mortgagor was permissive. But the judgment which is reported in 7 Moore's Indian Appeals, and in 4 Weekly Reporter, goes even further and says that the possession of the mortgagor ought not to be treated as adverse so long as the mortgagor asserts a title to redeem, and advances no other title inconsistent with it. It must be treated at any rate as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the continuance of his lien on the thing pledged.

So that, in the case before us, the time when the plaintiff's cause of suit first accrued depends upon the question, when, if at all, did the mortgagor's possession first cease to be permissive and became adverse to the mortgagee, *i. e.*, inconsistent with the relation of mortgagor and mortgagee. The Subordinate Judge, assuming the fact of the original mortgage, admits that there was some evidence on the record of payment of interest by the mortgagor, but he refuses to give any serious consideration to it, because he thinks that interest is not rent. Of course, that position is entirely correct. But it was the undisturbed subsistence of the relation of mortgagor and mortgagee, which might be indicated by the payment of interest, which was the principal question in this matter. And it was an error on the part of the Subordinate Judge to consider that the payment of money could only be of value as evidence of the continuance of that relation if it was paid

by way of rent. By the nature of the case, in all probability, if the mortgagor was allowed to retain possession of the property, he would not pay a money-rent for it; he would merely pay money by way of interest upon the mortgage-debt.

It seems to us, therefore, on the whole, that the Subordinate Judge has taken a wrong view of the nature of the plaintiff's cause of action, and in consequence of the error thus committed may have wrongly determined the issue of limitation. It becomes necessary for us, therefore, to reverse his decision, and to send back the case to the Lower Appellate Court for re-trial.

The costs of this appeal will abide the event.

The 19th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Lis Pendens—Act VIII. of 1859, s. 246.

In the Matter of
Ram Kishen and others, *Petitioners,*

versus

Doolee Chand, *Opposite Party.*

Mr. R. T. Allan and *Baboo Juggut Chunder Banerjee* for Petitioners.

Messrs. J. W. Montriou and *C. Gregory* and *Moonshee Mahomed Yusuf* for Opposite Party.

Possession of property obtained from a defendant, while a suit is pending against him in respect of that property, must be taken to be the possession of the defendant himself for the purposes of the suit.

Phear, J.—We think that the rule must be discharged. It appears now very clear that the petitioner bought the rights and interests of Ram Ruttun Neogy in the property which is the subject of suit, at a time when a suit was actually pending against Ram Ruttun Neogy at the instance of Doolee Chand, in which suit Doolee Chand was seeking to realize a charge upon that very property. And that suit, subsequently to the date of the petitioner's purchase, ripened into a decree for sale of this property. It is in execution of that decree for sale that the present petitioner's objection is made. It is said that the possession which the petitioner obtained in consequence of his purchase of the rights and interests of Ram Ruttun Neogy is such a possession as obliged the Subordinate Judge, when this objection was made under the provisions of section 246 of the Civil Procedure Code, to uphold the objection, and so to send the decree-holder Doolee Chand to a fresh suit for the purpose of establishing his right to have this property sold as against the petitioner. Now, it appears to us that this is a state of things in which the well-known doctrine of *lis pendens* applies, for clearly, if the Subordinate Judge is obliged, upon the facts which have been mentioned, to uphold the objection, and to remit the decree-holder to a fresh suit against the objectors, then this process may be repeated almost *ad infinitum.* For it may happen that, after Doolee Chand has instituted such fresh suit against the objector, *i. e.*, the present petitioner, and while that suit is pending and in due course of prosecution, the present petitioner's rights and interests in the property may be sold, either by himself voluntarily, or under some decree against him involuntarily, and the purchaser may get into just the same position with regard to the property as the present petitioner now is in. And, therefore, Doolee Chand would a third time be forced to bring a suit against a new defendant. It is just to prevent such a course of things as this that the doctrine of *lis pendens* has force given to it. Probably section 246 is not happily worded by the Legislature for the purpose of meeting a case like the present. And it may even be doubtful whether that section was originally intended to apply to cases of sales in execution of decrees made directly against the land itself. But, however that may be, we think it reasonable to hold that the property in the possession of Ram Ruttun, under the circumstances of this case, a possession obtained from the defendant while the suit was pending and in due course of prosecution, must be taken to be the possession of the defendant himself for the purposes of the suit. And if so, then, even in view of the express words of section 246, the Judge's order is entirely right. At all events, we do not think this is a case in which we ought to exercise our extraordinary jurisdiction. And the petitioner must be left to his remedy, if he is entitled to any, by a regular suit.

The rule must be discharged with costs, which we assess at one gold mohur.

Let the record be sent down to the Court below on the respondents undertaking to bring it up to this Court when required.

The 21st September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Neej-jote Lands—Enhancement of Rent—Act VIII. (B. C.) of 1869, s. 8.

Case No. 2755 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 23rd August 1873, modifying a decision of the Moonsiff of that District, dated the 18th June 1873.

Janoo Mundur (Defendant), *Appellant,*

versus

Brijo Singh (Plaintiff), *Respondent.*

Baboo Gopeenath Mookerjee for Appellant.

Baboos Kalee Kishen Sen and *Rash Beharee Ghose* for Respondent.

A landlord seeking to obtain an enhanced rate of rent on account of neej-jote land held by a tenant without a right of occupancy has no right to obtain a judicial assessment upon the footing of a notice under Act VIII. (B. C.) of 1869, ss. 14 and 5. His right, in accordance with s. 8, is to make his own terms with the tenant, or to turn him out of occupation. This he can do by serving the tenant with a reasonable notice to quit, unless he agrees to pay the rent required, and, if the tenant continues in occupation, he must be taken to have agreed by implication to pay the said rent.

Phear, J.—In this suit the plaintiff seeks to obtain enhanced rate of rent from the defendant, upon the footing of a notice issued by the plaintiff to the defendant under section 14, Act VIII. (B. C.) of 1869.

Both the Courts below have found as a fact in the case that the land which is held by the defendant is the kamut land of the plaintiff, by which we understand them to mean neej-jote land of the plaintiff; and also that the defendant has not acquired a right of occupancy.

In view of these facts, the suit as laid is clearly misconceived. The plaintiff has no right to obtain a judicial assessment of enhanced rent upon the footing of a notice, under sections 14 and 5 of Act VIII. (B. C.) of 1869, in such a case as this. As has been more than once remarked in this Court, the right of the plaintiff is, in accordance with section 8, to make his own terms with the defendant, or to turn the defendant out of occupation of the land. He could do this by serving him with a reasonable notice requiring him to quit his occupation at the end of the year, unless he agreed to pay henceforward the rates of rent mentioned in the notice. And, in the event of such a notice as this being served, if the ryot chooses to continue on in the occupation of the land, he must be taken to have agreed by implication to hold the land at the rate mentioned in the notice. This was the view apparently taken by the Full Bench in the case which is reported in 10 Weekly Reporter, p. 33. But in that case it was further held that, inasmuch as the notice was not served until the last month of the year, the Courts ought not to enforce the rates of rent mentioned in the notice against the ryot, unless the plaintiff satisfied them that those rates were fair and reasonable—not merely fair and reasonable with reference to the particular grounds of section 18 of Act VIII. (B. C.) of 1869, but with reference to all the circumstances of the case.

The first Court, in the present case, has tried this suit as if it were an ordinary suit for enhancement under sections 14 and 5 of Act VIII.; and after discussing the evidence bearing upon the rates of rent, finally determined that 12 annas per beegha of rent, a rate much less than any of those mentioned in the notice, was a fair rate for the defendant to pay. And accordingly the Moonsiff gave a decree in favour of the plaintiff on that footing.

But, if the suit was entertained at all in its present form, this was clearly a wrong mode of treating it. The Court ought simply to have inquired, first, whether there had been in regard to time a reasonably sufficient notice to quit, given or involved in the notice, upon which the plaintiff relied. And if that was not a reasonably sufficient notice with regard to time, then to inquire whether the terms proposed by it, that is, the rates of rent mentioned in the notice, were such as the defendant ought fairly to be taken to have agreed to by reason of having held over notwithstanding the notice, regard being had to all the circumstances of the case.

On appeal from this decision to the Lower Appellate Court, it seems that the Judge did treat the case somewhat in the mode which has just now been indicated. Having considered the terms of the notice, he said it appeared to him that "the plaintiff has been "at some pains to prove what the neighbour-"ing rates are, and that they are the rates he "charged defendant. Had he asked more, "defendant could not have complained." In other words, that the rates of rent which the plaintiff had in his notice required the defend-

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ant to pay were not more than, under all the circumstances of the case, he had a fair right to ask. And on this ground, he modified the decree of the Moonsiff, and decreed the plaintiff's claim in full.

On the whole, we think we should not be justified on special appeal in interfering with this decision. It is no doubt to be regretted that the plaint was put into an unsatisfactory form. Indeed, the notice originally served upon the defendant was not in the simple shape which it ought to have borne. But we perceive that it was served upon the defendant in the month of Pous—three whole months before the expiration of the year—and therefore was, in respect of time, a reasonably sufficient notice to quit. Consequently, the defendant by holding over in view of the terms proposed to him by the notice, when he had the reasonable opportunity of quitting his tenancy if he did not like those terms, impliedly intimated his acceptance of them. Moreover, the Lower Appellate Court has, as just now mentioned, found that the rates of rent proposed to the defendant by the notice were nothing more than the plaintiff might reasonably require the defendant, under all the circumstances of the case, to pay, in the event of his retaining occupation of the land. And this being so, we think that the decree was a proper decree, and ought not to be disturbed. We dismiss the appeal with costs.

The 24th November 1874.

Present:

The Hon'ble W. Markby, *Judge.*

Evidence—Act I. of 1872, s. 34.—Jumma-wassil-bakee Papers.

Case No. 124 of 1874.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th December 1873, reversing a decision of the Second Moonsiff of Diamond Harbour, dated the 23rd January 1873.

Belaet Khan (one of the Defendants), *Appellant,*

versus

Rash Beharee Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Ashootosh Mookerjee for Respondents.

Though not alone sufficient to charge any one with liability, documents admissible as evidence under Act I. 1872, s. 34, were held to be sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant; *e. g.*, in a suit for enhancement of rent, to rebut a presumption arising from uniform payment for 20 years.

The question to be decided in this case is whether the use which has been made in evidence of certain jumma-wassil-bakee papers by the Judge of the Lower Appellate Court is in accordance with section 34 of the Evidence Act. It appears to me that these documents were not such documents as are described in section 35, and it is only under section 34 that they would be admissible, and they are subject, therefore, to the special limitation which relates to documents admissible under that section. Now, the suit was a suit for arrears of rent at an enhanced rate. It was admitted that the rent had been paid at an uniform rate for twenty years, and the jumma-wassil-bakee papers in question which related to the years 1242, 1243, and 1246 were put in evidence in order to rebut the presumption which arose from this uniform payment, that is to say, they were put in in evidence to establish that the tenure had been created at some time subsequent to the permanent settlement. Now, it would appear that prior to the late Evidence Act these papers would not have been admissible to prove that fact unless some other evidence tending to establish the same fact had also been given. This was so held in a case reported in the 8th Weekly Reporter, page 280. The language of the statute that was then in force differs, however, very materially from that of the present Act. By Act II. of 1855, section 43, documents of this kind were declared to be only admissible as corroborative, but not as independent, proofs of the facts stated therein. That language has not been adopted in the present Act. The only limitation in section 34 is that statements contained in documents of this kind shall not alone be sufficient evidence to charge any one with liability. It appears to me that this change of expression has made a substantial alteration in the law, and I do not consider that it can be said that these documents have been used alone in order to charge the defendant in this case with the liability that has been imposed upon him. He is charged with the rent of the land he occupies by reason of its occupation by him, that rent being considered to be a fair and equitable rent for the land occupied; and what these documents have been used for is, not to charge him with the liability, but to answer the claim which he set up to exemption from what would be the ordinary liability

of a tenant. It therefore seems to me that these documents have not been used in this case as alone sufficient to charge him with that liability in the sense in which those words are used in section 34 of the Evidence Act.

But, further than this, it appears to me that there is other evidence in the case which bears upon this question. In the document which is called a kubooleut, and which was signed by the tenant in the year 1246, there is a statement that "when this jumma-"bundee shall have been sanctioned by the "Board of Revenue, then I shall take a "poltah according to custom; otherwise the "amulnama granted by you shall not be "valid." That is a document addressed to the Collector. Now, it is quite true, as pointed out by the Vakeel for the appellant, that that document is a printed form, and that circumstance might, no doubt, go to diminish somewhat its value in evidence. Probably for that reason it has not been more prominently noticed by the Judge of the Lower Appellate Court. But at the same time it seems to me impossible to say that that document is not some evidence of the tenure having been created very recently—in fact, not fully created in the year 1246. A tenant who had been in possession prior to the permanent settlement, and who had given his attention to the matter, could scarcely have signed such a document as this. On the whole, therefore, I think there is nothing in the words of section 34 of the Evidence Act which will justify me in saying that the Lower Appellate Court has used these documents in evidence in a way contrary to law.

The special appeal will be dismissed with costs.

The 27th November 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution-sale — Irregularities — Act VIII. of 1859, s. 256.

Case No. 232 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 28th April 1874.

Sheo Prokash Misser (Judgment-debtor), *Appellant,*

versus

Hurdai Narain (Decree-holder), *Respondent.*

Mr. G. H. P. Evans and *Baboos Unnoda Pershad Banerjee* and *Tarucknath Sen* for Appellant.

The Advocate-General, Mr. J. T. Woodroffe, Baboo Chunder Madhub Ghose, and *Moonshee Mahomed Yusuf* for Respondents.

In order to make out a case which will justify a Court in setting aside a sale under the provisions of Act VIII. of 1859, s. 256, the judgment-debtor must prove, not only that irregularities existed in the conduct of the sale, but also that they were such as to lead naturally to diminution in the price given for the property.

Phear, J.—This is an application to set aside an auction-sale which has been effected in execution of a decree founded upon some of the grounds mentioned in section 256 of the Civil Procedure Code. Now, in order to make out a case which will justify the Court in setting aside a sale under the provisions of this section, the judgment-debtor must prove, not only that the irregularities in the conduct of the sale of which he complains took place, but also that they were such as to lead naturally to diminution in the price given for the property. In the present instance, the Subordinate Judge has come to the conclusion, in the first place, that the irregularities complained of are not proved. And we certainly find it very difficult to say that he is wrong upon this point. The judgment-debtor first complains that the requisite proclamation was not made in the mofussil on the spot. But there is the evidence of the officer whose duty it was to make this proclamation, and to publish the sale, affirming that it was duly made. On the other hand, no doubt, there is the evidence of the village headmen to the effect that they did not know anything of the alleged proclamation. At best, we may observe that this is negative evidence. But in addition to this circumstance affecting its force, we cannot shut our eyes to the fact that these persons are the immediate dependants and the ryots of the judgment-debtor. We all know too well how the, so to speak, feudal relations between these persons and their zemindar do very often lead to their being very facile instruments in the hands of the zemindar for the purpose of proving facts of this kind, if it is convenient for him that such facts should be proved. The Subordinate Judge has himself made this remark; and, sitting here as a Court of appeal, we think that we ought not to interfere with the conclusion of fact at which the Subordinate Judge, who saw the

witnesses and heard them giving their evidence, has arrived.

No doubt, a question may reasonably be raised as to whether a notice of the sale was hung up in the Collector's cutcherry as it ought to have been. The judgment-debtor, however, has not given any very direct evidence on the point; and even if we assume that this irregularity in the conduct of the sale took place, yet it remains, as already remarked, for the judgment-debtor, before he can succeed on this application, to show that it led, or may be reasonably assumed to have led, to a diminution in the bidders at the sale, and to a consequent depreciation of the price. But we have not had the slightest evidence brought to our notice such as could in any way lead us to suppose that there would have been more bidders at the sale, or that a higher price would have been offered, if the notice had been hung up in the Collector's Court, than if it had not been so hung up. The Legislature has expressly made it a condition of the irregularity being a cause for setting aside the sale, that it must have led to this result. The mere fact of an irregularity itself having occurred is not sufficient; and therefore we cannot, simply from the omission to hang up the notice in the Collector's Court, and from that omission alone, infer that there was a necessary diminution in the price offered at the sale. It would hardly in a case of this kind have been difficult, if the facts had been so, for the judgment-debtor to prove that there were other persons than those who did attend the sale who would have gone to it with the intention of bidding had larger notice of it been given than was given.

Even as to the price which was actually realized, the only material evidence bearing upon the proper value of the property is that of Gunga Pershad, a person who appears, by the representations which have been made to us on both sides, to be much interested in the matter of this sale. He says, now that the property has been sold, and therefore passed beyond his reach, that if he had been there, he would have given large a sum as Rs. 40,000 for it free mortgage. But it is left, even by his timony, quite uncertain whether the prorty is in the hands of the purchaser subct to a mortgage or not. The Subordinate dge says: "The judgment-creditor purased the property for Rs. 6,800, and will ve to pay the money for which the estate mortgaged." He afterwards said: "I cannot conclude this without noticing one "point, which is this, that the judgment-"debtor was largely indebted, and he owes "a large sum of money to his witness "Gunga Pershad. But it is not known "whether or no the property is hypothecated "somewhere else."

We may reasonably suppose that the property of a debtor, who is in the condition thus described, when sold without specification that it was free of incumbrances, is not likely to fetch a very high price. However this may be—whatever this supposition may be worth—it would seem from the testimony of Gunga Pershad, if it be assumed that his mortgage is a good and valid mortgage upon the estate, that the purchaser in this case has in fact given more for the property than Gunga Pershad himself would have given.

On the whole, we think that, even if the sale proceedings have not been entirely regular, the judgment-debtor has failed to make out that any loss of price or other injury to him has proceeded from such irregularity as may have occurred. And, therefore, it seems to us that the decision of the Lower Court is right, and that this appeal ought to be dismissed with costs.

We allow Rs. 50 for pleaders' fees.

The 30th November 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Malikana—Limitation.

Case No. 1770 of 1873.

Special Appeal from a decision passed by the Judge of Patna, dated the 21st May 1873, reversing a decision of the Officiating Moonsiff of that District, dated the 11th February 1873.

Nursingh Narain Singh and others (Plaintiffs), *Appellants,*

versus

Mussamut Ameerun (one of the Defendants), *Respondent.*

Mr. C. Gregory and *Baboo Mohendro Lall Mitter* for Appellants.

Moonshee Abdool Baree for Respondent.

A suit against E and A to recover malikana, said to be due as a charge upon land belonging jointly to them, was dismissed by the Lower Appellate Court on the ground that the claim against A was barred by limitation. As it had been found, however, by the first Court that plaintiff

had received malikana from within 12 years antecedent to his plaint, the High Court in special appeal held that, if this was a payment on account of land held jointly by E and A, it would save the operation of the statute even as against A.

Phear, J.—In this suit, as it at present stands, the plaintiff seeks to recover from two persons, Emam Buksh and Ameerun, certain malikana, which, he says, he is entitled to obtain from them by reason of its being a charge upon land belonging jointly to Emam Buksh and Ameerun. The Judge has dismissed the suit upon the ground of limitation, with this brief finding: "The plaintiff's claim being "barred as regards the *present appellant* by "limitation, the appeal is decreed with costs "and interest at 6 per cent." The "present appellant" here referred to is Ameerun. And it seems that the plaintiff has failed to show that he has received any money by way of malikana from Ameerun within the period of 12 years antecedent to the date of the filing of the plaint. But, on the other hand, it appears to have been found by the first Court that the plaintiff received a certain sum of money by way of malikana from Emam Buksh in the year 1266. If this was a payment made on account of malikana charged upon land to which Emam Buksh and Ameerun were jointly entitled, then this payment by Emam Buksh would operate to save the operation of the statute even as against Ameerun. By that payment the plaintiff would, to the extent of the payment, have enjoyment of the malikana which was due from Emam Buksh and Ameerun jointly, and would have no cause of suit against either of them. And as that date was within less than 12 years before the date when the plaint was filed, the plaintiff would be, on that state of the facts, entitled to prosecute this suit. The Judge has not apparently enquired whether the malikana which the plaintiff claims was jointly due from Emam Buksh and Ameerun, or rather whether it was a charge upon land which was jointly held by Emam Buksh and Ameerun. If it was divisible into two parts—part of it charged upon land belonging to Emam Buksh, and part of it charged upon land belonging to Ameerun—then the payment, of course, of the portion which was due from Emam Buksh would not have saved the time as regards the portion which was due from Ameerun.

On the whole, we think that the issue of limitation has not been satisfactorily determined; and, therefore, we reverse the decision of the Lower Appellate Court, and remand the case to that Court for re-trial on all points.

Costs will abide the event.

The 2nd December 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Case No. 2355 of 1873.

Special Appeal—Joint Family Property—Mitakshara—Alienation.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 5th August 1873, affirming a decision of the Moonsiff of Jamooe, dated the 15th May 1873.

Bunsee Lall and others (Plaintiffs), *Appellants,*

versus

Shaikh Aoladh Ahsan and another (Defendants), *Respondents.*

Baboo Nil Madhub Sen for Appellants.

Mr. C. Gregory for Respondents.

Parties are not entitled, in special appeal, to set up a new case, involving an argument entirely different from that raised in the Courts below, and a state of facts entirely inconsistent with their statements there.

As long as a Hindoo family under the Mitakshara is living in the joint enjoyment of family property, such property can only be alienated by the joint consent of all the members, or in the event of such necessity as will in the eye of the law give the *kurta* power to alien as the agent of all, then by the *kurta* alone.

Kemp, J.—The plaintiffs are the special appellants in this case. The suit was for possession of a defined share in a certain mouzah. The allegations of the plaintiffs were that under a partition the plaintiffs were entitled to four shares; that their father, who has been made a defendant in the case, the defendant No. 2, is entitled to one share, and Koonj Beharee Singh, their minor brother, to the other share—the estate having been divided into the above six puttees. They therefore sued on the footing that the defendant No. 1, Shaikh Aoladh Ahsan, on pretence of a purchase at an auction sale of the rights and interests of the defendant No. 2, had taken possession, not of the share which the father was entitled to under the partition, but of the entire property left by Lalla Sungun Lall, the common ancestor of the plaintiffs and their father. The defendant No. 1 replied briefly, stating that the plaintiffs and the defendant No. 2, the sons and father, had been in possession collectively, and that the defendant No. 2, the father, had borrowed certain moneys under legal necessities, namely, for the maintenance and support of the

family during a famine, and also for discharging the expenses attending the marriage of his sons; and that, for that debt of the father, the property was sold and purchased by the defendant No. 1; that the sons, the plaintiffs, in that case had admitted the act of their father; that they were still living in commensality with the father; that the allegation of partition was false; and that the suit which had been brought to bring about a partition was a collusive suit instituted for the purpose of defeating the defendant No. 1's rights under the mortgage and sale; and further, with reference to the mokurruree right which was put forward by Mitterjeet Singh, a third party, the defendant No. 1 states that that also was a sham put forth in collusion by the plaintiffs and their father. On that portion of the case, both Courts have found that the mokurruree was a sham, and that question is not in any way before us.

The issues tried by the Moonsiff were: *1st.*—Whether the partition-suit, upon which the plaintiffs relied, was a collusive suit or not? *2nd.*—Whether their allegation of possession and dispossession of the property in dispute was true or not? *3rd.*—Whether the defendant No. 2, the father of the plaintiffs, had borrowed money from the defendant No. 1 for a legal necessity, and whether the money so borrowed was spent in the education, marriage, and maintenance of the plaintiffs or not; and then whether the plaintiffs and the defendant No. 2 were joint in mess, and whether the present suit was a *bonâ-fide* one, or had been instituted by the sons in collusion with their father.

On the first point, the Moonsiff found, and the Judge concurs in this opinion, that the suit for partition was a sham, that no partition has taken place, and that the plaintiffs have not been able to prove that they ever were in separate possession; on the contrary, that the evidence proves that the father was all along in possession, and that the defendant No. 1 took possession by order of the Court under the execution-sale; that the money was borrowed *bonâ fide* for a legal necessity from the defendant No. 1; that the plaintiffs and their father were still living joint in mess; and that the father was looking after the case and after the witnesses for plaintiffs.

Both Courts concurred in the findings arrived at on these questions of fact, and have dismissed the plaintiffs' suit.

The grounds taken in special appeal raise points which were not before the Courts below, and were not put in issue between the parties. They are points which appear to us to have suggested themselves to the pleader who has conducted the argument, from the case reported in Volume XX., Weekly Reporter, page 174. The grounds of special appeal are based entirely upon the Mitakshara law, and not upon the issues in the Courts below. The grounds are that the father had no assignable interest to convey, and that nothing passed to the defendant No. 1 under the auction-sale. This, as we have already observed, is entirely a new case. In the Court below, the plaintiffs based their case on the allegation that a partition had taken place, and that, therefore, the defendant No. 1, the auction purchaser of the right and interest of their father, was entitled only to the share which, under that partition, fell to the father; and both Courts having found that that allegation of partition was false, and that the suit which was brought by the plaintiffs to effect a partition was a collusive suit, the plaintiffs are not entitled, at this stage of the case, to raise an argument entirely different from that raised in the Courts below, and to set up a state of facts entirely inconsistent with their statements in the Courts below.

Then, with reference to the decision referred to by the pleader for appellants in the course of the argument (Weekly Reporter, Volume XX., page 174), in that case it was clearly found that there had been no partition; in fact, it was never alleged in that case that there had been any such partition; and moreover, in that case, the important element that the money was borrowed by the father for a legal necessity was not raised or decided. Now, it is remarkable also that the same learned Judges who decided that case do, in another case to be found in the same Volume of the Weekly Reporter, page 194, which case is referred to in the decision which has been quoted by the learned pleader for the special appellants, distinctly state that, under the decision of the Full Bench, it is placed beyond doubt that, as long as a Hindoo family under the law of the Mitakshara is living in joint enjoyment of the family-property without having come to an actual partition amongst themselves of that property or an ascertainment and partition of their rights in it, so long no member of the family has any such separate proprietary right in the property as he can alienate or encumber; that the property, under such circumstances, belongs to all the members of the family jointly as to a corporation, and no one individual member has any share in it which he can deal with as property.

Also, under the same circumstances, the property can only be alienated by the joint act of all the members, express or implied; or, in the event of such a case of family-necessity occurring, as will, in the eye of the law, serve to invest the *kurta* with authority to alien as the agent of all, then by the *kurta* alone. As already observed in the case quoted from page 174, the element of legal necessity does not enter, while in the present case it does enter, and it has been found by the Courts below that the money was advanced to the father by the special respondent, who is a Mahomedan, for purposes of legal necessity. However, be that as it may, we think that the case was properly dismissed, as it was put before the Courts below by the plaintiffs, namely, on the basis of a partition, which it has been found never took place.

We dismiss the special appeal with costs.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 20th April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Oath—Evidence—Witness—Act I. of 1872, Section 118—Act X. of 1873, Section 13.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of kidnapping a girl from her lawful guardianship.

The Queen

versus

Anunto Chuckerbutty and others, *Appellants.*

Mr. C. H. Reily and *Baboo Juggut Chunder Banerjee* for the Appellants.

Baboo Juggadanund Mookerjee for the Prosecution.

The Court in this case declined to act on the evidence of a child 9 years old, who had been examined without oath, although she was a competent witness under Section 118 of the Evidence Act, I. of 1872, inclining to the opinion that Section 13 of the Oaths Act, by which the evidence of a witness may be received in evidence, although no oath was administered, did not render the deposition of a child of 9 years, whose deposition had been taken advisedly, and not by omission, without oath or solemn affirmation, admissible as evidence.

Kemp, J.—ANUNTO Chuckerbutty, Anundo Sein, Haradhun Dey, and Adooree, have been convicted by the Sessions Judge of Midnapore under Section 363 of the Indian Penal Code, and the prisoners Anunto Chuckerbutty and Anundo Sein have been sentenced to four years' rigorous imprisonment, and Haradhun Dey and the female prisoner Adooree to two years' rigorous imprisonment. The Sessions Judge also finds the prisoners guilty of an offence under Section 366 of the Code, but he passes sentence under Section 363 for the offence of kidnapping.

The first point taken by the learned Counsel who appears for the prisoner is that the evidence of the witness Prosunno, the niece of the prosecutor, or rather of the principal witness in this case, Luckhy Narain Dey, is not admissible, inasmuch as that evidence has not been recorded on oath or solemn affirmation. Under Section 118 of the Evidence Act, all persons are competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. This witness would come under the description of a witness of tender years, being only 9 years of age, but the Judge says that she appeared to be a very intelligent girl, and thoroughly understood what she was about when questions were put to her. Therefore, this witness would be a competent witness, although, of course, the amount of credence to be given to her evidence is quite another matter; but the learned Counsel further objects that, although the girl is a competent witness under Section 118, yet, inasmuch as all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court, or person having, by law or consent of parties, authority to examine such persons, or to receive evidence, should be examined on oath or solemn affirmation, the witness Prosunno ought to have been so examined. Section 13 of the Oaths Act says that no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in, or in respect of, which such omission, substitution, or irregularity took place, shall affect the obligation of a witness to state the truth. Now, this appears to me to apply, for instance, to the case of a person who has made a statement which is subsequently found to be a false statement—that he shall not get rid of the obligation of stating the truth by setting up a plea

that there has been an omission on the part of the Court to administer to him an oath or solemn affirmation. It does not appear to me that this Section would render the evidence of a child 9 years old, whose evidence, as in this case, has been advisedly, and not by omission, recorded without any oath or affirmation, admissible as evidence; but, be that as it may, there is independent evidence in this case of the aunt of the child, of the uncle of the child, of the two neighbours, and I may say the statement of Adooree herself, the grand-aunt of the child, and of Haradhun Dey, who is also one of the accused, before the Magistrate. The child Prosunno was, in our opinion, under the lawful guardianship of her uncle, the witness Luckhy Narain. Luckhy Narain and the father of Prosunno lived in commensality, and were uterine brothers, and therefore Luckhy Narain, according to Hindoo law, would be a guardian preferable to the grand-aunt of the girl; the girl was living under the care of her lawful guardian; she was a girl under 16 years of age, and she was enticed away by her grand-aunt, Adooree, under pretence of taking her to see a katpootlee nautch, not in the day-time, but at an unusual hour of the night. There is evidence, the evidence of Luckhy Narain as well as of the neighbours and the aunt of the child, and also the answers of the accused parties, that negotiations had been going on with respect to the marriage of the girl Prosunno with the son of the prisoner Anundo Sein. Luckhy Narain deposes that he objected to the marriage, first, because he was not acquainted with the boy, the son of Anundo, and also because his niece was, according to Hindoo notions, impure on account of the death of her mother having occurred only five months before overtures for the marriage of the girl were made. Then we have the statements of Adooree and Haradhun before the Magistrate, in which they admit that Luckhy Narain did not consent to marry his niece to the son of the prisoner Anundo Sein. The prosecutor Luckhy Narain was absent at the time the offence was committed, as he was in charge of one of the locks connected with the waterworks in the District of Midnapore. On returning home, he heard that his niece had been married, and he then lodged a complaint at the police-station. This is not the conduct of a man who, if the story for the defence is true, had consented that Adooree should take upon herself all the negotiations and arrangements necessary for the marriage of the girl, and that he was only to advance Rs. 5. It is clear that Luckhy Narain was not a consenting party to this marriage, and that the prisoners took advantage of his absence from home, going there at an unusual hour of the night, accompanied by Adooree, who enticed this little girl away from her home and the lawful guardianship of her aunt; and that the girl was married against her will and the consent of her guardian to the prisoner Anundo Sein's son. This, looking to Hindoo customs and prejudices, appears to us to be a very serious offence indeed, and it is idle to say that no prejudice was caused to this girl by the marriage. It so happens that the caste of Anundo Sein is the same as that of Luckhy Narain, but it may be that there was between them some social difference of position which rendered the marriage particularly obnoxious to Luckhy Narain. But, be that as it may, looking to the time at which the offence was committed, during the absence of the girl's legal guardian, and to the fact that the girl was married against her will, we think the offence a very serious one, and we are, therefore, not disposed to mitigate the sentence which has been passed upon the prisoners by the Sessions Judge.

The appeal is rejected.

The 21st April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Perjury—Alternative charge—Deposition—Memorandum of evidence—Act X. of 1872, Section 80.

Committed by the Magistrate, and tried by the Additional Sessions Judge of 24-Pergunnahs, on a charge of giving false evidence in a stage of a judicial proceeding.

The Queen

versus

Gonowri, *Appellant.*

To support a finding upon an alternative charge of perjury, there must be legal evidence of the truth of each branch of the charge.

The deposition of the prisoner given in Hindustani, but taken in English by the Magistrate, and the memorandum at the foot of the deposition that it was read to the witness, and was by him acknowledged to be correct, though held not to be quite satisfactory (as the person who took down in English what the prisoner had said in Hindustani was not examined as a witness, and the prisoner had no opportunity of cross-examining him), was admitted as a proper deposition within the provisions of the Code of Criminal Procedure, and the memorandum was taken under Section 80, Code of Criminal Procedure, as evidence of the facts stated in it, and as affording some evidence that the translation was correct.

Phear, J.—THIS appeal, which has for several reasons been pending before us some little time, is an appeal preferred by a prisoner who has been convicted on a trial by Jury upon an alternative charge of perjury, and has been sentenced to six months' rigorous imprisonment.

We cannot, on this appeal, determine anything judicially with regard to the merits of the case; we can deal with matters of law only. And, after consideration, we have arrived at the conclusion that the conviction is not open to be disturbed for error of law.

The Jury has returned a general finding of guilty upon the double charge, without specifying which alternative is true; and the recent Full Bench decision* has set at rest any doubts which might otherwise have existed, whether or not such a finding is valid in law.

To support such a finding, however, it seems to me that there must be legal evidence of the truth of each branch of the charge, because, inasmuch as the Jury abstains from specifying the state of facts which it finds to be true, in the event of there being no legal ground for the one charge, it cannot be known that that was not the charge which the unexpressed opinion of the Jury, or of part of the Jury, held to be made out. Besides, the only justification under the Procedure Code for the alternative charge is that, on the evidence, it is uncertain which branch of the charge is true. And the Sessions Judge put the case to the Jury in this form.

The alternative charge upon which the prisoner has in this case been convicted may be concisely stated as follows: that the prisoner, when he was first examined before the Magistrate, said: "My master had a Jew friend, who used to visit him;" and when he was examined a second time before the same Magistrate, he said: "I don't know whether or not my master had a Jew friend. I don't believe he had;" and that one or other of these statements is false.

The only evidence which the prosecution put before the Jury for the purpose of proving this charge was the depositions of the prisoner taken in English by the Magistrate on the two occasions of his examination respectively. And the only evidence offered for the purpose of satisfying the Court that the depositions thus taken in English represented a true translation of the words which the accused person actually spoke in Hindustani is the endorsement or memorandum to be found at the foot of the deposition signed by the Magistrate in these words: "The above was read to the witness in Hindustani, which he understood, and by him acknowledged to be correct."

It appears to me that this is about the most meagre material that could be well put before the Court for the purpose of establishing a charge of perjury. It would have been at least only fair to the prisoner that the person who took down in English what the prisoner had said in Hindustani should have been examined as a witness, in order that the prisoner might have an opportunity of cross-examining him. There are very few of us, I suspect, who would like to be made responsible for our words in English upon the representation of them rendered in a foreign language by some person who does not personally come forward to say that that representation is correct, and to submit himself to examination as to his ability and opportunity to translate, and take down in the one language what had been said before him in the other. It must be remembered that, however well qualified and capable a translator may be to represent in one language what he has heard said in another language, it is also necessary that a Court, in order to be in a position to judge of the accuracy with which this has been done in a given case, should have before it all the circumstances which surrounded the parties at the time when the translation was effected.

However, such as it is, this is the material upon which the prosecution placed the charge in the Sessions Court, and upon which the Jury has convicted the prisoner. It seems that the Magistrate had authority, under the Criminal Procedure Code, to take down in English what the witness had said in Hindustani, and therefore the deposition in this form is a proper deposition within the provisions of the Criminal Procedure Code; and I am not prepared to say that, under Section 80 of the Evidence Act, the memorandum endorsed upon it cannot be taken as evidence of the facts which are stated in the memorandum itself, and which themselves afford some evidence that the translation is correct.

This being so, the English deposition is probably evidence, upon which alone the Jury could lawfully act, of what the prisoner had said in Hindustani. And, on considering these depositions, we find in the second of them a passage which amounts to an admission by the prisoner that the statement made

* *Ante*, p. 72.

on the first occasion, and recited in the charge, was not a true statement. So that we have here in this way been furnished with evidence from which the Jury might, in its discretion, come to the conclusion that the first statement made by the prisoner, namely, "My master had a Jew friend who visited him," was a statement falsely made, and by a comparison of the two statements, I mean those made on the first and second occasions respectively, which are alleged in the charge and proved by the depositions, the Jury might also be justified in coming to the conclusion that the second statement was falsely made.

Thus, it appears, on the whole, that there was material enough before the Jury to justify the Jury in law in coming to the conclusion that one or other of these statements was false, although the Jury was not able further to say upon that evidence which of these two statements was false. I am, therefore, of opinion that the verdict is good in law, and cannot be disturbed on this appeal.

I am, however, further of opinion that the sentence which has been passed upon the prisoner is unnecessarily severe. It seems to me that, assuming the verdict to be a just verdict, and that the prisoner deliberately told a falsehood on either one or the other of the two occasions when he was examined before the Magistrate in the way alleged by the prosecution, yet the falsehood was one of the most insignificant character.

It does not appear from anything in the depositions before us, and these constitute the only evidence upon which we can go, that it was in any way a relevant fact to the case in which the prisoner gave this testimony that "a Jew friend visited his master." The witness who was called at the present trial to prove that the depositions of the accused person were taken in a judicial proceeding did, no doubt, in answer to a question put to him by the prosecution, say that a certain person named Belilios was a Jew. And it probably was important in that judicial proceeding for the one side or the other to show that Belilios visited the present prisoner's master. But if it was important, and if the one side or the other desired to ascertain the fact from the mouth of the present prisoner, it would seem that nothing could have been easier than to have asked the prisoner expressly whether Belilios did visit his master or not, and to have further made that question specific with regard to the time and occasion of the visit. But this course does not seem to have been taken; whichever side was interested in ascertaining the fact was content to take the answer. "My master had a Jew friend who visited him." And it is left to us to infer that when the prisoner was examined a second time, he discovered, in some way or other, that his answer, "My master had a Jew friend who visited him," was likely to prejudice Belilios, and that he, therefore, changed his story in this particular by saying, "I don't know whether my master has or has not a Jew friend." But obviously, at any rate, to one who has the slightest experience in the conduct of civil or criminal trials, this latter answer could have had no effect whatever in perverting the interests of justice; it could have only served to lead the more directly to the truth of the facts. I cannot conceive anything more likely than the behaviour of this witness, as alleged by the prosecution, to lead the Court entirely to understand the value of his evidence and the direction in which the truth lay. Indeed, prevarication of this sort is perhaps the commonest form in which a witness who is not truthful endeavours, almost invariably without success, to escape from the consequences which he imagines may proceed from his having already disclosed too much. The real effect of it, however, always is to further, and not to prejudice, the interests of justice. Unquestionably, conduct of this kind is dishonest. But it appears to me that the falsehood, the untruth such as it is, is of most insignificant character, and hardly rises to the level of deliberate perjury. If it was not for the facility of getting a conviction which is afforded by the particular form of charge employed against the prisoner in this case, I feel persuaded that the Courts would seldom think it worth while to take notice of petty dishonesty of this kind. The costs of the trial, and the expense to the public which will be incidental to keeping the prisoner in confinement, are not in any degree commensurate with the smallness of the offence. That these prosecutions are not maintained with a view to uphold a high moral tone in society and to vindicate the cause of truth seems apparent from the fact that Courts of Justice usually pass by substantial cases of deliberate perjury without the smallest effort at punishing it, or even any expression whatever of disapprobation of the crime. It is but a few days ago that this Bench had a case before it in which a Subordinate Judge had discredited three or four persons of respectable position in society; had come to the conclusion that they had conspired together with the plaintiff to make

out a fraudulent cause against the defendant, and had deliberately come into Court to perjure themselves, and to back their testimony by books and papers fabricated for the purpose of supporting this case; and he found his verdict according to that view of the facts; yet he expressed no sort of disapprobation of the conduct of these people. It never occurred to him that, if his judgment were not at fault, these persons ought to be put upon their trial for perjury; that the offence of which they had been, in his opinion, guilty was one of the most serious that could be committed in a civilized community, and ought on no account to be passed over and disregarded by those who are charged with the administration of justice; and instances of this kind constantly occur. It is not, as it seems to me, true zeal for the interests of justice and honesty which has given rise to the prosecution in this case; but it is simply the facility with which a conviction could be obtained against the prisoner for the small dishonesty of which he has been guilty in the matter of giving his evidence, which has led to his having been made to answer for his want of truthfulness in a Criminal Court.

On the whole, I am of opinion that the sentence of even six months' rigorous imprisonment is disproportionate to the offence of which the prisoner has been found guilty, and that it ought to be reduced. We find that he has already been suffering imprisonment for a period which somewhat exceeds two months; and I think that punishment is amply sufficient to meet the requirements of the case. I would, therefore, reduce the sentence to two months' imprisonment, and as that period has expired, I think the order of the Court should be that the prisoner be discharged.

Morris, J.—I agree in thinking that the verdict of the Jury and the conviction that has followed upon it should not be disturbed. It has been proved that, in the trial of Queen *v.* Humayoon Shah, Toolsee Dutt, and others, before the Deputy Magistrate, the prisoner made on solemn affirmation two statements. The first is in substance that "a Khottah, a "Jew, and Bengalees were his master the "Nawab Humayoon Shah's friends;" and the second, "that he did not know whether his em-"ployer, the Nawab, has or had any Jew friend "when he was employed in his house." The whole of the depositions of the prisoner in the trial were put in evidence before the Sessions Court. From these it appears that the prisoner himself admitted that the statement made by him in the first instance was untrue, and that he had willingly told an untruth. The reason he assigned for this was that he had been maltreated by the police. No evidence of such maltreatment to the extent of fear of his life, or indeed to any extent, was given by the prisoner in his defence; and, as pointed out by the Judge to the Jury, even if he did experience some maltreatment at the hands of the police, such maltreatment would not, under Section 94, Indian Penal Code, absolve him from the consequences of deliberately making a false statement. The Jury had the case clearly before them, and came to the natural conclusion that, on the second occasion of giving his evidence, the prisoner attempted to befriend and screen the Jew Belilios, who was then on his trial as an accomplice of the Nawab, and that he intentionally spoke falsely when he said that, so far as he knew, his master had no Jew friend.

There is, therefore, in my opinion, no ground in law for this appeal.

In the matter of the sentence I should have been disposed, after the conclusion arrived at by a Jury, not to interfere with the sentence passed by the Sessions Judge; but, under the particular circumstances of this case, I am not prepared to dissent from my learned colleague in commuting the sentence from six months' to two months' rigorous imprisonment.

The 22nd April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

High Court—Punishment—Enhancement—Act X. of 1872, Section 280.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of murder, voluntarily causing grievous hurt, &c.

The Queen

versus

Saffiruddi Palwan and another, *Appellants.*

The High Court, in exercise of the powers conferred on it by Section 280 of the Code of Criminal Procedure, altered the conviction in this case by the Sessions Judge from grievous hurt into one for murder, and enhanced the punishment accordingly.

Kemp, J.—In this case, three prisoners were committed to take their trial for the

murder of Somosdi, *viz.*, Noimuddi, Saffiruddi, and Bussiruddi. The Sessions Judge, in concurrence with the opinion of the Assessors, has convicted the prisoner Noimuddi under Section 325 of the Penal Code, and has sentenced him to be rigorously imprisoned for seven years, and to pay a fine of Rs. 100; the prisoner Saffiruddi, under Section 201—sentence five years; and has acquitted Bussiruddi on account of his youth, and because he believes that he acted under the coercion of his father, the prisoner Saffiruddi.

The Sessions Judge observes that he considers "that it has been established by "the evidence that the prisoner Noimuddi "caused the death of Somosdi by throttling "him," but he convicts him of "grievous hurt," because the body of Somosdi has not been found. In another part of his judgment, in remarking upon the case of the prisoner Saffiruddi, the Sessions Judge observes that it is clearly proved that this prisoner assisted Noimuddi to make away with the body of deceased, and from the circumstance of his death he, the prisoner Saffiruddi, must have believed that the offence committed was murder; but this is wholly inconsistent with the Judge's finding that Noimuddi has committed the offence of grievous hurt.

It appears clear to us, after a careful consideration of the evidence, that the prisoner Noimuddi is guilty of the offence of murder. It is proved that he went to the house of the deceased at night, and that there was a squabble and a struggle between the prisoner, the deceased, and the witness Hukima; that they were separated by the prisoners Saffiruddi and Bussiruddi; and that the whole party, including the deceased, then went to the house of Saffiruddi, where the deceased threatened the prisoner Noimuddi with reporting his conduct the next morning to their zemindar. Upon this, words ensued between Noimuddi and the deceased, when the former pressed the latter down upon a log of wood which was lying in the courtyard of the house, and throttled him. When it was found that Somosdi was dead, the witness Idrak, whose evidence before the Deputy Magistrate has been put in under Section 33, Act I. of 1872, was sent for and consulted as to what was to be done. After ascertaining that Somosdi was dead, he declined to have anything to do with the matter. Upon this, the body of the deceased was taken by Noimuddi, Saffiruddi, and Bussiruddi to a river, described by the Deputy Magistrate who committed the case as flowing near the house of the prisoner, and with a rapid stream, and thrown into it. The body has not been found, but from the evidence and the admissions of the two prisoners, Saffiruddi and Bussiruddi, before the Deputy Magistrate, it is clear that the dead body of Somosdi was disposed of as stated above.

We, therefore, think that this is a case in which we ought to exercise the powers conferred upon us by Section 280 of the Code of Criminal Procedure, and to alter the finding of the Court below, and also to enhance the punishment awarded by it. We convict the prisoner Noimuddi of murder under Section 302, and sentence him to be transported for life. We convict the prisoner Saffiruddi under Section 201, and inasmuch as he knew that the offence which was committed was punishable with death, we sentence him to seven years' rigorous imprisonment.

The 23rd April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Preliminary investigation—Criminal breach of trust—Act X. of 1872, Sections 64 & 69.

Reference to the High Court by the Officiating Joint Magistrate of Purneah.

The Queen

versus

O. J. Macdonald.

Moonshee Mahomed Youssuf for the accused.

The High Court, under Sections 64 and 69 of the Code of Criminal Procedure, directed the preliminary investigation in this case, in which the accused was charged with criminal breach of trust, to be held in Calcutta, the place where the offence charged was, if not wholly, at all events partly, committed.

Reference.—I HAVE the honor to forward the papers, and beg that you will place them with this letter before the High Court, with a view to an order being passed by that tribunal under Sections 64 and 69 of the Code of Criminal Procedure as to the district in which the complaint hereinafter mentioned should be tried and determined.

Rajah Sreenundun Kour Sing, of this district, has charged one Oliver Macdonald,

formerly in his employ, with criminal breach of trust with reference to Rs. 12,614-9-9, the proceeds of indigo belonging to the complainant. The complaint sets forth that, in Magh or January last year, the accused Macdonald took 150 maunds of indigo to Calcutta for sale through the indigo-brokers, Messrs. Thomas and Co.; that the indigo was duly sold, and realized Rs. 22,614-9-9, of which the accused has remitted to the complainant, his employer, only Rs. 10,000; that the express contract between the complainant and accused was that the total proceeds of the indigo were to be remitted in half notes to the complainant when the accounts had been made up; that accused, seven or eight days after he had returned to Calcutta to clear up accounts, telegraphed to complainant that the balance of the proceeds of the indigo had been stolen in transit by rail from Calcutta to Purneah; that the complainant, disbelieving this statement, charges accused with the criminal misappropriation of this sum of money.

The accused, in his statement before Major J. D. Parsons, Assistant Inspector-General of Railway Police, Lower Provinces, and Magistrate, first class, says that he booked Rs.12,000 in specie at Howrah Railway Station, paying Rs. 9-9 o freight at his own risk, and taking the boxes in the carriage with him; that a casual acquaintance, whom he had met at the Great Eastern Hotel, travelled with him as far as Burdwan, where this man alighted; that at Moharajpore Railway Station accused *first missed* the boxes *containing the treasure;* that he carried the money in specie, because he could not get notes from the Bank of Bengal, where he cashed certain cheques received from Messrs. Thomas and Co.; that he received no instructions from his employers to forward the money in half notes.

It appears that the principal evidence obtainable against accused are: 1st, the books and accounts of Messrs. Thomas and Co.; 2ndly, the books and accounts of the Bank of Bengal, where the money was received; 3rdly, the books and accounts of the Howrah Booking Office, where accused booked the specie. From the police-investigation it appears that accused made large purchases of jewellery from Messrs. Cooke and Kelvey shortly after he drew the money from Messrs. Thomas and Co., and also that he resided at the Great Eastern Hotel, where the police think that they can trace misappropriation of some of the complainant's money. It appears likely also that several Railway employés will be called, either for the prosecution or defence.

Under these circumstances, I am of opinion that, as most of the witnesses likely to be called are at present resident at Calcutta where they could attend with least inconvenience to themselves, the charge should be tried in Calcutta rather than at Purneah, more than 40 miles from the nearest Railway station, and the most extreme point where the charge could possibly be investigated. There is no specific instance of embezzlement mentioned, or even hinted at, as having occurred in Purneah itself, and though, strictly speaking, the case may be tried in Purneah, I would point out that the proper district for the enquiry and trial of offences is that where the witnesses could, with the least inconvenience, attend. I am requested to state that both the complainant and accused are both not only willing, but anxious, that the case be enquired into and tried in Purneah, and I am of opinion that it would not be wresting the law in any way to enquiry into the charge in Purneah, as the Counsel for defence points that, under Section 65, the "act omitted to be done" was the payment of the money to complainant, which should have taken place in Purneah. I may mention also that there is a charge preferred against the accused by the police of escaping from legal custody, and also of absconding to avoid service of warrant or summons. These charges, especially the latter, may, of course, be tried in Purneah. The first was committed in a journey from Burdwan to Purneah between the two stations of Moharajpore and Sahibgunj, when accused is stated to have thrown himself from a Railway-train, and the second was committed in the District of Purneah itself.

I might venture to suggest that the Howrah District Court would be the place where, all circumstances considered, the witnesses could, with least difficulty and expense, attend, and I would call your attention to the fact that, in case the accused be committed to stand his trial before the Court of Session, the witnesses for the prosecution certainly, and possibly also those for the defence, will have to appear twice in the District Courts, first during the enquiry previous to committal, and subsequently during the trial before the Court of Session.

Judgment of the High Court.

Kemp, J.—The Magistrate of Purneah has submitted the preliminary proceedings in this case to this Court under Section 69 of

the Criminal Procedure Code. So far as the proceedings in this case are concerned, no doubt arises as to the district in which the offence was committed. It seems clear to us, judging from the enquiries made by Major Parsons of the Railway Police, as well as the statement of the accused Macdonald, that the offence charged was wholly, or at all events partly, committed in Calcutta (*vide* illustration *e*, Section 67 of the Criminal Procedure Code). We think the Magistrate should send the accused to a Calcutta Magistrate, binding over, if necessary, the prosecutor and his witnesses to attend that officer's Court, and prosecute the charge.

The 25th April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Abkaree—Country-spirits—Act XXI. of 1856, Sections 48 & 90.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Jessore.

The Queen

versus

Koylash Boona and others.

To warrant a conviction under Act XXI. of 1856, Section 48, the accused must have manufactured some country-spirit made by the native process of distillation as described in Section 90 of the Act, or they must have sold spirituous or fermented liquors or intoxicating drugs.

Reference.—THE accused have been convicted by the Deputy Magistrate of Magoorah of having committed a breach of Section 48, Act XXI. of 1856, of illicit manufacture of spirits. The Deputy Magistrate's order shows, and the evidence establishes, that the spirit manufactured was puchweye. Puchweye is a fermented liquor, and unlicensed sale of it is prohibited by the Section above quoted, and unauthorized possession of more than a certain fixed quantity of it is made punishable under Section 49. It is not, however, a country-spirit, as defined in Section 89, Act XXI. of 1856, and therefore it is not a country-spirit, the manufacture of which is prohibited under Section 48. Indeed, it is a well-known excise rule that the liquor may be manufactured for home-use.

The order of the Lower Court has been a fine with imprisonment in default. As the act which the prisoners on the evidence committed, and of which they have been convicted, does not amount to an offence in law, the conviction should be reversed: the fines, if realized, returned; and the sentences of imprisonment in default cancelled.

Mr. Deare, the Deputy Magistrate, has submitted an explanation which I forward. It appears to me to be in no way to the point. Mr. Deare says that the spirit, nominally puchweye, was really a country-spirit of sufficient potency to intoxicate; that it is not a simple product of vinous fermentation, but is strengthened by the admixture of numerous ingredients used by the distillers in the manufacture of distilled spirit: all this is foreign to the point. He admits that it is not manufactured by any process of distillation, and thus admits that it is not a country-spirit, as that term is used in the Section under which the conviction has been had.

Mr. Deare suggests that the excise-revenue may suffer if the conviction be quashed. This is not a reason which, it appears to me, it is open to us to consider. The law, as I have above indicated, places certain restrictions on the liquor, and these the Excise Department may legitimately use. The Deputy Magistrate says he has ascertained that the spirit is manufactured for sale: such sale may be punished, and possession of more than the authorized quantity may be punished also, and this will go a far way to stop such sale if it exist, but beyond the law we cannot go. I think that the conviction should be quashed. If it be found necessary to take stronger measures to protect the revenue, it will be for the Government and the Legislature to amend this law, and not for the judicial tribunals to treat as offences what the law sanctions.

Judgment of the High Court.

Kemp, J.—The conviction under Section 48, Act XXI. of 1856, is illegal, and must be set aside.

The accused did not manufacture any country-spirit which is described in Section 90 of the Act "as any spirit made by the native process of distillation," nor did they sell any spirituous or fermented liquors or intoxicating drugs.

The fines, if realized, must be refunded.

The 8th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contraband salt—Act VII. of 1864.

(Miscellaneous Case.)

Gungadhur Sahoo and two others, *Petitioners.*

Mr. W. C. Bonnerjee and *Baboo Bhoyrub Chunder Banerjee* for the Petitioners.

In a case of conviction, under Act VII. of 1864, of having in possession contraband salt, the penalty cannot be inflicted on the owner of the salt, and also on the servant or gomashta of the owner who has the salt in his possession, as the possession of the latter is the possession of the former.

Kemp, J.—THESE three parties have been convicted under Section 17, Act VII. (B.C.) of 1864, the Salt Act. Gungadhur Sahoo has been fined Rs. 817-8 at the rate of Rs. 5 per maund on 163 maunds 20 seers of salt in excess of the quantity covered by the rowannahs. Banchanidhi Sahoo has been fined Rs. 380 on an excess of 76 maunds at the same rate, and Dudhee Sahoo, the gomashta of Gungadhur Sahoo and Banchanidhi Sahoo, has been fined in two sums of Rs. 817-8 and 380. The case was sent for by Justices Phear and Morris, notice having been given to the Magistrate and also to the Government pleader, who informs the Court that he has received no instructions. The grounds upon which this application was made are contained in the third ground in the petition of application, namely, that, assuming the conviction to be right, an offence under Section 17 of Act VII. (B.C.) of 1864 is one which may be committed by two or more persons jointly, and is not an offence which is several in its nature. The penalty, moreover, not being a fixed sum, but varying according to the quantity of salt held to be contraband, the full amount of fine which may be imposed under the law ought not to have been imposed upon both Gungadhur Sahoo and Dudhee Sahoo in the one case, and upon both Banchanidhi and Dudhee Sahoo in the other. The learned Counsel who appears for the petitioners has called our attention to a decision to be found in Volume VII., Bombay Reports, p. 39, in which it was held by the Full Bench of that Court in a somewhat analogous case under a Bombay Act, with reference to contraband opium, that, where one or more persons are concerned in an offence coming under the provisions of that Act, the offence being one, there ought to be only one penalty, and only one fine should be levied. In this case, which comes under Section 17, Act VII. (B.C.) of 1864, it appears that the person who was in possession of this salt was the gomashta Dudhee Sahoo, and his possession, he being admittedly the servant of Gungadhur Sahoo and Banchanidhi Sahoo, was on their account, and, therefore, within the meaning of the Act, the possession was that of Gungadhur Sahoo and Banchanidhi Sahoo.

We think that the offence being one, and the sum in which the parties are liable to be fined not being a fixed one, being, of course, as stated in the grounds of appeal, liable to vary according to the quantity of salt, the Magistrate was wrong in law in fining both Gungadhur Sahoo and Dudhee Sahoo in the one instance, and Banchanidhi Sahoo and Dudhee Sahoo in the other instance. We therefore quash that portion of his decision which fines Dudhee Sahoo in the sums of Rs. 817-8 and 380 respectively, and direct the amount, if paid, to be refunded. The fines imposed upon the other petitioners, Gungadhur Sahoo and Banchanidhi Sahoo, will stand.

The 25th April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Breach of the peace—Security—Procedure.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Gya.

Dilloo Singh

versus

Ootim Singh and others.

In a case in which the accused were charged with unlawful assembly and trespass, the Magistrate acquitted the accused, but eventually ordered the parties to execute bonds and furnish security, refusing to take further evidence, and relying on the evidence which had been given before him in the original case in the presence of the accused.

HELD that the proceedings were irregular; the order was accordingly set aside.

Reference.—I HAVE the honor to submit, for the consideration of the Court, the record of this case, and to recommend that the orders of the Joint Magistrate of the

16th January, directing that the parties whose names are given in the margin shall be bound over to keep the peace, be set aside.

Dilloo Singh, Ootim Singh, Ruttoo Singh, and Lal Behary Singh.

The circumstances of the case are as follow: One Dilloo Singh charged Ootim Singh and others before the police with unlawful assembly and trespass; the case was enquired into, and the accused were sent up for trial. On trial, the Joint Magistrate acquitted the accused, but at the same time ordered that all the parties, complainant as well as accused, should be required to show cause why they should not be bound over to keep the peace. This order was passed on the 14th January, and by it the 16th was fixed as the day for hearing. The parties appeared upon that day, and presented petitions setting forth the reasons why they should not be bound over; at the same time, they applied to have witnesses summoned and examined in support of their statements. The Joint Magistrate, however, declared that, in his opinion, the taking of further evidence was unnecessary, and at once ordered the parties to execute bonds and furnish security.

These orders of the Joint Magistrate appear to me to be illegal, inasmuch as they were not passed after adjudication upon evidence taken before him. The Joint Magistrate would at first seem to suppose himself to have been acting under the provisions of Section 489 or 490 of the Code of Criminal Procedure; but he clearly was not so. Those Sections provide for the taking of bonds and securities to keep the peace from parties who have already been convicted, but here there was not only no conviction of any of the parties, but one of them was actually the complainant in the original case. Under those circumstances, it was undoubtedly the duty of the Joint Magistrate to follow the course prescribed by law (Section 491 and following) as that to be adopted in cases in which a breach of the peace may be apprehended on grounds independent of any previous proceedings in the Courts; to have heard such evidence as the parties may have had to offer; and to have pronounced judicially upon the same before requiring bonds or security. This he clearly did not do, and his proceedings consequently appear to me to be illegal and liable to be quashed as such.

The Joint Magistrate is of opinion that he was at liberty to make use of the evidence recorded in the original case, it having been taken in the presence of the accused. He writes: "This is specially "allowed under Section 489 in cases of a "conviction for the substantive offence; "the evidence is, therefore, legal evidence in "cases under Section 492." I confess I am unable to follow this reasoning; the inference I should have thought ought rather to have been the other way. Especially will this argument not apply to the case of Dilloo Singh, who, as I have already said, was the complainant on that former occasion. The Joint Magistrate's reference to Section 515 is obviously made under a misapprehension of the provisions of that Section, which have nothing whatever to do with the manner in which witnesses shall be produced before the Court, but merely prescribe the manner in which their evidence shall be recorded.

I submit that the proceedings of the Joint Magistrate in the matter of taking security to keep the peace are altogether irregular and illegal, and ought to be quashed.

Judgment of the High Court.

Kemp, J.—The Judge's view of the case is correct.

The order of the Joint Magistrate must be quashed as illegal.

The 28th April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Sub-Registrar—Public officer—Court—Judicial proceedings—Jurisdiction—Contempt of Court—Act XLV. of 1860, Section 228—Act X. of 1872, Sections 435 & 436, & Chapter XXXII.

(Miscellaneous Case.)

Sardharee Lâl, *Petitioner.*

Mr. M. L. Sandel and *Baboo Doorga Mohun Dass* for the Petitioner.

A Sub-Registrar is a public officer; his proceedings are judicial proceedings within the meaning of Section 228 of the Penal Code; and his Court is a Court within the meaning of that word in the Evidence Act.

In cases under Section 228 of the Penal Code, the Court in which the offence is committed is to try the offence, but the procedure is to be restricted by the provisions of Chapter XXXII. of the Code.

Where, in a case under Section 228, the Sub-Registrar, before whom the offence was committed, did not proceed under Section 435 or Section 436, it was held that a Magistrate had no jurisdiction.

Kemp, J.—THIS is a very petty case, but several points of law have been raised in the course of the argument which must be decided. The accused is a pleader of the

Bhaugulpore Court. The Sub-Registrar of that place brought a charge against him under Section 228 of the Indian Penal Code, and the Assistant Magistrate has fined the petitioner, the pleader, Rs. 10. The Assistant Magistrate says that the pleader has in words admitted the offence—that he reasoned unbecomingly with a public servant in the course of a proceeding, which the law says shall be held to be a judicial proceeding, and threatened to publish his conduct in the newspapers—a speech most unbecoming to make in his presence. The Assistant Magistrate regrets that he should have to punish a man in the accused's position, and therefore thinks that a nominal fine of Rs. 10 will meet the requirements of this case. It is now contended in this Court that the conviction is illegal, inasmuch as, if the Sub-Registrar be considered to be a public officer, and if his proceedings be considered to be judicial proceedings, and if he is to be considered to be a Court, then the Assistant Magistrate had no jurisdiction, inasmuch as the said Sub-Registrar did not proceed under Sections 435 and 436 of the Criminal Procedure Code; and there is also an objection that the Magistrate has not examined the witnesses of the accused, or given him an opportunity of adducing any evidence on his behalf.

We think that there can be no doubt that the Sub-Registrar is a public officer; that point is clear under the Registration Act. We also think that the proceedings of a Sub-Registrar are judicial proceedings within the meaning of Section 228 of the Penal Code. That also is set at rest by the Registration Act, Section 82. Then, on turning to the Criminal Procedure Code, we find that offences under Section 228 are triable by the "Court," using the word "Court" generally, in which the offence was committed, subject to the provisions contained in Chapter XXXII.; that is to say, the Court in which the offence is committed is to try the offence, but that the procedure is to be restricted by the provisions of Chapter XXXII. Now, in the new Evidence Act, a "Court" is described thus: "A Court includes all Judges and "Magistrates, and all person, except "arbitrators, legally authorized to take evi-"dence." There is no doubt that he Sub-Registrar under the Registration Act is legally authorized tto take evidence, and therefore his Cour is a Court under the interpretation put upon that word by the Evidence Act; and Schedule IV. to the Code of Criminal Procedure, column 7, says that an offence under Section 228 is triable by the Court in which the offence is committed under Chapter XXXII., Section 435. Now, Section 435 refers to offences under several Sections, and, amongst other offences, to offences under this very Section 228 of the Indian Penal Code, and enacts that the Court may take cognizance of such offences, and adjudge the offender to punishment by fine not exceeding Rs. 200, and, in default of payment, by imprisonment in the civil jail for a period not exceeding one month, unless such fine be sooner paid, and that, in every such case, the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence. Then Section 436 goes on to say that, if the Court in any case considers that the person accused of any such offence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding Rs. 200 should be imposed upon him, such Court, after recording the facts constituting the offence and the statement of the accused person as before provided, shall forward the case to a Magistrate. Now, in this case, the Sub-Registrar has proceeded neither under Section 435 nor under Section 436. We think, therefore, that the Assistant Magistrate had no jurisdiction in the case. We quash his order, and direct the fine to be refunded.

Birch, J.—I concur.

The 28th April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

High Court—Sanction to prosecute—False evidence—Act X. of 1872, Section 468.

(Miscellaneous Case.)

Money Mohun Dey, *Petitioner,*

versus

Dinonath Mullick, *Opposite Party.*

Mr. S. J. Leslie for the Petitioner.

Baboo Bhowanee Churn Dutt for the Opposite Party.

In a case in which the High Court was asked, under Section 468, Code of Criminal Procedure, to sanction a prosecution for giving false evidence of a plaintiff in a suit before a Small Cause Court, which Court had refused such leave to defendant, it was held that the High Court would

not be justified in exercising the discretion vested in them by Section 468, unless it appeared very clearly that there were strong grounds for granting the sanction.

Kemp, J.—THIS is an application on the part of the petitioner before us, who was the defendant in a case before the Small Cause Court Judge of Sealdah, for sanction to prosecute the plaintiff in that case, Dinonath Mullick, under Sections 210 and 193 of the Indian Penal Code; under Section 210, for fraudulently obtaining a decree for a sum not due, or for a larger sum than the amount due; and, under Section 193, for giving false evidence. The Small Cause Court Judge has refused to give sanction for the prosecution, and the petitioner, Money Mohun Dey, has, therefore, applied to this Court to exercise the powers vested in it by Section 468 of the Code of Criminal Procedure, which lays down that an offence committed under Section 193 of the Indian Penal Code shall not be entertained in any Criminal Court, except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate. It has been conceded by the pleader on the other side that the Small Cause Court Judge is subordinate to this Court. The question, therefore, is whether, in the exercise of our discretion, we ought to sanction this prosecution. Now, on referring to the decision of the Small Cause Court Judge in the suit, we find that he lays down these issues, namely, whether the promissory note was executed, and whether the payment of Rs. 15 was made on account of the debt, or on account of the costs. He goes into the evidence on these two points, namely, as to the execution of the promissory note, and as to whether the Rs. 15 were paid on account of costs or on account of the debt, and on balancing the evidence and probabilities he is inclined to hold that the promissory note was given by the defendant and accepted by the plaintiff, and that the payment of Rs. 15 was not on account of costs, but on account of the debt. He says, in commenting upon the evidence, that the evidence of Rajchunder Dey may not have been altogether satisfactory and convincing, but that he sees no reason to doubt the witness Dhurneedhur, who made the payment of Rs. 15, and endorsed the same on the promissory note. Then he takes into consideration the probabilities of the case, and says that it is not probable that this payment would have been made without some entry or acknowledgment. Then, with reference to the evidence of the vakeel Khetter Mohun Biswas, he says that, although it is entitled to credit, it does not show that he was an attentive observer of all that passed between the plaintiff and defendant at the time of the compromise, or sufficiently acquainted with the facts to be a competent witness. Therefore, it is very clear from this commentary of the Judge upon the evidence that his finding that the promissory note was given was arrived at on a balance of evidence, and that there was no decided preponderance in favor of the defendant in the case; and then, when he is applied to for sanction to prosecute, he also says that, in deciding the suit, he found upon the greater weight of the evidence and upon the probabilities of the case that the promissory note was executed, but at the same time he says that he does not think there was any fraudulent motive on the part of the opposite party in bringing the suit, and that the evidence given by the petitioner was not so overpowering and free from all taint as to render a conviction in the Criminal Court probable. He, therefore, seems to have exercised a proper discretion in the matter, and unless we were shown very clearly that there were strong grounds for granting our sanction, when the Court in which the alleged offence was committed, and who was in a better position than we are to judge of the motives of the parties and of the weight of the evidence given by them, has refused to do so, we should not be justified in exercising the discretion vested in us by Section 468. The rule must be discharged.

The 6th May 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Compensation—Charge—Acquittal—Act X. of 1872, Sections 209, 211, & 220.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Midnapore.

Radhanath Panja

versus

Wooma Churn Chowdhry and another.

Where a formal charge has been drawn up, and the accused tried and acquitted, the acquittal should be one under Section 220, Code of Criminal Procedure, and not under Section 211, and therefore no compensation can be awarded to the accused under Section 209 in such a case.

Reference.—A COMPLAINT of theft of standing rice was made before the Deputy Magistrate of Gurbetta on the 16th October 1873. The defence was, as usual, a claim to the land and crop in question. A local enquiry was ordered, and as the Deputy Magistrate was expecting to visit that part of the country himself, he delayed the case till he went there. In this way, various delays occurred, and finally the Deputy Magistrate heard the evidence for the prosecution at Gurbetta, and drew up a charge on the 9th March under Section 379, Indian Penal Code.

Immediately afterwards, the Deputy Magistrate was transferred to Behar on famine-work, and the case came into the hands of Baboo Gossain Das Dutt, a temporary Deputy Magistrate employed in relieving distress in the neighbourhood where the alleged offence was committed, who has been vested with third-class magisterial powers.

His decision, copy of which I append, will show that he held a local enquiry, and took some trouble with the case, which resulted in the acquittal of the accused.

The irregularity, or rather illegality, which forms the subject of this reference is that, instead of acquitting under Section 220, Criminal Procedure Code, as the Deputy Magistrate should have done when a charge had been drawn up, he acquitted under Section 211, and thus, treating the case as a summons-case, awarded the accused Rs. 50 compensation under Section 209.

Had he acquitted under Section 220, he could not have made this award.

If the High Court consider the illegality established, it is further desirable that they should quash the order, because it cannot, I submit, be regarded as a judicious one.

The case was not free from difficulty. The first local enquiry held by the canoongo resulted in favor of the complainant. The Deputy Magistrate of the Sub-division was himself sufficiently impressed with the evidence for the complainant to draw up a charge. Even the chief witness, on whom the officer who subsequently passed the order of acquittal relies, stated that the complainant had cultivated the land during the last preceding year. It was not, therefore, a case in which the power conferred by Section 209 ought, it appears to me, to have been resorted to, even were it legal.

Decision of the Deputy Magistrate.

This is a complaint of theft and criminal trespass against the talookdar of the village of Konkabutty. The complainant, a ryot, states that, on the 27th of Assin last, the accused Wooma Churn Chowdhry, with his six servants, were cutting away his paddy during the night, and that he came to know of this suddenly when he was going to call a physician for his wife that very night; he immediately rebuked the accused, but was abused, and through fear kept himself at a distance, and cried for help. On this, some fourteen or fifteen persons came out, and saw the accused cutting the paddy; but at the same time he states that they will not give their evidence in his favor. He then cites Jagannath Bagdi, Sreeram Pal, and Kali Santh as his principal witnesses; but none of these were examined in the first instance. I received the case when the prosecution was finished, and the evidence for the defence was called for. The accused Wooma Churn pressed me very much for a local enquiry; but as the case had once been investigated by the canoongo, I refused to investigate the same again. A few days after, the complainant also agreed to a further investigation being made; and as I was about to proceed to those places for other business, I consented to investigate the case locally myself. Before I took up the case, the prosecutor produced two witnesses only, one Dinonath Rai, whom he had brought to the Court to speak in his favor, and the other Rajaram Ghose, a recorded badmash. On the other hand, the defendant produced constable Montaroodin as his principal witness. This constable had been deputed to the village to keep peace with regard to another piece of land between the same parties on the same date, and he states that, on the day of the occurrence, he was on the spot, and heard nothing about the present theft. The other witnesses are the defendant's servants and ryots, whom the Court can either believe or disbelieve according to circumstances. There are two parties in the village, in one of which Wooma Churn Chowdhry is the leader; the other party is very strongly headed by Ram Taruck Barik and the Roy family of Gohaldanga, and several cases were instituted in the Civil Courts for dispossessing Wooma Churn from his landed property. Some of these cases are still pending in the High Court, and during the last year no less than seven cases were instituted against Wooma Churn in the Criminal Courts. In a village where such strong party-feeling exists, it is very difficult to ascertain which party is right, and which is in the wrong. I therefore enquired of everybody, and tried to find out witnesses who would give

me the truth, and therefore examined Shiboprosad Acharjee, talookdar of a portion of the village; and his deposition shows that the land in question was in possession of Wooma Churn for a long time, and that he did not pay any rent for the same, but says that it was cultivated by the complainant last year; there is only one wall between the disputed land and the house of Wooma Churn: the land is a long strip of ground outside the wall of Wooma Churn, half of which the complainant claims; the other half he would not say whose, or even feign to know to whom it belongs. Moreover, the complainant was the servant of Wooma Churn, and has been dismissed for about a year or two. Besides Shiboprosad, I examined Kali Santh, whom the complainant had cited as his witness in the first deposition, Nanda Rai, Sreenath Rai, Haro Bhandari, Anundo Pakhira, Ram Chand Bhandari, and several others who passed along the road while I was enquiring, and they all said that the land was Wooma Churn Chowdhry's, and that he had always cultivated the same. Under these circumstances, I am inclined to think that the case is a false one got up by the Gohaldanga party to put Wooma Churn in difficulty, and consequently dismiss the same as a vexatious one, and acquit Wooma Churn and Basdeb Bagdi under Section 211, Criminal Procedure Code. Further, I do not at all believe that Wooma Churn did cut paddy during the night. Considering the position of the disputed land and the house of Wooma Churn, and his position as talookdar of the greater portion of the village, it was not at all necessary for him to cut away the paddy during the night; and in my opinion a simple dismissal of a false and vexatious charge is not sufficient remedy for others to deter others from the same, and therefore award that the complainant Radhanath Panja shall pay to the accused Wooma Churn Chowdhry a sum of Rs. 50 as compensation, and in default of payment shall undergo imprisonment in the civil jail for a period of thirty days. The fine to be realized under Section 209, Criminal Procedure Code.

The Court finds that the complaint of Radhanath Panja is not proved, acquits Wooma Churn Chowdhry and Basdeb Bagdi, and directs that they be discharged.

Judgment of the High Court.

Markby, J.—We agree with the Magistrate that the order of the Deputy Magistrate was illegal, and direct that it be set aside.

The 9th May 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch.
Judges.

Evidence—Oath—Child—Irregularity—Further charge—Accused—Cross-examination—Act I. of 1872, Section 318—Act X. of 1872, Section 283—Act X. of 1873, Section 13.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Patna, on a charge of attempt at murder.

The Queen

versus

Mussamut Itwarya, *Appellant.*

Mr. Collis and *Baboo Kalikishen Sein* for the Appellant.

The evidence of a child of immature age—who the Sessions Judge considered understood the questions which were put to her, and who was, therefore, a competent witness under Section 318 of the Evidence Act—taken by the Sessions Judge on a simple affirmation, because she was not aware of the responsibility of an oath, was held to be admissible as evidence under Section 13 of the Oaths Act X. of 1873.

Case of Dwarkanath Dutt (7 W. R. 151), which ruled that a Court before which a second trial is held has nothing to do with the evidence given in the former trial except for the purpose of ascertaining whether the offence in the two trials is the same, followed.

A prisoner originally charged with an offence under one Section (302) and acquitted of that charge was committed, the day following that on which she was acquitted, for trial under another Section (307), without any witnesses being examined on the charge under Section 307, and without having any opportunity of cross-examining the witnesses on the first charge with respect to the second charge. HELD that the irregularity was one which was not covered by Section 283, Code of Criminal Procedure, and that the prisoner had been prejudiced thereby in her defence. The trial under Section 307 was accordingly quashed, and a new trial ordered.

Kemp, J.—THIS prisoner has been convicted under Section 307 of the Indian Penal Code, and has been sentenced to transportation for ten years. The trial was by Jury. The points taken are, *1st*, that the Judge was wrong in not permitting the Jury to refer to the evidence in a case in which this prisoner was committed for an offence under Section 302, and of which she has been acquitted, inasmuch as the evidence in both trials is the same, and refers to the same occurrence and to the same party accused; *2nd*, that the evidence of the witness Ramkooeree is not legal evidence, as Section 318 of the Evidence Act does not obviate the necessity of an oath or solemn affirmation.

Another point of law has been taken before us by the learned Counsel who appears for the prisoner, namely, that no preliminary

enquiry was held by the Joint Magistrate with reference to the charge of an offence under Section 307; that the prisoner was not put upon her defence upon that charge: and that she has been prejudiced by this irregularity in the procedure, inasmuch as she had no opportunity of cross-examining the witnesses on this charge, and has been deprived of the benefit of testing the accuracy of their evidence by comparing their depositions in the Sessions Court with the evidence which they gave before the Joint Magistrate.

With reference to the objection taken as to the inadmissibility of the evidence of the girl Ramkooeree under Section 15 of Act II. of 1855, the old evidence law, this evidence would have been admissible. Section 15 enacts that "any person who, by reason of immature age or want of religious belief, or who, by reason of defect of religious belief, ought not, in the opinion of the Court, to be admitted to give evidence on oath or solemn affirmation, shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth—the whole truth—and nothing but the truth." Now, in this case, Ramkooeree is a child of immature age; she has been examined on simple affirmation, and her evidence would have been admissible under Act II. of 1855. We have now to consider whether, under the new law, her evidence is admissible. Under Section 318 of the Evidence Act, this little girl is a competent witness, for the Court below has considered that she understood the questions put to her, and was able to give rational answers to those questions; but it has been contended that, although she is a competent witness, her statement is inadmissible, inasmuch as it is not a statement on oath or solemn affirmation, and we have been referred to Act X. of 1873. Section 5 enacts that oath or solemn affirmation shall be made by the following persons—namely, all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having, by law or consent of parties, authority to examine such persons or to receive evidence. The learned Counsel, therefore, contends that, inasmuch as this girl has not been examined on oath or solemn affirmation, her evidence is inadmissible; but, under Section 13 of the same Act, it is enacted that "no omission to take any oath or make any affirmation, any substitution of any one for any other of them, and any irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth." Now, it is clear that, in this case, the Sessions Judge, being of opinion from the answers given by this little girl that she was not aware of the responsibility of an oath, examined her on simple affirmation. Therefore, the omission to examine the witness on oath or solemn affirmation was an omission which was knowingly made by the Judge; and it cannot be said that, because the omission was knowingly made, it renders the evidence inadmissible under Section 5, for Section 13 says that no omission of any kind, whether made knowingly or otherwise, shall render the evidence of a witness inadmissible. We therefore do not think, on the first point, that the child's evidence was inadmissible, and the Judge has properly left the amount of credibility to be attached to her evidence to the consideration of the Jury.

Then with reference to the second point, namely, that the Judge ought to have allowed the Jury to refer to the evidence of the former trial for murder in which this prisoner was acquitted, we observe that the Judge, in his charge to the Jury, remarked that "that case was not before them, and that they must be governed solely by the evidence in the case before them," that is, the present case, in which the prisoner is charged with an offence under Section 307. With reference to this point, we would refer to the remarks made by the late Chief Justice, Sir Barnes Peacock, in the case of Dwarkanath Dutt, to be found in Volume VII., Weekly Reporter, p. 15, Criminal Rulings, to the effect that a Court before which a second trial is held has nothing to do with the evidence given on the former trial, except for the purpose of ascertaining whether the offence which formed the subject of the first trial is the same as that which forms the subject of the second charge. If the offence is the same, the former conviction or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given in the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding that the evidence given in the two cases is the same; and the Court, whether the same as that which tried the prisoner for the first offence or a different Court, is bound

to apply its own judgment to the evidence before it, and to give a verdict according to its own conviction. Now, in this case, it is clear that the offence is not the same on which the prisoner Itwarya had been committed on a charge of murder of the boy Jugurnath under Section 302. In the present case, she is committed on a charge of attempting to murder the girl Ramkooeree under Section 307; and therefore we do not think that the Judge was wrong in that part of his charge to the Jury.

Then we come to the third point, and we think that there must be a re-trial for the following reasons. On the 31st of December 1873, the Officiating Joint Magistrate of Patna drew up a charge against the prisoner Itwarya, charging her with the murder of Jugurnath under Section 302. The prisoner was called upon to enter upon her defence; she did so, and on the same day, namely, on the 31st of December, a charge was drawn up, and she was committed on that charge alone, and she was acquitted of that charge on the 6th of February. On the 7th February, we find that the Magistrate adds the following remarks to his former judgment or reasons of committal, *viz.*: "Mussamut Itwarya is also committed to take her trial before the Sessions Judge on a charge of attempting to murder the girl Ramkooeree under Section 307." The prisoner Itwarya was not put upon her defence; no witnesses were examined with reference to the second charge under Section 307; and all that was done was to ask her on the 7th of February whether she wished to examine any further witnesses before the Sessions Judge, on which date she intimated that she did not require any further witnesses to be sent for, but would examine the witnesses she had already named on the former charge. Now, under Section 283 of the Code of Criminal Procedure, no finding or sentence passed by a Court of competent jurisdiction can be reversed or altered on appeal on account of any error or defect either in the charge or in the proceedings on or before the trial, or on account of the improper admission or rejection of any evidence, or by any misdirection in any charge to a Jury, unless such error or defect has occasioned a failure of justice, either by affecting the due conduct of the prosecution, or by prejudicing the prisoner in her defence. Now, in this case, it is clear that the procedure in the Joint Magistrate's Court has prejudiced the prisoner in her defence. She has not had the opportunity, which she ought to have had, of cross-examining the witnesses, and in this case there were none examined in the matter of the charge made against her under Section 307. We therefore think that, looking to the irregularity in the proceedings of the Joint Magistrate in this case, the trial of the prisoner Itwarya on a charge under Section 307 of the Indian Penal Code must be quashed. The Joint Magistrate will be directed to hold a preliminary enquiry according to law, giving the prisoner an opportunity of cross-examining the witnesses who may be adduced in support of the charge under Section 307; and if he is satisfied with that evidence, he can recommit her to take her trial in the Sessions Court. The Magistrate will be directed to proceed at once with the new trial.

The 18th May 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Sanction to prosecute—Act X. of 1872, Section 469.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of fraudulently using as genuine a forged document.

The Queen

versus

Subal Chunder Gangooly, *Appellant.*

The Court declined in this case to say, under Section 469 of the Code of Criminal Procedure, that a conviction was bad, because the Judge who tried the case, and the Judge who sanctioned the criminal proceedings, was the same person.

Markby, J.—With regard to the first point that has been taken under Section 469, no doubt, it is very undesirable that the same Judge who has heard the evidence, and expressed an opinion upon the evidence in the civil case, should also be the Judge who tries the prisoner upon a charge arising out of the civil case supported by the same evidence. But we do not think we should be justified in saying that, under Section 469, the conviction is bad, because the Judge who tries the case, and the Judge who sanctioned the criminal proceedings, is the same person. In some cases, that may be inevitable.

With regard to the facts of the case, no doubt, the prisoner has throughout consistently maintained that this is a genuine

document, but the Judge and the assessors who heard the evidence have believed the statement of the Rajah and the witnesses who supported him, that this document was never executed by the Rajah, and we should not be justified, when the question depends entirely upon the credibility of the witnesses, in interfering with that finding.

The appeal must be dismissed.

The 26th May 1874.

Present :

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Rioting—Common object—Act XLV. of 1860, Sections 447 & 453.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of rioting armed with deadly weapons, &c.

The Queen

versus

Gholam Mahomed and others, *Appellants.*

Mr. C. Piffard for the Appellants.

It is necessary, before persons can be convicted of rioting, &c., under Sections 447 and 453, Penal Code, to ascertain clearly that they have taken such a share in the transaction as will bring them within the criminal charge; and it must appear on the evidence that they had a common object, which common object they were going to carry out by unlawful means.

Markby, J.—The charges upon which the prisoners have been convicted in this case are under Sections 147, 149, 447, and 453 of the Indian Penal Code. Now, as to the particular parts of the case which might bring the prisoners under Sections 447 and 453, I will notice that presently. It seems to us that the most important part of this case is to ascertain how far the three prisoners at the Bar can be made responsible in this case, upon the ground that they have acted with a common object, that common object being unlawful or intended to be accomplished by unlawful means. Now, the common object with which the Judge considers that they have acted is (as stated by him) the arrest of the men who were supposed to have beaten the khansama in the employ of Captain Browne, whose servants the prisoners also are. That only brings the prisoners within either Section 147 or 149, if that common object was intended to be carried out by one of the modes specified in Section 141, namely, that they intended to arrest these persons (because that is the only part of that Section which would apply to this case) by resorting to some criminal trespass, or by using some criminal force. In all cases of this description, it is, no doubt, somewhat difficult to ascertain the precise share which each person takes in the transaction, but nevertheless it is necessary, before we can convict these prisoners, to ascertain clearly that they have taken such a share in this transaction as will bring them within that criminal charge. Now, they were, as I have said before, servants of Captain Browne, and it appears that Captain Browne, being encamped at the opposite side of the river to the bazar where his khansama was, received intelligence that his khansama had been severely ill-treated, and whether or no that was a matter in which the khansama may have been to blame, as the Judge says, is not important. There can be no doubt that Captain Browne did receive that information, and that he had no reason to doubt that that information was true, nor in the inception of the proceedings does there seem to be anything but what was perfectly natural and reasonable in the conduct of Captain Browne or his servants. All that he did was this; he crossed over the river accompanied by the prisoners. It is very natural under the circumstances that he should have them with him, and the Judge apparently thinks (and we have no reason to doubt that he is right) that the first intention of Captain Browne was to apply to the police. It appears that, very shortly afterwards, Captain Browne and the prisoners reached the other side of the river, the police-constable Sharafat Khan did come up, and that a large body of persons were collected, who are called the bazar-people, that is, the people hostile to the khansama; that they were armed; that they spread in different directions; and that a large majority of them went towards the place which is called the naib's cutcherry, where the important part of the occurrence, so far as these prisoners are concerned, took place. Now, the Judge has thought it right to make some observations upon the conduct of

Captain Browne in coming to the cutcherry. It is no part of our duty here to consider in any way whether Captain Browne acted prudently or imprudently. Our duty is solely confined to considering the conduct of the prisoners, and it appears to me that the prisoners, in following Captain Browne to the cutcherry, Captain Browne being at that time accompanied by a responsible police-officer, cannot, at any rate, whatever opinion a person might form of the conduct of Captain Browne, be considered as having done anything more than what all men might be expected to do under the circumstances. They were acting under their master's order, and their master was accompanied by a police-officer. Therefore, it cannot for a moment be supposed that they could contemplate that anything unlawful was to be done by them. There is considerable evidence as to what took place at the time; but the only evidence which bears in any way upon the charges against these prisoners is the evidence of Sharafat Khan, the head-constable, and that evidence has been disbelieved in most important particulars by the Judge himself, and inasmuch as even the very small part of it which relates to the prisoners is flatly contradicted by Captain Browne, we have not the slightest hesitation in accepting Captain Browne's account in preference to that of Sharafat Khan. We have not the least doubt that the account which Captain Browne has given as to what part the prisoners took in this matter is a true account, and we entirely accept it. What he says is this; he denies the assertion of Sharafat Khan that his men went inside; he says that he gave them a strict order not to go inside, speaking in the Persian language, which they understood; and that he himself, for what he considered to be sufficient reason, did go inside the house, leaving his men outside. We are not, as I have said before, to consider whether Captain Browne was right or wrong in going to the inside of the house, and we desire it to be distinctly understood that we express no sort of opinion one way or the other on that point. The point we have to consider is whether or no these prisoners have committed the offence with which they are now charged. Taking, as I have already said (and I think we undoubtedly ought to do so), Captain Browne's account as a true one, it is perfectly clear that these persons never went inside of this house at all. The result is that we have simply these facts against these persons. They are the servants of Captain Browne, and they accompanied their master to the naib's cutcherry for the purpose, apparently, of assisting the police in arresting the persons by whom the khansama was then said to have been beaten.

It seems to me that, on that evidence, there is nothing at all upon which we can say that they have had any common object, which common object they were going to carry out by any unlawful means whatever. In all probability, not speaking the language of the country, they may have only got imperfect information as to what was being done. But their duty was to obey their master's order; and they did so. Whatever Captain Browne may have intended to do in this matter, in all probability, these persons simply followed him in obedience to his directions. Under these circumstances, there is really no evidence upon which we can say that they were acting with a common object, which they intended to carry out by any unlawful means. The importance of this is this, that, when once we have removed any common object of an unlawful kind, the prisoners then remain responsible only for the acts which they actually committed themselves. Of course, if there had been any common object proved between the large number of persons, railway-police, khallasies, and other persons who were present on the spot, and if that common object had been shown to be an unlawful one, all these persons would have been guilty of being members of an unlawful assembly, and they would have been punished for the acts of each other. But I do not think that is the case here, and therefore we not only get rid of all the charges under Sections 147 and 149, but, as regards the other two Sections, 447 and 453, we have the prisoners only responsible for the acts which they themselves have committed. Now, even taking the evidence of Sharafat Khan, it would be very difficult, indeed, to convict the prisoners either under Section 447 or 453. There is nothing to show in that evidence that these prisoners either committed, or intended to commit, any violence at all. But, as we have said, we have not accepted that evidence, and we have accepted the evidence of Captain Browne. Under these circumstances, neither as regards Sections 147, 149, and 447, nor 453, is there any evidence at all which can be relied on against these prisoners.

We think, therefore, that the conviction and sentence as against these prisoners must be set aside, and that they must be discharged.

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The 4th June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Magistrate's powers—Nuisance—Public thoroughfare—Act X. of 1872, Section 521.

(Miscellaneous Case.)

Shah Soojaut Hossein and another, *Petitioners.*

Moonshees Mahomed Yousoof and *Abdool Baree* for the Petitioners.

A Magistrate's powers, under Section 521, Code of Criminal Procedure, are confined to the instances specifically mentioned in that Section, which does not confer general powers upon a Magistrate to pass any order he may consider necessary for the protection of the public health.

It is only from a thoroughfare or public place that, under that Section, a Magistrate is at liberty to direct a nuisance to be removed.

Markby, J.—It appears that, in this case, the Assistant Magistrate made two orders, both of which have been brought to our notice, and both of which we consider to be illegal. It appears that Mr. Chardon had an indigo-factory; that the water which had been used by him for the purpose of manufacturing indigo flowed from the factory into certain pits which were upon the land of the defendants; and that the Assistant Magistrate considered that this water, by being allowed to remain there in a stagnant condition, became, on account of the decomposition of vegetable matters which it contained, offensive and dangerous to the health of the neighbourhood. That being brought to the notice of the Assistant Magistrate, he issued the two orders in question. The first order directs the defendants to cause the pits to be filled up, and the police to submit a report, after inspection, as to whether the defendants have caused the pits to be filled up. That order was made on the 17th February 1874. Then, I believe on the same day, an order was issued that the said defendants do allow Mr. Chardon to construct a drain to discharge this water into the river Soane, and Mr. Chardon do pay to the defendants the fair value of the land required for the construction of the drain.

It is clear that the intention of the Assistant Magistrate was (as it also appears from the explanation which he has sent up to us) that the drain he speaks of should be constructed by Mr. Chardon through and across the land of the defendants. The Assistant Magistrate in his explanation has informed us that he made those orders under Section 521. They are, therefore, by the express declaration of the law, "judicial proceedings;" and, if so, it is our duty to quash those orders, if they are illegal. It appears to us that, under Section 521, the Magistrate had no power to make either of these orders. He rather seems to consider that, under Section 521, he has power to make whatever orders he may consider necessary for the protection of the public health. But that Section does not contain any such general powers. It lays down specifically what the powers of a Magistrate are. He may remove an obstruction or nuisance from any thoroughfare or public place; he may suppress a trade or occupation which is injurious to the health or comfort of the community; he may stop the construction of a building, or remove it under certain circumstances which are specified; he may order any combustible substance to be removed, or any tank or well adjacent to any public thoroughfare to be fenced. But beyond those things which are there stated, that Section confers no general powers upon the Magistrate whatsoever. In the second of these orders, the Assistant Magistrate directs the defendants to surrender the use of their property to another, and to allow a drain to run through it. However convenient that might be to Mr. Chardon, the Assistant Magistrate had no power whatsoever to make any such order. The first of these two orders approaches somewhat nearer to the powers contained in that Section; but the Magistrate has not found, nor, as far as I can see, was there any assertion, that this accumulation of the water did cause any nuisance in a thoroughfare or public place, and it is only from a thoroughfare or public place that, under that Section, a Magistrate is at liberty to direct a nuisance to be removed. It seems to me, therefore, that, quite independently of any question as to the irregularity of the proceedings by which these orders were made (and the Assistant Magistrate seems to admit that there was some irregularity), the orders themselves are not such as the Magistrate is empowered under the law to make, and therefore we are bound to quash them. The orders of the Assistant Magistrate are quashed accordingly.

The 5th June 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Jurisdiction—Magistrate—Military authorities—Regulation XX. of 1825.

(Criminal Jurisdiction.)

The Queen

versus

William Jackson, *Prisoner.*

Mr. Collis for the prisoner.

The Advocate-General for the Crown.

Regulation XX. of 1825 has no force in Hazareebaugh.

Under that Regulation, the Military Authorities can require a Magistrate to hand over to them any prisoner who may be apprehended and brought before him for an offence committed at a place more than 120 miles from the presidency-town; but the proceedings before a Magistrate, when taken at the request of, and assented to by, the Military Authorities, are not Absolutely void, and a commitment so made is not an invalid commitment.

Markby, J.—In this case, a rule was issued, calling upon Mr. Beadon, the Committing Magistrate, and the prisoner William Jackson, to show cause why the commitment should not be quashed as contrary to the provisions of Regulation XX. of 1825. The rule was issued upon an affidavit of Major-General Johnson, the Adjutant-General of Her Majesty's Indian Army, stating that, on the 16th May last, the Officiating Deputy Commissioner of Hazareebaugh committed William Jackson, an European British subject, and a private in Her Majesty's 2-22nd Regiment stationed at Hazareebaugh, to take his trial before this Court at the next Sessions on a charge of murder of a comrade committed at Hazareebaugh, a place distant more than 120 miles from Calcutta; and that the Commander-in-Chief is desirous of having the prisoner made over to the Military Authorities at Hazareebaugh to be dealt with according to the Military Law. Mr. Beadon has not appeared to show cause, but he has sent an affidavit, stating the circumstances under which the commitment took place; and, according to the usual practice in these cases, we have referred to that affidavit in order to acquaint ourselves with those circumstances. The prisoner has appeared by Counsel, and has shown cause against the rule; and through his Counsel he has expressed his desire that the commitment should not be quashed, and that he should be tried by the civil power.

Now, before proceeding to discuss the law on the subject, I think it necessary to refer shortly to the circumstances under which this commitment was made. It appears from the affidavit of Mr. Beadon that he received from the Adjutant of the 2-22nd Regiment, on the 15th May, a letter informing him that private Taylor, a soldier in the regiment, had been shot by a comrade on the previous night; and Mr. Beadon treated that (and I think he was fully justified in so treating it) as a request to him as a Magistrate to take the usual proceedings in the matter. He replied to that letter immediately, acknowledging its receipt, and requesting that the culprit should be made over to the custody of the police in order that he might be conveyed to the European Penitentiary, and that the case should be brought up for preliminary inquiry on the following day, that is, on the 16th May. He also asked that the witnesses and the prisoner should be produced before him on that day for this purpose. The prisoner and the witnesses were produced accordingly, and the commitment was at once made. Under these circumstances, I think we must take it that these proceedings were taken at the request, and with the assent and concurrence of the Military Authorities; and the question which we have to determine is whether the proceedings so taken are void as being in contravention of the provisions of Regulation XX. of 1825.

Now, the first objection taken on the part

of the prisoner is that Regulation XX. of 1825 is not in force in Hazareebaugh where this offence was committed. It appears that, by Regulation XIII. of 1833, certain parts of the country, which were formerly included in the Districts of Ramghur, Jungle Mehals, and Midnapore, were separated from those districts; and by Section 3 of that Regulation it is declared that the operation of the rules for the administration of civil and criminal justice, as well as the rules for the collection of the land-revenue and other matters, together with all other rules contained in the Regulations printed and published in the manner prescribed by Regulation XLI. of 1793, were suspended, and were to cease to have effect therein from the date specified in the preamble of the Regulation, except as thereinafter provided. Then all that is thereinafter provided is that the Governor-General may, by an order in Council, make such rules as he thinks proper. Now, I think it can scarcely be contended that the portion of Regulation XX. of 1825 which is now relied on, and which is said to prescribe the course to be taken in dealing with a European British subject who has committed an offence, is not a rule for the administration of criminal justice. Therefore, it falls clearly within the provisions of Section 3. But it is contended that the preamble of the Act shows that the only object was that special rules for the administration of civil and criminal justice should be provided in order to prevent the mischief there spoken of, namely, the disturbed condition of the country, which could have no reference whatsoever to the administration of criminal justice, so far as the European British subjects were concerned. But I think we must apply to this Regulation the rule which I believe to be a well-established rule for the construction of Acts of the Legislature, namely, that the preamble of the Statute can only restrict the words of the Statute itself where there is any ambiguity in those words, and I must say that it appears to me that the words of Section 3 are perfectly clear, and that it is not possible to raise upon them any ambiguity whatsoever. It seems to me that the operation of the rules for the administration of civil and criminal justice is by that Section wholly suspended. It is said, however, that it is quite impossible that the country should be left in that condition, and that something must have been substituted for the rules which were suspended by this Regulation; and that it is quite possible that these rules, although rescinded by this Regulation, may have been restored by the Governor-General in Council under the powers reserved to him by the Act. Now, it is well known that the state of the law in these Non-Regulation Districts is one which it is extremely difficult to ascertain. As a matter of fact, what I believe generally took place was that no attempt was made formally to legislate for these Non-Regulation Districts, but the questions which arose there were dealt with what I may call executive matters; and with reference to the questions which from time to time arose, directions, sometimes in a general form, and sometimes having reference only to the particular case which had arisen, were issued by the Governor-General or some other executive authority. No doubt, it is also well known that all these rules were recognized, and I may say legalized, by the Indian Council's Act, and so have become part of the law of the land. But, at the same time, we must say that we are not aware of any rule made by the Governor-General, or any other authority, which has restored this particular Regulation XX. of 1825. On the other hand, Mr. Beadon, who is an able and competent officer in the district, has informed us that, in his opinion, this Regulation is not now in force in this district. That is really the only information which we have upon this subject, and therefore it seems to me that, as far as we have any information before us, we must hold that Regulation XX. of 1825 has been rescinded in Hazareebaugh.

But I do not wish to rest my judgment solely upon that. It will, I think, be more satisfactory if we give our opinion upon the construction of the Regulation; and it seems to me, upon the best consideration which I have been able to give to this Regulation, that, even if it is applicable to this district, the proceedings taken in this case are not in contravention of it, bearing, of course, always in mind that we take it, as I have already said, that those proceedings were taken at the request of, and were assented to by, the Military Authorities.

The jurisdiction of the Civil Magistrate in a case of this kind can only be taken away by the express words of the Legislature, and in coming to a conclusion as to whether or no that has been done by this Regulation, I think we ought to see what were the provisions of the English Statute, which led, as it appears from the preamble, to the passing of this Regulation.

It is contended for the Crown that, even upon the English Statute, the jurisdiction

of the Civil Magistrate is taken away. But certainly I am unable to come to that conclusion. The Statute 4 George IV., Chapter 81, which led to the passing of Regulation XX. of 1825, no doubt, does say in Section 3 that, if any person liable to be tried by a Court-martial for an offence alleged to have been committed at a place in India above 120 miles from the Presidencies of Fort William, Fort St. George, and Bombay respectively, and for which no proceeding shall have been commenced in any ordinary Court of competent civil or criminal jurisdiction, shall be apprehended by the authority of, or brought before, any Magistrate for such offence, it shall and may be lawful for such Magistrate, and *he is hereby required*, to deliver over such accused person to the Commanding Officer of the Regiment, and so forth. No doubt, the words "he is hereby required" are imperative words, and, so far as regards the matter to which they relate, they undoubtedly compel the Magistrate to comply with this Act. But, then, I think it is quite clear upon these words, and looking to the words of the 16th Section, that the jurisdiction of the Civil Magistrate is not altogether excluded, because the 16th Section says that "nothing in this Act contained shall extend or be construed to exempt any officer or soldier whatsoever from being proceeded against by the ordinary course of law, unless such officer or soldier shall have been tried by a Court-martial in manner hereinbefore provided in respect of offences committed within the territories of any Foreign State, or in any country under the protection of Her Majesty or the said United Company, or at any place in the territories of the said United Company situate above 120 miles from the said Presidencies of Fort William, Fort St. George, and Bombay respectively." I think, therefore, that it is clear upon this Statute that the state of things which was intended to be introduced was this, that, if the Military Authorities desire to do so, they have power to require persons to whom this provision relates to be handed over to them, and can deal with them for the offences which they have committed; but, if they do not choose to do so, or if they desire it, then the Civil Magistrate can deal with such cases. The words of 3 and 4 Vict., Chapter 37, are not identically the same as those of 4 George IV, Chapter 81; but I think the words of that Act also give, not exactly concurrent jurisdiction, but rather (I would say) preferential jurisdiction to the Military Authorities in cases occurring more than 120 miles from the Presidency-town. Now, that being so upon the English Statutes, we have now to consider the words of Regulation XX. of 1825. Of course, it may very well be that the authorities here might choose to restrict the power of the Civil Magistrate within narrower limits than the Imperial Parliament thought fit to do. I have, however, come to the conclusion that in substance the provisions are the same. The first Clause of the second Section of the Indian Statute provides that, if any European British subject, who shall be apprehended by, or brought before, a Magistrate on a charge of murder, rape, robbery, theft, or other criminal offence, shall be found to have been a soldier, and that the offence was committed at a place above 120 miles from the Presidency-town, then it shall be the duty of the Magistrate by whom such person may be apprehended, instead of proceeding to hear evidence to the charge as directed in such cases in the Regulations, to deliver over such person so charged, together with a statement of the charge brought against him, to the Commanding Officer, and so forth. There, again, the words of the Section are, as in the English Acts, imperative upon the Magistrate. But the question still remains whether these words do entirely exclude him from all jurisdiction whatsoever in the matter. Now, there is no doubt that this Act, in one respect, is stronger against the jurisdiction of the Magistrate than the English Act; it does not contain anywhere any express saving of the authority of the civil power as is contained in the Acts of the Imperial Parliament. But in the fourth Clause of that Section, where the Magistrate was intended to be entirely prohibited, the prohibition is contained in express terms. That Clause says that the several Zillah and City Magistrates are hereby prohibited from receiving and inquiring into any criminal charge of the nature described in Section 2 of Statute 4 George IV., Chapter 81, which may be preferred to them against any British commissioned or non-commissioned officer, soldier, or other person attached to the Army, who may have been regularly brought to trial under the provisions of the said Act, and acquitted or convicted by the sentence of a Court-martial of such offence. Now, the only case in respect of which the Act contains an express prohibition altogether to the Magistrate from interfering is the case in which the accused has been regularly tried, and either acquitted

or convicted by a Court-martial, and that seems to me to indicate that this was the only prohibition intended. Then there follows a proviso which, no doubt, at first sight, might seem to point out that, in all other cases, the Magistrate is also prohibited, but on further consideration it appears to me that it is not so. The proviso is that, in any case wherein it may be ascertained by the Magistrate, on due inquiry, that any person accused of such criminal offence who may be subject to trial by Court-martial has not been brought to trial, and that no effectual proceedings have been taken, or have been ordered to be taken, against him, then the Magistrate is to refer the matter to the Governor-General in Council, who will give him proper directions how to proceed; and the Magistrate, if so authorized, shall be competent to proceed against the offender. Now, I think that that proviso was put in to meet this class of cases. The second Section provides what the Magistrate is to do when the prisoner has been apprehended by, or brought before, him; and then it is clearly his duty to hand him over to the Military Authorities, if they are willing to take him. The fourth Clause, on the other hand, I think, provides for the cases in which the prisoner has not been apprehended by, or brought before, the Magistrate; but if the Magistrate finds upon enquiry that an offence has been committed, and that the Military Authorities have not taken, and are not about to take, any steps to bring the offender to trial, then he can refer the matter to the Governor-General in Council. I think that that proviso was put in to prevent, on the one hand, the offender from being let go unpunished, and at the same time not to allow the Magistrate to assume any power which might bring him in conflict with the Military Authorities.

I do not wish to deny that I have come to this conclusion upon the Regulation with considerable hesitation, because, if this Regulation stood alone, and it was now for the first time that it had to be considered, there are, every one must admit, some expressions in it which might seem to show that the civil authority was entirely to be excluded. But that that was not the intention of the Imperial Statute, and that this Regulation was only intended to carry out in India in a convenient way the principle which had been already laid down by the Imperial Act, is, I think, shown by the way the Regulation has always been understood in India. We must recollect that this Regulation has now been in force for nearly fifty years, and, as far as we have been able to discover the construction which has been put upon it, not by express decision (because, as far as I am aware, the question has never been expressly decided until now), but by the practice of the Courts in the administration of criminal justice, I believe to be that the jurisdiction of the Civil Magistrate is not thereby entirely ousted. It is certainly within my own knowledge that several soldiers have been sent up to this Court to be tried from places situate above 120 miles from Calcutta, and it was not denied that many prisoners so sent up had also been tried by the late Supreme Court. Now, with regard to the prisoners who were tried by the Supreme Court, it was argued, and I think correctly argued, that there the jurisdiction would not be touched by Regulation XX. of 1825, and that, therefore, in the Supreme Court, and also in the High Court down to the year 1865, when the Grand Jury was abolished, there might be no objection to the trial of such prisoners under this Regulation. But nevertheless, until the year 1865, it is perfectly well-known that, as a matter of fact, no trial, except on very, very rare occasions, that is, no ordinary trial, did take place merely upon the presentment of the Grand Jury; and that the prisoners were always sent up here to be tried under the commitment of a Magistrate. We, therefore, cannot escape from this, that, if the construction which is now sought to be put upon this Regulation is a correct one, then in every one of these cases, at any rate, until the prisoner arrived at this Court, the custody was illegal, and all the proceedings were illegal; and if the construction which was sought to be put upon the Imperial Statute is also correct, as far as I can see, all the proceedings in the Supreme Court and the High Court would have been illegal, because, if the English Statute were to be taken as containing a prohibition of the civil power, then that would apply to the High Court and Supreme Court just as much as to the Magistrate of the District. The words "Civil Magistrate" in the English Acts are the words which are always used in these Acts to express the civil power as distinguished from the Military Authorities, and do not refer to a Magistrate holding inferior powers as distinguished from Courts having full jurisdiction to deal finally with the case. It will be found that prisoners are constantly spoken of as being tried and convicted or acquitted for such crimes as theft, robbery, or murder, &c., by the Civil

Magistrates. Now, if the contention that the English Statute prohibits the Civil Magistrate is good, it prohibits the jurisdiction of the High Court just as much as the jurisdiction of a Magistrate, and all such trials were without jurisdiction. But even if the prohibition depends upon the Regulation, then all the proceedings up to commitment were illegal, and every trial which has taken place since the Grand Jury were abolished has been upon an illegal foundation, because, since that time, the commitment by the Magistrate and the charge drawn up by him are the foundation of the trial by the High Court, and they were all illegal. I think that we may well hesitate before coming to any such conclusion; and, under these circumstances, it appears to me that, having regard to the principles laid down by the Imperial Statute, and to the course of practice which has been adopted in this country, we should not be justified in saying more than that the Military Authorities can require a Magistrate to hand over to them any prisoner who may be apprehended and brought before him for an offence committed at a place more than 120 miles from Calcutta; but that the proceedings before a Magistrate, when they are taken at the request of, and are assented to by, the Military Authorities, are not absolutely void, and that a commitment so made is not an invalid commitment. That seems to me to be a reasonable construction of the Regulation and of the Statutes. If the Military Authorities choose to assert their claim to deal with the case, and punish the offender, they can do so at the proper time. But if they choose to hand the prisoner over to the civil power, they can do that also; and I can hardly conceive that the Military Authorities would so long have continued the practice of handing over prisoners to the civil power, unless it were that, in a certain class of cases, or under certain circumstances, they find it convenient to do so.

For these reasons, I think that the rule must be discharged.

On the two other points taken in this case, it is unnecessary for us to express any opinion whatever. The one is whether, having regard to Section 33 of the Code of Criminal Procedure, a commitment can be quashed at the request of the Crown. We express no opinion whatever upon this point, nor do we express any opinion whatsoever upon the other point that was raised, namely, whether the Indian Legislature had power to pass the Regulation XX. of 1825.

The 6th June 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

High Court—Rule nisi—Charter Act, Section 15—Jurisdiction.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Dacca.

Kali Narain Roy Chowdhry, *Petitioner,*

versus

Abdool Guffoor Khan, *Respondent.*

Baboo Doorga Mohun Dass for the Petitioner.

Baboo Hari Mohun Chakravarti for the Respondent.

Case in which the High Court, in exercise of the jurisdiction given to it by Section 15 of the Charter Act, issued a rule *nisi* at the instance of the party aggrieved, calling upon the opposite party to show cause why an order made by a Magistrate, which was complained of, should not be set aside for want of jurisdiction, although the matter had already been brought to the notice of the Court on a reference made by the Sessions Judge. Two previous cases on the point discussed.

Phear, J.—We are of opinion that this rule must be made absolute.

The facts of the case are almost identical with the facts of a case which was lately decided by this Bench, and which is reported in 21 W. R., Criminal Rulings, p. 26. Not only has the Magistrate not recorded any opinion to the effect that a resort to the procedure contained in Section 521 and the next following Sections of the Criminal Procedure Code would occasion a greater evil than that suffered by the person upon whom the Magistrate made the order, but there is not the slightest material on the record upon which such an opinion could be grounded. It is in this case quite beyond question that there was nothing whatever which could bring the matter within the scope of Explanation 1 of Section 518 of the Criminal Procedure Code. And consequently, according to the express words of the Legislature to be found in that Explanation, the Magistrate had no sort of authority or jurisdiction to make the order.

The matter was brought to our notice by a reference made by the Sessions Judge. But we issued a rule at the instance of the party aggrieved to the opposite party, in exercise of the jurisdiction given to us by

the 15th Section of the Charter Act, calling upon that party to show cause why the order complained of should not be set aside for want of jurisdiction. And no cause has been shown against this rule upon the facts. It is admitted that no cause can be found in the facts themselves. But two decisions of this Court, respectively reported in 20 W. R., p. 53, and 21 W. R., p. 22, were cited to us as reasons why the rule ought not to have issued.

It should be remarked that, although both these decisions were, in fact, passed before either the case which is reported in 21 W. R., Criminal Rulings, p. 26, was heard, or the rule in this case issued, still they were neither of them brought to the notice of this Bench until, indeed, cause was shown two days ago in the present case; it may be because they had not been published in any report.

On a reference to the decision which is to be found in 21 W. R., p. 22, we find that the Judges simply refused to exercise the particular power of revision which is given to this Court by Section 296 of the Criminal Procedure Code in the manner prescribed by that Code. And, no doubt, the Court was entirely right in so doing.

But Mr. Justice Markby says: "The "Sessions Judge has also asked us to deal "with this case under Section 15 of the "Charter Act. But if it is desired that we "should exercise any powers which we may "possess under that Section, I think there "must be a separate application for that "purpose." That is, I suppose, an application made by the party aggrieved.

In the present case, the rule was asked for by the party aggrieved, asking for relief upon the footing of the authority reposed in this Court by Section 15 of the High Court Act. All available materials were brought before the Court, and the respondent had the fullest opportunity to show cause against the rule; and it would seem as if it was Mr. Justice Markby's opinion that, if the proceedings had taken the course in that case which they have taken here, the Bench ought not to refuse to entertain the matter. And therefore it seems to us that the case reported in 21 W. R., Criminal Rulings, p. 22, is not an authority adverse to the conclusion which we have come to.

Also it is plain from the report of the case in 20 W. R., p. 53, that no steps whatever had been there taken towards the proper exercise of the extraordinary power of this Court under Section 15 of the Charter Act. The Judges simply declined to exercise the powers of revision which are given by Section 297 merely in view of the Judge's reference.

Moreover, it does not appear from the report of that case that the Magistrate's order was defective in the way in which the Magistrate's order in the present case is defective. It may be, so far as it is disclosed in that case, that the Magistrate found such facts, and expressed such an opinion, as brought the matter within the scope of Explanation 1 of Section 518; and in that event, of course, this Court would have nothing to go upon, even if the rule had issued under Section 15 of the Charter Act. It could only revise the decision of the Magistrate, if it entered upon the matter at all. by going into the merits of the case; and that clearly it was precluded from doing.

On the whole, we have come to the conclusion that these two decisions are not opposed to the course we have taken; and as no ground is shown upon the merits against the rule, the rule must be made absolute.

The 8th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Discharge—Acquittal—Witnesses—Act X. of 1872, Sections 220 & 315.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Shahabad.

The Queen

versus

Japit Ahir *alias* Laljee.

Under Section 315, Act X. of 1872, an order of discharge cannot be passed, unless the evidence of all the witnesses for the prosecution has been taken; and under Section 220 of the same Act, no judgment of acquittal can be recorded, unless a charge has been drawn up.

Reference.—THE prisoner in this case, Japit Ahir *alias* Laljee Ahir, was sent up by the police charged with having committed an offence under Section 379 of Act XLV. of 1860.

Five witnesses were cited by the police for the prosecution, and sent in for examination; out of this number, the Deputy Magistrate examined only two, and then passed the following order in the case:—

"The accused stands charged with stealing the peas of the complainant from his field. The latter states that the accused was

one of several thieves who had stolen his peas in a body, and that he was arrested with the peas.

"The accused denies the charge, and pleads the enmity of the complainant with his (accused's) master Hurruk Ahir.

"Two witnesses are examined on behalf of the prosecution, whose statements are full of discrepancies, and throw doubt over the whole case.

"The discrepancies are of a material nature, and serve to show that either the charge is false or the witnesses are false. The Court cannot convict the prisoner on such evidence as is adduced, and directs that Japit Ahir be acquitted and discharged."

On this order, the complainant made an application to me, stating that there has been a failure of justice, and calling for a fresh trial.

It appears to me that the Deputy Magistrate's order is wrong in law. He has both acquitted and discharged the defendant.

Under Section 315, Act X. of 1872, the order of discharge could not have been passed, as the evidence of all the witnesses named for the prosecution had not been taken; and under Section 220 of the same Act, as no charge was drawn up, no judgment of acquittal could be recorded in favor of the defendant.

I am of opinion, then, that the order of the Lower Court should be set aside.

Judgment of the High Court.

Jackson, J.—We concur with the Magistrate of the District, and quash the order improperly made by his subordinate. The trial is to proceed.

The 10th June 1874.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Kidnapping—Compounding—Acquittal—Act X. of 1872, Section 188.

Committed by the Magistrate, and tried by the Additional Sessions Judge of Hooghly, on a charge of kidnapping a girl from lawful guardianship.

The Queen

versus

Gopee Mohun Mitter, *Appellant.*

Baboos Biprodass Mookeriee, Hari Mohun Chuckerbutty, and *Bharut Chunder Dutt* for the Appellant.

The offence of kidnapping can be lawfully compounded.

Where a charge of such an offence was withdrawn by the complainant, it was held that, under Section 188 of the Code of Criminal Procedure, it had the effect of an acquittal.

Ainslie, J.—THE prosecutor made a verbal complaint to the Magistrate of Beerbhoom against Gopee Mohun Mitter, a coolie-recruiter, to the effect that the latter had kidnapped his daughter, a girl under 16 years of age, for the purpose of sending her to Assam as a coolie. The Magistrate hereupon made a verbal order to the police to bring the complainant and accused, together with their witnesses, before the Court. When this order was carried out, it appeared that the parties had come to terms, and the prosecution was allowed to drop, and the accused was discharged.

Gopee Mohun Mitter, having been subsequently re-arrested in Howrah, was tried there, and convicted by the Court of Session, under Section 363 of the Indian Penal Code, of the offence of kidnapping.

He now appeals, and pleads previous acquittal.

The record of the proceedings before the Magistrate of Beerbhoom, so far as appears from the papers before us, consists of nothing but a police-report with the order of discharge endorsed thereon. This report sets out in the heading the nature of the offence which the police-officer supposed the prisoner to have been charged with, and this agrees with the evidence given in the case before us. I think it is clear that the offence then charged was identical with the offence of which the prisoner has been now convicted, and that we must hold that this offence had been compounded with the permission of the Court. The question before us is simply whether the offence of kidnapping can be lawfully compounded. If it can be so compounded, the withdrawal of the complainant from the first prosecution must, under Section 188 of the Criminal Procedure Code, have the effect of an acquittal.

On referring to the Penal Code, Section 214, it appears that a certain class of offences is excepted from the penal operation of that and the preceding Section; or, in other words, may be lawfully compounded. These are "cases in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action."

In this case, the offence of which the accused has been convicted is simply kidnapping, as punishable under Section 363.

It has not been found that there was an intention to commit any further offence. The recruiting of coolies and forwarding them to Assam is not in itself an offence at all. Thus, this case is covered by the first part of the exception. And I am of opinion that it is also covered by the second part of the exception.

There is no ground on which we should hold that a parent or guardian cannot bring an action for damages against a person who kidnaps a child from his custody, and it is unnecessary to consider whether the damages recoverable are to be limited to compensation for the loss of time and money expended in searching for and recovering the child or not. This, at least, he may sue for and recover, and this is enough to bring this case within the second part of the exception.

The result is, that the offence was one which could be lawfully compounded, and that the plea of former acquittal is good.

The prisoner must be acquitted and released.

The 11th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Procedure — Immaturity of understanding — Incapacity—Criminal offence—Act XLV. of 1860, Section 83.

Reference to the High Court by the Sessions Judge of Nuddea.

The Queen

versus

Lukhini Agradanini.

An objection that the accused is of such an age as not to have attained sufficient maturity of understanding to judge of the nature and consequences of his conduct is not one of a preliminary character, but rather a matter of defence, to be considered with the other issues arising in the case.

Where the accused was over seven years of age and under twelve, the incapacity to commit an offence only arises where the child has not attained sufficient maturity, &c.; such non-attainment would have apparently to be specially pleaded and proved.

The "consequences of his conduct" mentioned in Section 83, Penal Code, are not the penal consequences to the offender, but the natural consequences which flow from a voluntary act.

Reference.—PREVIOUS to entering on the trial of this case, the objection has been raised by the prisoner's Counsel that she, over seven and under twelve years old, has not attained sufficient maturity of understanding to judge of the nature and consequences of her conduct. It is, therefore, necessary to put the question to the Jury, after asking the prisoner questions: Has the prisoner attained sufficient maturity of understanding to judge of the nature and the consequences of the act with the commission of which she is charged?

The Jury, through their foreman, reply that, in their opinion, the prisoner was aware of the nature of her act, *i.e.*, that it would do damage, but that she was not aware she would be imprisoned in consequence.

Under these circumstances, I think it is necessary to ask the High Court the question as to whether the trial of the case should be proceeded with.

For my own part, I have no doubt, from what I have seen of the child, that she has certainly attained such maturity of understanding as to be able to judge of the propriety or otherwise of her act, and I further have myself no doubt but that she knew her act was punishable; for I find that the prosecutrix in her deposition before the Deputy Magistrate says that, in the forenoon of the day her roof was fired, a thatched roof, the eaves of which came over the yard of the prisoner's mother's house, had also been burned, and the prosecutrix had threatened the mother with the hakim.

In my opinion, the girl has displayed sharpness in dealing with the questions here asked her. When asked whether she considered the burning of a person's house a good or a bad act, she would not say, but merely replied, "I did not do it." When her defence before the Deputy Magistrate was read over, she said it was made in consequence of police-tuition and threat.

It seems to me that, if a person be aware of the nature of his or her act, *i.e.*, whether it is right or wrong, that person may, even if he or she do not know that imprisonment or other punishment will follow, be considered capable of *committing an offence.*

But, as above said, it appears to me necessary to request the instructions of the High Court on the point as to whether or no the trial of the case should be proceeded with.

Copy of this proceeding with the record of the case is forwarded, therefore, to the Hon'ble High Court.

Judgment of the High Court.

Jackson, J.—We consider that the Judge ought not to have made this reference, but should have decided the matter for himself. But as the question has been put, we proceed to answer it. The objection raised in this

case is not, we think, of a preliminary character, but rather a matter of defence, and a matter which may conveniently be considered with the other issues arising in the case.

If the accused were a child under seven years of age, the proof of that fact would be *ipso facto* an answer to the prosecution. But where the accused is above seven years of age and under twelve, the incapacity to commit an offence only arises where the child has not attained sufficient maturity, &c., and such non-attainment would have apparently to be specially pleaded and proved, like the incapacity of a person who, at the time of doing an act charged as an offence, was alleged to have been of unsound mind.

The Legislature is manifestly referring in Section 83, Indian Penal Code, to an exceptional immaturity of intellect; and we may observe that, where the "consequences of his conduct" are spoken of, it is not apparently the *penal* consequences to the offender that are referred to, but the natural consequences which flow from a voluntary act, such for instance as that, when fire is applied to an inflammable substance, it will burn, or that a heavy blow with an axe or a sword will cause death or grievous hurt.

We suggest, therefore, that the trial should proceed, and that, if the prisoner's Counsel or the Judge thinks it worth while, the question of capacity may be put with others to the Jury.

The 16th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Procedure—Summary cases—Act X. of 1872, Chapter XVIII.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Tirhoot.

The Queen

versus

Johrie Singh, *Constable.*

In summary cases under Chapter XVIII. of the Code of Criminal Procedure, the formalities provided by that Chapter should be most strictly observed.

Jackson, J.—THE Sessions Judge of Tirhoot, being moved by the Sub-Divisional Officer at Durbhanga, applies to this Court, under Section 296 of the Code of Criminal Procedure, to set aside a conviction by Mr. E. Francis, a First-class Magistrate, in the exercise of summary jurisdiction under Sections 222 and 223 of the Code. The person convicted is Johrie Singh, constable. The offence is described to be theft under Section 379 of the Indian Penal Code, and it appears incidentally in the course of the judgment that the theft alleged to have taken place was in respect of Rs. 7. The whole record of this so called trial consists of a half-sheet foolscap paper in which the name of the accused Johrie Singh, constable, the offence, that is, of theft under Section 379, and the names of two witnesses, are set down at the top; and then follows the judgment. From that judgment, it does not appear, except that the offence was theft, what the offence complained of actually was, whose property was stolen, and from what place, nor is the date of the report or complaint stated, nor the name of the complainant, nor the parentage and residence of the accused person, except his name, nor any particular bringing the charge home to the accused. From the report transmitted by the Joint Magistrate, there seems to be much reason to believe that, in point of fact, no offence could have been substantiated in this case, and it certainly appears that one of the two witnesses examined was the so-called thief Umnas Kahar, who, at the time of the supposed theft by the constable, was actually in the custody of the constable. A chowkeedar was examined, but it does not appear what the chowkeedar could have known. It seems to me, however, that the ground upon which, if at all, we are to deal with the order of the Magistrate is that, in exercising summary jurisdiction, he has failed to comply with the requirements of Section 227. In a trial by a Magistrate under a procedure which is most justly called summary, the Legislature has provided a minimum of protection for the person affected by the order; and it appears to us absolutely necessary that officers who act under the 18th Chapter of the Code should most strictly observe the scanty formalities which the Chapter provides. If they do not do so, it would be absolutely impossible for this Court as a Court of revision, or for any other authority, to exercise the smallest control over proceedings which may form the subject of complaint. In this case, on the face of the paper which has been laid before us, and considering the omissions noticed, it is impossible for us to say that the accused person, who has been sentenced to three months' rigorous imprisonment, has had any trial at all. We direct, therefore, that the proceedings of the Magistrate be set aside, and the accused set at liberty.

The 17th June 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Procedure—Summary trials—Act X. of 1872, Chapter XVIII.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Dinagepore.

Chunder Shekhur Thakoor

versus

Nitaloo and another.

The powers conferred upon Magistrates under the 18th Chapter of the Code of Criminal Procedure were not intended to give them the power of altering a charge brought against an accused person, so as to bring his case within the provisions of that Chapter; but when a charge of a serious offence, one which the Magistrate is not competent to enquire into summarily, is preferred, it is the plain duty of the Magistrate to apply the procedure prescribed for such cases, and either to convict or acquit, or commit for trial, the person implicated. The procedure under Chapter XVIII. is to be followed when a charge is plainly and directly one of those specified in Section 222.

Jackson, J.—THE Magistrate of the District of Dinagepore has referred to this Court for revision the proceedings of the Joint Magistrate in a case in which two persons, *viz.*, Nitaloo and Khair Mahomed, were tried summarily, under the provisions of Chapter XVIII. of the Code of Criminal Procedure, for the offence of dishonestly retaining stolen property. They were discharged by that officer under Section 215 of the Code. It appears that, a complaint having been preferred by one Chunder Shekhur Thakoor that his house had been broken into, and property valued at Rs. 884 stolen therefrom, the police instituted enquiries, as the result of which they sent up the two persons accused with a charge-sheet in what is called "A Form," whereby those persons were charged, under Section 457 of the Indian Penal Code, with the offence of committing house-breaking by night in order to the commission of theft, an offence which, if proved, is punishable with imprisonment (in case of theft) extending to 14 years, and also with fine. There is no trace of any kind of trial or enquiry by the Joint Magistrate as to the offence under Section 457, but he appears to have converted the charge, as appears from the register of summary trials, into one under Section 411, that offence being one cognizable under Chapter XV., which an offence under Section 457 is not. The Magistrate of the District observes that all the witnesses sent up for the prosecution had not been examined by the Joint Magistrate, and he considers that the result of the proceedings most justly called summary proceedings has been that persons who ought to have been punished have been discharged. The Joint Magistrate, having been called on to justify his proceedings, admits that the course taken by him was injudicious, but he seems to be of opinion that it was not illegal. Now, it appears to me that it was both injudicious and illegal, and, what is a still more important consequence, that it caused a probable failure of justice. The powers conferred upon Magistrates under the 18th Chapter of the Code of Criminal Procedure appear to me not to have been intended to give them the power of altering a charge brought against an accused person, so as to bring his case within the provisions of that Chapter; but when a charge of a serious offence, one which the Magistrate is not competent to enquire into summarily, has been regularly preferred, it is the plain duty of the Magistrate to apply the procedure prescribed for such cases, and either to convict or acquit, or commit for trial, the person implicated. The procedure under Chapter XVIII. is to be followed when a charge brought against the accused is plainly and directly one of those specified in Section 222. Now, supposing even that the Joint Magistrate could properly and legally have brought this case within the provisions of Chapter XVIII., there were, in my opinion, very cogent reasons why he should not have done so. Whether the Legislature intended to bring under this Chapter all cases of receiving stolen property, whether the value of the property stolen did or did not exceed Rs. 50, it is clear that, where the value is large, and where the property has been acquired by so grave a crime as house-breaking, the offence is one which it would be proper to visit with a punishment far exceeding three months' rigorous imprisonment, and in which, consequently, an appeal would lie to the Court of Session. In such a case, therefore, the provisions of Section 227 would manifestly not apply, and it would be necessary to record at least the substance of the evidence. As the case stands, there has been absolutely no trial and no investigation into the charge preferred by the police, *viz.*, a charge under Section 457 of the Indian Penal Code. The Joint Magistrate says: "I do not suppose that the Magistrate wishes "to lay down that a Court is bound by the

"view of the law taken by an investigating "police-officer." Certainly, the Magistrate could not have had such intention, but a Magistrate who tries a case is undoubtedly required to investigate the charge preferred by the police-officer, and to see whether the charge is made out or not. I think, therefore, that the proceedings of the Joint Magistrate in this case were not only illegal, but improper, and that they constituted an entire misapplication of the powers vested in Magistrates by Chapter XVIII. It would be extremely unfortunate if, in the use of these powers, Magistrates were to adopt the practice of making superficial or slight enquiries into serious cases. The proceedings of the Joint Magistrate will accordingly be set aside, and the original charge preferred by the police will be prosecuted and enquired into.

I may remark that the form, as filled up by the Joint Magistrate in this case, is misleading, because, in the place where it is intended to insert the offence complained of, he has only inserted the offence which he chose to inquire into, and which he considered not proved. It may also be added that, in one of the columns of the form, he seems to have found the accused not guilty, although it afterwards appears that they were discharged under Section 215, which discharge is not tantamount to acquittal.

The 23rd June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Maintenance—Jurisdiction—Act X. of 1872, Section 536.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Gya.

Mussamut Somree

versus

Jitun Sonar.

In a case in which a Magistrate made an order under Section 536, Code of Criminal Procedure, directing the husband to pay a monthly sum for the maintenance of his wife, the High Court set aside the order, on the ground that it appeared that the husband had not been called upon to maintain the wife, who had, up to that time, lived with her father, and that the father had refused to let the wife live with her husband without receiving money from him.

An order under Section 536 cannot be made by a Magistrate of the second class.

Where the law empowers Magistrates of a particular grade to do a particular act, or make a certain order, it should always appear upon the proceedings that the Magistrate making the order or doing the act is a Magistrate who had jurisdiction to do it.

Jackson, J.—We think the order made in this case must be set aside, though not, perhaps, altogether for the reasons stated by the Magistrate of the District who makes the reference. It appears that, on the complaint of one Somree, a young married woman of the age of fifteen years belonging to the Sonar caste, the Magistrate, Mr. Beames, made an order under Section 536 that, "until he can prove that his wife refuses "to live with him, or until he can prove she "is living in adultery, he will pay Rs. 5 a "month in this Court, or to the order of "this Court, if elsewhere, or, in default, he "will undergo one month's imprisonment "with hard labor."

The facts of the case, as appear in evidence, are that the defendant had been married to this girl about two years before the time of the complaint, and that the girl, being very young, continued to live with her father. It also appears that recently some discussion had taken place between the husband and the father regarding her leaving the father's house, and the father, it seems, asked some money-payment, before she could be allowed to do so. It also appears that, in the month of Kartick last, the husband had gone to the house of his father-in-law, and staid there a night, during which he had opportunities of intercourse with his wife. After that, that is to say, in the month of Falgoon, he came again to the house, and he seems to have found that his wife then was pregnant, and he thereupon objected to take her away with him, and also, according to her statement, proposed to her that she should take some drugs to bring about an abortion to prevent the possibility of a child being born to her, which, he said, he suspected was the child of some other man. The result was the calling of a punchayet, by whose decision the girl was put out of caste. The husband afterwards re-convened the punchayet, and admitted that he had visited his wife in Kartick, so that it was after all possible that the child with whom she was pregnant might be his child, and the result of that was, that the husband as well as the wife were both put out of caste. It was under these circumstances that the wife made the application to the Magistrate, and the order was made, which is now the subject of this reference. It appears to us that the circumstances have not arisen under which this order could be properly made. In

applying the provisions of Section 536, it is necessary to bear in mind the conditions of Hindoo society under which a girl, after she has been given in marriage, continues to live for some time in the house of her father. It can scarcely be said that, up to the time when the father consents to allow his daughter to go to the house of her husband, and when, by the customs of the Hindoo society, she would probably go, the husband incurs any liability in respect of her maintenance. In the present instance, the girl was only 15 years of age. It does not appear that her husband had been at any time called upon to remove her to his own house, and, if he did not, to make any payment for her maintenance. The Magistrate, in taking the examination of the complainant, would have been bound under such circumstances to put questions to her to elicit the fact of the husband's having been duly called upon to maintain her; but, in fact, so far from this being the case, it would seem to be the fact that the father had refused to let her go without receiving money from the husband. We also think that, under the circumstances, he ought to have required her distinctly to clear herself, at least by her own oath, from the imputation which the husband had laid upon her. Under these circumstances, it appears to us that this order has not been duly made. We must add that the order in respect of maintenance, *viz.*, that the husband should pay Rs. 5 a month, app ars to be greatly in excess of what the justice of the case demanded.

It is also necessary to advert to another serious defect in the proceedings, which is this, that, upon the face of the order and of the proceedings, it would appear that the Magistrate who made the order had no jurisdiction to make it. The Section expressly says that the Magistrate of the District, or a Magistrate of a division of a district, or a Magistrate of the first class, may make the order. Throughout the proceedings in this case, the Magistrate is described simply as a Magistrate of the second class. Where the law empowers Magistrates of a particular grade to do a particular act, or make a certain order, it should always appear upon the proceedings that the Magistrate making the order or doing the act is a Magistrate who had jurisdiction to do it. It may be in this case that the Magistrate is a Magistrate of a division of the district, but we have no means of knowing whether he is or not. In strictness, therefore, this alone would be sufficient to vitiate the order, but we may put it upon the ground which I have first stated; and if the Magistrate should think fit to make any further enquiry in the case, and should think it necessary to make a fresh order, nothing in the order which we now make is to prevent him from doing so, provided he has sufficient materials before him. In that case, he should take all the circumstances into consideration, and make such order in the case as he thinks to be equitable, but taking care that his jurisdiction, if he has it, appears.

The 23rd June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Opium—Act XXI. of 1856—Act X. of 1871.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Dinagepore.

The Queen

versus

Khetter Nath Shaha.

Act XXI. of 1856 (the Opium Act) has not been repealed, so far as it relates to the Lower Provinces of Bengal, by Act X. of 1871.

Jackson, J.—THIS is a case in which two persons were tried by the Joint Magistrate of Dinagepore for the offence of illegally dealing in contraband opium. They were both convicted—the one being fined Rs. 200, and the other Rs. 50. The order of the fine of Rs. 200 being appealable, the defendant appealed, and the sentence was reversed by the Judge. The other order being within the limit of non-appealable cases, the Judge has referred the case to this Court, with a view to the order being quashed. The grounds on which he makes this reference are, firstly, that Act XXI. of 1856, under which the fine was inflicted, has been repealed by Section 2, Act X. of 1871; secondly, that there is no evidence whatever to support a charge against the defendant Khetter Nath, under Section 44 of Act XXI. of 1856, of having sold a seer of opium to defendant

Tikun Lall; and, thirdly, that the evidence of the witnesses has been so hastily and carelessly recorded that it is doubtful whether, in justice to the defendant, it should be taken into consideration at all.

In regard to the first of these grounds, there appears to have been some misconception on the part of the Sessions Judge. The second Section of Act X. of 1871, no doubt, repeals certain Acts of which Act XXI. of 1856 is one. The first Section, however, enacts that the Act extends to the territories respectively under the Government of the Lieutenant-Governors of the North-Western Provinces and the Punjab, and under the administration of the Chief Commissioners of Oudh, the Central Provinces, British Burmah, and Coorg. The Act, therefore, not extending to the Lower Provinces of Bengal, could not effect the repeal of the enactments mentioned in the Schedule in those provinces any more than the repeal by Indian legislation of the English statutes, or portions of the statutes, could affect the working of those statutes in those parts of the country in which they are in force.

On the second ground, we do not agree with the Sessions Judge. It appears that a chaprassee gave evidence that he heard defendant No. 1 proposing to the other to sell him a seer of opium, for which he offered to give 8 annas over the cost-price. Almost immediately afterwards, the same chaprassee, accompanied by another person, met and seized the person, who had made the proposal, with a seer of opium in his possession. It appears to me, supposing the chaprassee to be believed, that these facts constituted evidence from which the Magistrate might properly infer that defendant Khetter Nath had acceded to the proposal made to him by defendant No. 1, and had sold to him the seer of opium. Therefore, we cannot say that there was no evidence on which the sale by Khetter Nath could be found.

As to the third ground, it is impossible for us to say whether the evidence of the witnesses was hastily and carelessly recorded. The Magistrate appears to have tried this case under the provisions of Chapter XVIII. We have nothing before us to show in what manner the evidence of the witnesses was taken. It is not suggested that the record, as framed by the Joint Magistrate, is any other than, under the law, it was necessary to be. We have no sufficient matter before us on which we can quash the proceedings of the Joint Magistrate, and we must decline to interfere.

The 26th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Evidence—Complainant—Conviction.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Dinagepore

Kulum Mundul

versus

Bhowoniprosad and others.

A conviction upon the statement of a complainant is lawful.

Reference.—The facts of the case, and the grounds on which I consider that the order of the Joint Magistrate should be quashed, are fully detailed in my proceedings to be found with the record, and dated the 22nd May last. The Joint Magistrate's remarks in support of his order will also be found with the record.

It will be seen that the Joint Magistrate practically admits that there is no evidence in support of the complainant's own statement on oath. But he says there is circumstantial evidence in support of complainant's story, showing (1) that he was beaten; (2) that the complainant's witnesses were biassed; (3) that he told the same story to the Moonsiff as he told before the Joint Magistrate; (4) that the Moonsiff dismissed the peon.

The only doubt that arises in my mind in this case is whether, if a complainant deposes on oath to the existence of certain facts which go to establish the charge instituted by him, and he produces no witnesses who can support his charge, a Criminal Court is justified in finding the accused guilty on the complainant's evidence alone, however trustworthy.

It may be said that, as, under Section 118, Act I. of 1872, all persons shall be competent to testify, subject to certain limitations which do not apply to this case, a complainant may testify on his own behalf, and, when so doing, is, in fact, a witness; and as Section 134, Act I. of 1872, declares that no particular number of witnesses shall, in any case, be required for the proof of any fact, the complainant's evidence, if believed, is sufficient in law to establish a charge. If this argument be sound, then the Joint Magistrate's order cannot be quashed on the ground of there

being no evidence, because the Joint Magistrate states that he fully believed the complainant's statement on oath.

But I can scarcely think that the Legislature intended so much as this when framing Section 134 of the Indian Evidence Act. That Section has taken the place of Act II. of 1855, Section 28, which declared that the testimony of one witness, if thoroughly credible, is sufficient in proof of a fact, except in cases of treason, and in cases where any rule or practice of any Court requires corroborative evidence of a single witness in the case of perjury.

In a well-known case (Queen *v.* Lall Chand Kowrah, V. Weekly Reporter, Criminal Rulings, page 23) it was laid down, with reference to this Section of the old Evidence Act, that the uncorroborated evidence of a single witness in a case of perjury was insufficient, and that there must be proof adduced, independent of the oath of one of the parties.

Now, if Section 134, Act I. of 1872, is to be interpreted in the manner I have above supposed, the above rulings will have become obsolete; for it will follow that the bare statement on oath of A in a charge of perjury brought by him against B, on the allegation that a certain deposition given by B in a civil suit between A and B was false, would, if the Court believed A, be sufficient evidence on which to convict B.

I cite this as an extreme instance of what might result from giving to Section 134, Act I. of 1872, the interpretation supposed.

It appears to me, then, that Section 134 of the new Evidence Act refers to witnesses other than the parties themselves, and, if this view be correct, there is absolutely no evidence whatever against the defendant in the case now under consideration. The Joint Magistrate should not have referred to the Moonsiff's proceedings in this case against the peon, as they are not evidence; and, as a matter of fact, the Moonsiff's order dismissing the peon has been reversed by this Court on the civil side. Again, that the complainant was beaten may be true, but this fact alone is not evidence that the defendants beat him.

As to the charge brought against defendants, it appears to me very clear that the complainant was not illegally confined within the meaning of the definition of illegal confinement given in the Penal Code. The Joint Magistrate, as I understand his remarks, would make every case of common assault one of illegal confinement; because the party assaulted, during the time he is defending himself, may be prevented by his assailants, who surround him from proceeding beyond certain circumscribing limits.

On the above considerations, I recommend that the order of the Joint Magistrate be quashed.

Judgment of the High Court.

Jackson, J.—We think the Court is not called upon to interfere in this case. It is unnecessary to determine whether the facts amounted to wrongful confinement, because an assault of a serious character was evidently committed, and it would only be necessary to amend the conviction by substituting one offence for the other.

As at present advised, however, we are not prepared to say that wrongful confinement was not established, and we cannot agree with the Judge that the complainant was at the time in lawful custody.

There cannot be a doubt that a conviction upon the statement of a complainant is lawful, otherwise a person who committed an assault, first taking care to ensure the absence of witnesses, could never be punished.

The rule of requiring a second witness in cases of perjury rested on a ground which has no application here.

We, therefore, return the proceedings, and we must also observe that we think it a subject of regret that the Judge should have reversed the order of the Moonsiff of Putnitolla, dismissing the peon.

On referring to the Moonsiff's proceedings, it is manifest that the peon behaved, not merely illegally, but most improperly, and was rightly dismissed.

The 26th June 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Procedure—Witnesses—Accused—Act X. of 1872, Section 327.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Rungpore.

The Queen

versus

Bocha Chowkeedar.

Under Section 327, Code of Criminal Procedure, the witnesses for the prosecution should be examined in the presence of the accused, when practicable, notwithstanding that their statements have been previously recorded in his absence.

Reference.—ONE Bocha Chowkeedar, against whom the Joint Magistrate of Rungpore issued a warrant, in order that he might be brought to trial on a charge under Section 331, Indian Penal Code, was not arrested under that warrant; and, in his absence, the enquiry proceeded against him in the Joint Magistrate's Court. The evidence of the witnesses against him was recorded in his absence, and subsequently, on his arrest, the depositions were put in against him, and he was committed to the Sessions for trial.

I am of opinion that the commitment was illegal, inasmuch as, though it was certainly practicable to procure the attendance of the witnesses against him after his arrest, they were not procured and examined in his presence. The latter part of Section 327, Code of Criminal Procedure, seems to me to clearly intimate that the witnesses, under such circumstances, should be examined in the presence of the accused, when practicable, notwithstanding that their statements have been previously recorded in his absence. But this was not done in the present case, and hence I submit that the proceedings were illegal. Under these circumstances, I did not proceed with the trial as against him at the Sessions, when he was brought up for trial with three others, against whom the trial proceeded. I should add that these three persons were yesterday (June 19) acquitted; and, as there is no further evidence against him than that forthcoming against these three accused, it will be unnecessary to take further proceedings against him.

I would recommend that the commitment be quashed, and that Bocha Chowkeedar, who is now on bail, be discharged.

Judgment of the High Court.

Ainslie, J.—We quash the commitment of Bocha Chowkeedar for trial before the Court of Session on the grounds taken by the Judge in his letter of reference.

The 30th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Procedure—Assessors—Sessions Judge—Act X of 1872, Sections 255 & 261.

(Criminal Referred Case.)

The Queen

versus

Matam Mal.

The intention of the Legislature in Sections 255 and 265 of the Code of Criminal Procedure in a case like this, in which the accused was tried on two charges, was that the assessors should give a definite opinion whether the prisoner is guilty of either of the offences charged, and, if so, of which of the charges preferred against him, and that the Judge, on delivering judgment, should give it with advertence to the opinion of the assessors.

Jackson, J.—IN this case, which, in other respects, appears to have been tried with great care and attention, we are unable to pass final orders in consequence of the proceedings being incomplete. The prisoner was tried by the Court of Session with the aid of assessors. Section 255 of the Code of Criminal Procedure provides that, in cases tried with assessors, the Court shall proceed to ask the assessors their opinion, and shall record it. Section 261 declares: "In cases "tried with assessors, the Court shall pro-"ceed to pass judgment of acquittal or "conviction, having considered the opinions "of the assessors, but not being bound to "conform to them." In the present instance, when the case for the prosecution had been closed, the Judge recorded what took place in the following terms: "The Court pro-"ceeds to ask the opinion of the assess-"ors: Baboo Gobindnath Tolapatro, in "answer to question put, answers that, in his "opinion, Matam Mal struck Mahojoni with "the *dão*, but did so in consequence of "Mahojoni having given him abuse. Baboo "Gobind Chunder Paul, in answer to ques-"tion put, answers that, in his opinion, Matam "Mal struck as alleged in consequence of "abuse received from Mahojoni." Now, the accused in this case was tried under two charges; the first, which was added by the Court of Session, was the charge of murder, and the second, on which he was committed for trial, was that of culpable homicide not amounting to murder. It appears to us quite clear that the intention of the Legislature in the Sections referred to was that the assessors should give a definite opinion

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whether the prisoner is guilty of either, and, if so, of which of the charges preferred against him, and that the Judge, in delivering his judgment, should give it with advertence to the opinion of the assessors. In this case, the assessors had not given any opinion as to whether the prisoner had committed the offence of murder or any offence at all. They said generally that, in their opinion, the prisoner had struck Mahojoni (who was his wife) with a *ddo*, in consequence of abuse received from her; and we find that, in the very elaborate judgment delivered by the Judge, he does not advert to the opinion of the assessors. We are, therefore, unable to judge whether, in the expressions they use, the assessors did, in fact, mean to find the prisoner guilty of murder, or of culpable homicide not amounting to murder, or of anything else. The case, therefore, must go back to the Court of Session. The Judge will re-open the proceedings, and require the assessors to give their opinion as prescribed by law, after which he should record any further judgment that may be necessary, and the proceedings will then follow the due course of law.

The 30th June 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Deaf and dumb person—Act X. of 1872, Section 186.

Reference to the High Court, under Section 186 of the Code of Criminal Procedure, by the Officiating Magistrate of Burdwan.

Dwarka Nath Haldar

versus

Noder Chand Kamte.

The High Court, under the circumstances of this case, which came before it under the last Clause of Section 186 of the Code of Criminal Procedure, set aside the conviction of the prisoner, who was deaf and dumb, and directed that he be admonished and discharged.

Jackson, J.—This case comes before us under the last clause of Section 186, Code of Criminal Procedure, and we find the circumstances a little embarrassing. A person who has been deaf and dumb from his infancy was charged with criminal misappropriation of property. He can only be communicated with by signs. The Magistrate who tried him certifies that he could not be got to understand the charge or the proceedings; yet he has been convicted, and the High Court is now called upon to pass final orders on the case.

What kind of orders we are to pass, or what advantages the High Court possesses in dealing with such cases, is not apparent, and upon general principles we should feel considerable difficulty in affirming a conviction in the case of a person who could not be made to understand the proceedings. On this point, we must accept the Magistrate's certificate as conclusive, and we think that his finding to this effect must be allowed some bearing on the facts of the case.

The evidence is to this effect, that the prosecutor, while bathing in a public tank, took off and laid upon the steps a gold neck-chain which he was wearing. The prisoner was, at this time, hovering about the spot, watching the proceedings.

Prosecutor, when he had bathed, went home forgetting his neck-chain, but, recollecting it immediately afterwards, went back to the steps, but did not find his chain. Suspecting the prisoner, he taxed him by signs with having taken it, but received a denial in the same form.

A police-officer was then fetched, who, after a time, induced the prisoner to disclose what he had done with the chain, and he accordingly produced it from an ash-heap, where doubtless he had buried it.

The impression produced upon our minds by these facts is that the prisoner is silly, and was probably attracted by the bright ornament, which, with a sort of magpie-instinct, he stole and hid.

Such a person, under the circumstances of the case, is not, we think, a person to whom penal discipline can properly be applied. We accordingly set aside the conviction, and direct that the prisoner be admonished and discharged.

The 3rd July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Dead and dumb person—Act X. of 1872, Section 186.

Reference to the High Court, under Section 186 of the Code of Criminal Procedure, by the Magistrate of Purneah.

The Queen

versus

Bowka Hari.

The High Court may, under Section 186, Code of Criminal Procedure, in the trial of a person who is deaf and

dumb, and who cannot understand the proceedings against him, or plead to the charge, treat the proceedings as amounting to a sufficient trial, and pass sentence upon the prisoner according to the facts which seem to be established in the course, and as the result, of those proceedings.

In this case, the Court had no doubt that the prisoner was guilty, but, before passing final orders, it gave the prisoner a further opportunity of being heard, and accordingly directed the Magistrate to give him notice.

Phear, J.—In this case, one Bowka Hari, Phosun Hari, and others, were charged and tried at the Sessions Court for committing burglary, and the Court found that Bowka Hari and Phosun Hari had committed the offence specified in the charge-sheet, and sentenced Phosun Hari to be rigorously imprisoned for one year.

But, with reference to Bowka Hari, the Sessions Court forwarded the proceedings to this Court for orders under Section 186 of the Criminal Procedure Code, on the ground that the accused Bowka is perfectly deaf and dumb, and unable to understand the proceedings against him, or to plead to the charge. The Judge added that "he is not a lunatic, "but I think that a separate report should "be made under Section 186, Criminal Pro-"cedure Code, to the High Court."

The words of the Section, so far as they are at present important, are as follow:—

"If an accused person, though not insane, "cannot be made to understand the proceed-"ings, the Court may proceed with the "inquiry or trial; and if such inquiry "results in a committal, or if such trial "results in a conviction, the proceedings "shall be forwarded to the High Court, with "a report of the circumstances of the case, "and the High Court shall pass thereon "such order as to it seems fit."

The discretion thus vested in this Court is very wide indeed. And it would seem to be a right inference from the Section that, although the prisoner had not been able to understand the proceedings, and therefore those proceedings had not, according to the principles of the English Common Law, constituted a fair and proper trial, yet, under special circumstances, if this Court should think fit, it might treat them as amounting to a sufficient trial, and pass sentence upon the prisoner according to the facts which seemed to be established in the course of, and as the result of, those proceedings. We have, accordingly, given our best attention to the evidence which is in the record before us, and we have satisfied ourselves that there was a careful investigation of the case in the Court of Session, and also from the fact of the other prisoners who were tried with Bowka having defended themselves with intelligence, and the evidence bearing (so far as regarded the principal fact of the case) upon all the prisoners simultaneously and alike, that this case does stand upon a very different footing from ordinary cases of this kind. At present, therefore, we are not prepared to say that we should be justified in treating the proceedings as amounting to an invalid trial, and setting aside the conviction. If we take the facts which seem to be established by the evidence, there can be no doubt whatever that the prisoner Bowka, although suffering under the infirmity which the Judge describes, was guilty of the offence charged against him.

At the same time, we think that we ought not to come to a final decision upon the materials which are on this record, without giving the prisoner a further opportunity of being heard in the matter of the charge and of this reference. And accordingly we direct the Magistrate to give notice to the prisoner in such a manner as he thinks may be best adapted to effect the purpose of this pending reference, and that he return to us the result of the measures he may take for this purpose as soon as he conveniently can.

The prisoner Bowka appears to be of mature age, and his conduct, so far as we can judge of it from the depositions, is that of a man who has his senses about him; and we can hardly doubt that his relations, or the persons with whom he usually associated, have some means or other of communicating with him, and we would suggest that the Magistrate should avail himself of these persons, if he can procure them, for the purpose of conveying the notice which we have directed to be conveyed to the prisoner.

The 9th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Breach of the peace—Evidence—Act I. of 1872, Section 33—Act X. of 1872, Section 491.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Moorshedabad.

The Queen

versus

Prosono Chunder Gossami and another.

Section 33 of the Evidence Act (I. of 1872) does not justify a Magistrate, when proceeding under

Section 491 of the Code of Criminal Procedure, in using evidence taken in a previous criminal trial in supersession of evidence given in the presence of the accused.

Jackson, J.—We consider that the order made by the Joint Magistrate in this case was irregularly made. Section 491 of the Criminal Procedure Code provides: "Whenever a Magistrate of a Division of a "District, or a Magistrate of the first class, "receives information that any person is "likely to commit a breach of the peace, or "to do any act that may probably occasion "a breach of the peace, he may summon "such person to attend at a time and place "mentioned in the summons to show cause "why he should not be required to enter "into a bond to keep the peace." Explanation 1 says: "A summons calling on a "person to show cause why he should not "be bound over to keep the peace may be "issued on any report or other information "which appears credible, and which the "Magistrate believes; but the Magistrate "cannot bind over a person until he has "adjudicated on evidence before him." In this case, the Joint Magistrate appears to have derived from the record of a case on appeal before him the information that the petitioners were likely to commit a breach of the peace, and thereupon he issued a summons. In issuing that summons, he omitted to comply with the requirements of Section 492, which provides that such summons shall set forth the substance of the report or information on which it is issued, together with other particulars; and he adjudicated upon the matter, not upon any evidence taken for the purpose of showing that the petitioners were then likely to create a breach of the peace, but upon certain depositions taken in a previous criminal trial, which was entirely for a different purpose. Upon that trial, the petitioners were found not to have committed the offence, and were acquitted.

The Joint Magistrate, in justifying his proceedings, refers to Section 33 of the Evidence Act. He contends that it was not necessary for him to summon the witnesses, or to take the evidence in the presence of the petitioners, because it was competent to him to use the evidence given in the previous judicial proceedings, and because Explanation 1, attached to Section 491, does not specifically provide that the Magistrate must adjudicate upon evidence taken on the particular occasion. We might not have thought it necessary to disturb the Joint Magistrate's order on account of his failure to comply with Section 492, but we think the other defects very material. A person complained of is entitled in the first instance to know on what information it is that the Magistrate proceeds, and what is to the nature of the bond or security which he is required to give; and he is also entitled have exhibited afterwards the evidence on which the Magistrate justifies the conviction. Section 33 of the Evidence Act does not, in our opinion, justify the use of evidence taken in a preceding criminal trial in supersession of evidence given in the presence of the accused. It is clear that evidence of that description could not suffice, because what the Magistrate was required to have before him was evidence to show that the accused, if not restrained, was then likely to commit a breach of the peace. That cannot be said to be established by the evidence given on the previous occasion, which rather tended to show that it was not proved that the accused had committed any criminal offence. We think, therefore, that the order of the Joint Magistrate was bad, and must be set aside.

The 9th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Surety—Act X. of 1872, Sections 505 & 516.

(Miscellaneous Case.)

Narain Sooboddhee, *Petitioner.*

Mr. C. Jackson and *Baboos Mohendro Lall Mitter* and *Hem Chunder Banerjee* for the Petitioner.

The Junior Government Pleader in support of the Magistrate's order.

In making an order for security to keep the peace under Section 505, Code of Criminal Procedure, a Magistrate has no right to impose an arbitrary condition not essential to restrain a party from the infringement of the law, *e. g.*, a condition requiring the accused to furnish two sureties, being persons of respectability and substance not related to him, and residing within one mile of his house.

The ground on which a Magistrate has power to refuse to accept any surety under Section 516 must be a valid and reasonable ground.

Jackson, J.—Upon the main question arising in this rule, we are inclined to agree with the Magistrate, who is charged with the maintenance of the peace and good order of the district. It appears to us that there is

good reason for thinking that the accused is a dangerous person, and a terror to the subjects in the neighbourhood; and under these circumstances we cannot say that the Magistrate was not right in requiring him to furnish security. We have considered the letter which has been addressed to the Registrar of the Court, dated the 26th June last, by the Magistrate, as well as the arguments submitted to us to-day by the Junior Government Pleader. We find that the learned pleader does not attempt to justify, and the Magistrate himself very faintly justifies, the extreme rigour of the order passed against the accused. We have no doubt that, in making an order under Section 505, it was illegal to require that the accused should give two sureties, being "persons of respectability and substance, not related to him, and residing within one mile of his house." The Magistrate contends that there is warrant for this kind of restriction in the terms of Section 509, which provides that the amount, the security, the "number and description" of securities, and the period of time for which the securities are to be responsible for the good conduct of the accused, shall be stated in the order for security. That, it seems to me, does not enable the Magistrate to impose arbitrary conditions not essential for the object in view, *viz.*, to restrain a party from infringement of the law; still less, impossible conditions. The Magistrate says that he has ascertained that no person of respectability resides within a mile of the house of the accused; consequently, it is clear that it was impossible for the petitioner to comply with the order of the Magistrate as it stood. To make such an order as that is tantamount to saying that the prisoner shall not furnish any security at all, but must go to jail. It seems to me, it is not in the power of the Magistrate to make such an order. The object of the law is that the person charged shall furnish, if he can, good and sufficient security.

It is matter of observation that, notwithstanding the very strongly expressed opinion of the Magistrate as to the character of the accused, he refrains from taking the procedure provided by Section 506, which would enable him to refer the case to a Court of Session, and thus have an order extending the period of the detention of the accused to three years, and prefers making an order which, though rigorous in its terms, would limit the term of the prisoner's detention to one year only. We think that the conditions prescribed by the Magistrate, *viz.*, that the sureties must be persons not related to the accused, and must be residents within a mile of his house, must be expunged from his order. The Magistrate will, of course, have a discretion under Section 516 to refuse to accept any surety, on the ground that such surety is an unfit person; but the ground of refusal, to be justified, must be a valid and reasonable ground. To this extent, we think, the order of the Magistrate must be varied. The previous order of this Court, that the petitioner should be enlarged on his own recognizance, is now withdrawn.

The 11th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Trial—Subsequent trial.

Reference to the High Court, by the Sessions Judge of Dacca, for the confirmation of the sentence of death.

The Queen

versus

Mohun Banfor, *Prisoner.*

A prisoner, whose trial is supplemental to that of others, is entitled to as full and complete an investigation of all the facts of the occurrences upon which the charge depends as if no previous trial of other persons for participation in these occurrences had ever taken place.

Phear, J.—It is very greatly to be regretted that there has been so imperfect a trial and investigation of this case in the Sessions Court as appears to have happened. The Sessions Judge had, on a former occasion, presided at a trial of several persons accused of participating in the same crime as that which is charged against the present prisoner; that trial was very fully and completely effected, and it seems that the Judge has, therefore, been induced to think that the knowledge of the facts which he himself obtained from the evidence given at that trial rendered it unnecessary that evidence of the same facts should be given over again at the present trial.

But very manifestly (as it seems to us) the prisoner in the present case was entitled to as full and complete an investigation of all the facts of the occurrences upon which the charge depended as if no previous trial of

other persons for participation in these occurrences had ever taken place. And had it not been for the very full admission of facts, which has been made by the prisoner at the present trial, we should have considered that he had been seriously prejudiced by the course which the Judge adopted with regard to it. Only one witness was called for the prosecution, and he was the approver. His testimony also is given in a very concise manner, and, indeed, commences most abruptly. The gentleman who examined him before the Sessions Court must have assumed that most material facts relevant to the matter which had to be tried were already known to the Court, and that, therefore, it was unnecessary to bring them out by the mouth of the witness. But this assumption was not well-founded. Although the Sessions Judge probably remembered most of the facts which had been deposed to at the former trial, the Jury, we must take it, were not acquainted with them, and, at any rate, they were bound to arrive at their verdict upon such information only as was rightly brought before them by evidence given in the presence of the prisoner at this trial.

It is probably open to grave question whether the evidence of the approver alone, uncorroborated, was sufficient to justify the Court in calling upon the prisoner for his defence. But, however this may be, the prosecution closed its case with the approver's testimony, and the Judge thereupon proceeded to examine the prisoner. On this examination, the prisoner, no doubt, admitted facts in very considerable detail, which are sufficient to support, at any rate, the charge of having abetted the murder of Jeithram. And we gather from the verdict of the Jury, as explained by the Judge at the end of his charge, that they found the prisoner guilty of abetting the murder of Jeithram, and were of opinion that he did not himself actually inflict a blow upon, or commit any act of violence against, the murdered man.

It seems to us that, on the record as it stands, this is the only safe verdict which could have been come to. It would have been most hazardous to have found the prisoner guilty of the actual murder, merely upon the statement, bald as it is, of the approver Domun.

Regard, then, being had to the circumstances of this trial and to the verdict of the Jury, we think that the prisoner should not be sentenced to suffer the capital punishment, but, in lieu thereof, should be transported for life.

The 16th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Previous conviction—Charge—Act X. of 1872, Section 439.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Dacca, on a charge of theft.

The Queen

versus

Sheik Jakir, *Appellant.*

Under Section 439, Code of Criminal Procedure, a charge of having committed the offence after a previous conviction therefor should contain an allegation that the offence has been committed after a previous conviction. A statement in a count that, at the time when the prisoner committed the offence (no offence being mentioned specifically in the count), he had been previously convicted of offences punishable under Chapter XVII. of the Indian Penal Code, is not a sufficient compliance with the provisions of Section 439.

Phear, J.—In this case the prisoner has pleaded guilty to the charge of having stolen a shawl. But he has been convicted by the Sessions Court, and sentenced by the Judge upon a charge of having committed the offence of theft after a previous conviction.

Now, on referring to the charges which were made against the prisoner, and upon which he was tried, we do not find one which expressly charges him with having committed theft after a previous conviction. By the first charge he is charged with having committed simple theft in a boat. By the second charge he is charged with having stolen property in his possession, and there is that which purports to be a third charge, but which is simply an allegation that, at the time when the prisoner committed the said offence (no offence whatever being mentioned specifically in this *quasi* charge), he had been previously convicted of offences punishable under Chapter XVII. of the Indian Penal Code, and so on. Now, Section 439 of the Criminal Procedure Code enacts: "If the accused "person has been previously convicted of "any offence, and if it is intended to prove "such previous conviction for the purpose "of affecting the punishment which is to be "awarded, the fact of the previous convic-"tion must be stated in the charge. If it "is omitted, it may be added at any time "before sentence is passed, but not after-"wards."

The Legislature has unquestionably made it material to the goodness of a charge of this kind that the allegation of the offence

having been committed after a previous conviction should be a substantive part of it. And it is easy to see why this should be so, namely, for this reason, among others, that the prisoner is called upon to plead to each charge separately. And while the prisoner, as in the present case, may be ready to plead guilty to the charge of stealing, he may possibly have good cause for not pleading guilty to the charge of stealing after a previous conviction.

In the present case, it is clear that the so-called third charge, upon which the prisoner is supposed to have been convicted, does not conform to the provisions of Section 439. And although the prisoner has, no doubt, pleaded guilty to the first charge of theft simply, it does not appear, on the facts stated in the record, that he can be rightly held to have pleaded within the meaning of the Criminal Procedure Code to a distinct charge of having committed theft after a former conviction. This charge was certainly not put to him in express terms. It is true that, after he had pleaded guilty to the first charge, he was interrogated by the Judge, and in the course of the interrogation admitted that he had been previously convicted. But it is not certain that, although he admitted this fact when he was thus rightly or wrongly examined by the Court, he yet would have pleaded guilty to the charge of having committed theft of property after a previous conviction, if he had been asked to plead to that charge specifically. The difference between the two cases is very manifest; for the law says that he could not be subjected to an enhanced punishment by reason of having been previously convicted, unless the allegation of that previous conviction was made a substantive part of the charge.

So that, while he pleaded guilty to the charge of theft simply, and afterwards admitted that he had been previously convicted (if it be supposed that he had the benefit of advice), he would have known that he could not be punished with greater punishment than three years' imprisonment; whereas, if he had been told distinctly that he was to be tried upon the charge of having committed theft after a previous conviction, he would have known (if again properly advised) that he had, by his plea, made himself liable to be transported for life, as, indeed, he has been by the sentence which has been passed upon him; and it is very possible in this view that he might have claimed the right to be tried upon that charge, instead of admitting himself guilty of it.

Under these circumstances, we are not prepared to say that the conviction upon the aggravated charge is sound in law.

Therefore, seeing that there is no doubt that the prisoner is, by his own confession, guilty of the simple charge of theft, we think that the punishment ought to be reduced from transportation for life to three years' rigorous imprisonment.

The 21st July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Complainant—Summons-case—Act X. of 1872, Sections 148, 203, and 208.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Magistrate of Howrah.

Mudoosoodun Sha, *Complainant,*

versus

Hari Dass Dass and others, *Opposite Party.*

Mr. M. L. Sandel for the Complainant.

Baboo Romesh Chunder Bose for the Opposite Party.

Under Section 203, Code of Criminal Procedure, a Magistrate may convict the accused person who has been summoned before him on the footing of a complaint, of any offence which is the subject of the definition in Section 148, if he thinks that the facts established by the complainant and his evidence only amount to an offence within that Section.

Where the Magistrate treats the complaint throughout as substantially a summons-case, and follows the procedure which is applicable to such a case, he is at liberty, under Section 208, Code of Criminal Procedure, if he adjourns the case to a future day, to dismiss the complaint, if the complainant does not appear on the day on which the hearing has been duly postponed.

Reference.—MUDOOSOODUN SHA petitioned this Court on the 20th of April against one Hari Dass and fifty others named, and five or six persons not named, on charges of unlawful assembly, Section 143, Penal Code; assault, Section 352; and insult intended to provoke a breach of the peace, Section 504. The case was referred to Sub-Deputy Magistrate Baboo Dinonath Dey, who, on the 4th of May, examined the complainant, and summoned the accused Hari Dass only on the charges stated in the petition. The case was heard on the 28th of May, when complainant substantially repeated those charges, and produced three witnesses, who testified to the facts constituting them. The defendant was also examined. He denied the same.

The Sub-Deputy Magistrate then ordered that, as the case was connected with one that was to come on the next day, it should stand over till the morrow.

On the following day, he dismissed the case on the ground of the non-appearance of the complainant.

Against this order the complainant objected in a petition of the 1st of June, requesting me to call for the papers, and rectify the proceedings of the Deputy Magistrate. The papers were gone over, and Baboo Kishto Comal Bhuttacharjee heard on behalf of the complainant on the 25th of June.

I think that, as the case was one involving the decision of charges under Sections 143 and 504, and as summons had been issued under those Sections, it was a warrant, and not a summons, case really, and that Section 205 should not have been applied by the Sub-Deputy Magistrate.

Further, I think that, even supposing that the Sub-Deputy Magistrate was justified in regarding the case as a summons-case, he was not justified in dismissing the case after the complainant and his witnesses and the defendant had been examined.

It seems to me that Section 205 is meant to provide for cases where a complainant does not appear to give his deposition under Section 207, and that it can hardly be meant that the complainant's attendance, even when he has done all his part of the work, and when he has not been told that he is any longer required, should be a *sine qua non* towards his obtaining a decision of his case on its merits.

The Sub-Deputy Magistrate's explanation is annexed.

It appears to me that the case should be remanded to the Sub-Deputy Magistrate for decision on its merits, and hence the present reference is made.

Judgment of the High Court.

Phear, J.—We think that there is not sufficient reason shown in the letter of reference to justify our disturbing the order of the Deputy Magistrate. It is quite plain upon the words of Section 203 of the Criminal Procedure Code that, notwithstanding the extent to which the complaint itself may go, and notwithstanding the terms of the summons, whatever they may be, the Magistrate may convict the accused person, who has been summoned before him on the footing of a complaint, of any offence which is the subject of the definition in Section 148, if he thinks that the facts established by the complainant and his evidence only amount to an offence within that Section; and we think, as far as we can judge from the papers which have been brought under our notice, that the Deputy Magistrate did in this case treat the matter of complaint before him as substantially a summons-case, *i.e.*, as a case involving only an offence which fell within the definition of Section 148. It does not appear that, at any stage of his proceedings, he took any other view of the matter. He, no doubt, adjourned the further hearing of the case after the complainant and the complainant's witnesses had given their evidence. But this he had a right to do under Section 208 of the Criminal Procedure Code, if he found good reason for so doing; and that Section enacts that, so long as the hearing of a complaint of this character is continuing, the complainant must, at the peril of his complaint being dismissed, appear on each successive day appointed for hearing, because the second paragraph of the Section says: "If on the day to which such hearing, "or such further hearing, has been so adjourned, the accused person does not appear, the "Magistrate may issue his warrant for the "arrest of such person."

And the third paragraph says: "If the "complainant does not appear, the Magistrate "may dismiss the complaint."

It thus appears to us that, so far as we can see, the Deputy Magistrate treated the substance of the complaint, as made out by the evidence before him, to be simply of such a nature as rendered it the subject of Section 148, and that he followed the procedure which is applicable to such a case, and had not come to the termination of the hearing. The complainant did not appear on the day on which the hearing had been duly postponed, and, therefore, there was nothing to prevent the Deputy Magistrate from exercising the discretionary power which the last clause of Section 208 gives him, and from dismissing the complaint. The Section 212, no doubt, says that the dismissal of the complaint under this Chapter shall operate in like manner as the acquittal of the accused person. It is not necessary, however, for us here to consider any question as to whether it will be an acquittal of the accused in reference to all the charges which might be found to lie within the letter of the complaint, or only an acquittal of such of those charges as the Magistrate had power to deal with, and to hear and determine under the provisions of this Chapter.

We decline to make any order in the matter of this reference.

The 21st July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Charge—Information—Act X. of 1872, Section 90.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Gya.

The Queen

versus

Ahmed Ali and others.

In a case in which the accused are charged with having omitted to give information which they were legally bound to give under Section 90 of the Code of Criminal Procedure, it should appear what the offence is as to the commission of which the accused wilfully omitted to give information; that the specified offence was, in fact, committed by some one; and that the accused knew of its having been committed.

Phear, J.—We think that this conviction, which has been referred to us by the Sessions Judge, cannot be supported. Indeed, it is not easy to ascertain what precisely the accused persons have been convicted of. There is no formal conviction in the record which has been sent up to us, neither is there anything in the shape of a charge. Although it was not incumbent upon the Magistrate in this case to draw up in the course of the trial any formal charge, yet he was bound to make it clear what was the charge upon which, in the end, he convicted the accused. But the convicting Magistrate only says: "The accused in this case were charged "with wilfully omitting to give information "respecting the commission of an offence, or "series of offences committed, by certain "inhabitants of their village, they being "legally bound, under Section 90, Code of "Criminal Procedure, so to do."

And we understand that it is upon a supposed charge of this kind that the accused persons have been convicted. But it is to be observed that this charge, as the Magistrate represents it, is in itself insufficient to specify an offence, for it does not mention the offence or offences as to the commission of which the accused persons wilfully omitted to give information. It does not even appear in the Magistrate's judgment, or upon any of the evidence which is on the record, that any specified offence was, in fact, committed by any one, still less that the accused persons knew of its being committed, and omitted to give information to the police, unless so much may be inferred from the deposition of the head-constable of police, who says: "Akloo Gualla and Dusruth Gualla lived "in Manikpur; these men were notorious "receivers of stolen property, were commit-"ted by this Court under Section 413, Indian "Penal Code, and received twelve and eight "years' imprisonment respectively at the Ses-"sions." * * * If the commission of the offence for which these two persons were, as the head-constable thus vaguely says, convicted at the Sessions Court, was that of which the present accused persons did not inform the police, and for which they are now sought to be made responsible, that fact ought to have been stated clearly and distinctly by the Magistrate; and, if it had been, the Magistrate would have seen at once that there was no evidence before him which could serve to support a conviction.

In the reasons, however, which have been sent up to us through the Sessions Judge by the Magistrate in order to justify the conviction which he made, he maintains that "the petitioners were legally bound to report "under Clause (*a*), Section 90, Act X. of "1872, the residence of the accused in their "village." By the accused he means Akloo Gualla and Dusruth Gualla. And, judging from this, we should be led to suppose that the Magistrate had intended to convict the petitioners of a breach of the duty which is mentioned in Clause (*a*) of Section 90 of the Criminal Procedure Code. But in the Magistrate's record itself, there seems to be no trace of a charge or conviction on this head. The Section runs in these words: "Every "village-headman, village-watchman, owner "or occupier of land, &c., * * * * is "bound forthwith to communicate to the "nearest Magistrate, or to the officer in "charge of the nearest police-station, any "information which he may obtain respect-"ing (1) the residence of any notorious "receiver or vendor of stolen property at the "village of which he is headman or watchman, "or in which he owns or occupies land, or "collects rent or revenue, as the case may "be; * * * * (2) the commission or "intention to commit suttee or other non-"bailable offence at or near such village." Thus, while the judgment of the Magistrate, which has been already referred to, would support the inference that the conviction made by him was intended to be a conviction under Clause (*c*) of Section 90, on the other hand, the reasons subsequently given by the Magistrate for supporting the conviction would appear to show that he intended to convict under Clause (*a*) of the same Section.

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We think it right to observe that the Section is quite express in stating the obligation which rests upon the person to whom it applies, namely, an obligation forthwith to communicate to the police-station any information which he may obtain upon certain subsequent specified heads. The meaning of this is, that, as soon as he gets information upon any one of these heads, he must communicate that information to the nearest police-station. There is not the slightest evidence, so far as we can discover upon this record, to show that the petitioners ever at any time received any information upon either the head comprised in Clause (*a*) or the head comprised in Clause (*c*); and, consequently, they could not rightly be convicted of any neglect of duty in not having forthwith communicated that information to the nearest police-station. In truth, the evidence in this case in the record, by which the conviction is sought to be supported, is exceedingly crude, and altogether insufficient to justify the conviction of the petitioners of anything whatever. In effect, the evidence at most proves that certain persons, namely, the two Guallas, who probably were at some time convicted in the Sessions Court of some unspecified offence, were, in the opinion of the police and, perhaps, of one other person, notorious offenders, and upon this ground alone the petitioners, because they are owners of property, and dwell in the villages where these Guallas dwelt, have been fined.

The conviction and sentence must be set aside, and the fine, if it has been paid, must be refunded.

The 25th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Summary proceedings—Act X. of 1872, Chapter XVIII. & Section 34.

(Miscellaneous Case.)

Khetter Mohun Chowrunghee, *Petitioner.*

Baboo Bhugobutty Churn Ghose for the Petitioner.

Baboo Juggadanund Mookerjee for the Crown.

A Magistrate having adopted the summary procedure prescribed by Chapter XVIII., Code of Criminal Procedure, in the case of an offence which he had no power to try summarily, the High Court set aside the proceedings as being void under Section 34, clause 4, of that Code.

Phear, J.—It seems to be quite plain upon the papers before us that the accused person in this case was tried summarily under the provisions of Chapter XVIII, and upon a conviction being come to by the Magistrate, and an appeal being preferred against that conviction, the only record which he sent up, indeed, which he had to send up to the Judge, was a judgment framed in obedience to Section 228, Criminal Procedure Code, containing the substance of the evidence and the particulars of the register which is directed to be kept by Section 227 of the Criminal Procedure Code. Upon this record of the summary trial coming before the Judge, the case being one which admitted appeal, the Judge was of opinion that further evidence was required; and accordingly, in exercise of the discretion which, in all cases of appeal, is reposed in an Appellate Court by Section 282, Criminal Procedure Code, he directed the Magistrate to take such further evidence as he specified in his order, and accordingly this additional evidence was taken and returned to the Judge. Upon consideration of this fresh evidence, together with the original record sent up to him, the Judge affirmed the conviction.

It is beyond doubt, we think, on this state of things, that the trial before the Magistrate was a trial in the summary mode which is prescribed by Chapter XVIII. But it is also quite plain beyond dispute—indeed, the learned Government Pleader who has appeared for the Crown admits—that the offence with which the accused person was charged, and of which he was convicted, is not one of the offences which a Magistrate has power to try and determine summarily. This being so, Section 34, Clause 4, of the Criminal Procedure Code, declares that the proceedings are void; and consequently the conviction, which was made by the Magistrate, and affirmed by the Judge, must be set aside as having been made without jurisdiction, and as being of no effect. Accordingly, we set aside the conviction and the sentence of forfeiture and fine. If the fine has been paid, it must be refunded.

The 29th July 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Accused—Cross-examination—Witness—Attendance.

(Miscellaneous.)

Khurruckdharee Sing, *Petitioner,*

versus

Pershadee Mundul, *Opposite Party.*

Mr. J. H. A. Branson for the Petitioner.

Baboo Kalikishen Sein for the Opposite Party.

Baboo Amarendra Nath Chatterjee, for the Junior Government Pleader, on the part of the Crown.

As a rule, the proper and convenient time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence; but it is in the discretion of the Criminal Court to allow the accused to recall and cross-examine the witnesses for the prosecution at any period of the defence, when the Court may think such a step right and proper.

It is incumbent upon a Court, when it discharges a witness from the duty of attendance before the trial is ended, to ascertain from the accused whether he has, or is likely to have, any need of the witness's testimony; and if he has such need, then to take such steps for insuring the presence of the witness at the required time as may be necessary.

Phear, J.—It is now, as the result of decisions of this Court, beyond question that the accused person in warrant-cases has, under Section 218 of the Criminal Procedure Code, an undoubted right to have the witnesses of the prosecution recalled for the purpose of cross-examination after the charge has been framed against him, unless he has waived that right. He may, no doubt, either waive it by express words, or he may waive it by allowing the proper time in the course of the trial to go by without availing himself of the right. And I apprehend there can be little doubt that, as a rule, the proper and convenient time in the course of the trial for the purpose of cross-examination of the witnesses of the prosecution is at the commencement of the accused person's defence. It is obviously expedient that the witnesses for the prosecution, if they are to be cross-examined at all, should, as a rule, be cross-examined before the witnesses for the defence are examined, rather than afterwards. And this course of proceeding is the accepted practice in our Courts of criminal justice. It may be, as has been suggested by the learned Counsel for the petitioner, that doubts have been entertained whether a precise and somewhat rigid course of proceeding in this respect has not been laid down by Sections 218 and 219 of the Criminal Procedure Code. And it is possible that the parties in the present matter were under an impression of that kind. It appears to me, however, without going into the details of these enactments, that this is not so, and that it is still left to the instructed discretion of the Criminal Court to allow the accused person to recall and cross-examine the witnesses for the prosecution at any period of the defence, when the Court may think such a step right and proper. If the words of Sections 218 and 219 are understood to indicate a strict order of proceeding, this order must be as follows: First, the examination of such witnesses as the accused person may have present when the charge is framed; then, the cross-examination of the witnesses who had been previously examined for the prosecution; and lastly, if the Court should, under Section 219, adjourn the trial for the production of other witnesses or evidence on the part of the accused, then the examination of this evidence without any cross-examination of the same on behalf of the prosecution. But it seems to me obvious that the Legislature did not intend to prescribe so inconvenient and imperfect a practice as this. In my view, Sections 217, 218, and 219, reasonably read together, merely lay down that, when the charge has been framed upon the footing of the evidence produced by the prosecution, then, and not before, the accused person shall be put upon his defence; that to support this he has the right to adduce the testimony of witnesses and other evidence, and incidental to this right, or rather as a branch of it, he has the right to have the witnesses of the prosecution recalled by the Magistrate, in order that he may cross-examine them, and that the Magistrate shall afford the accused the requisite means and opportunity of, in this way, making out his defence by issuing summons to witnesses, whether persons who have already been examined or not, and adjourning the trial, &c., when, in his discretion, it seems necessary to do so. The order in which the testimony of witnesses or other evidence is to be taken, and examinations or cross-examinations had, is (as in all other judicial trials) left to the discretion of the Magistrate, which ought to be exercised, not capriciously, but in such a way as to best ensure simplicity of procedure

and a fair trial, and to promote the ends of justice.

Now, it is certain in the case before us that the witnesses were not cross-examined by, or on behalf of, the accused after the charge was framed. This took place on the 18th March; and the further hearing of the trial was adjourned on that day until the 25th March, in order that the accused person might produce his witnesses. And when the 25th March came, the witnesses who then made their appearance at the instance of the accused were examined on his behalf, and cross-examined on behalf of the prosecution; but none of the witnesses for the prosecution were recalled for the purpose of cross-examination or for any other purpose; and no request had been made to the Magistrate that they should be recalled. This being so, the question was whether, when the vakeel of the accused on the next morning, that is, on the morning of the 26th, asked, as he then did, to have the witnesses for the prosecution recalled for the purpose of cross-examination, the Court ought to have held that the accused person had waived his right to cross-examine. The Magistrate appears to have thought that the provisions of the Criminal Procedure Code were opposed in terms to the witnesses being recalled for cross-examination at this time. He did not address his mind to the question in the shape which I have endeavoured to give it. He did not enquire whether, regard being had to all the circumstances of the trial, the accused person had, in fact, waived his right to cross-examine or not. In speaking of what occurred on the morning of the 26th, he says: "Gopal Baboo then appeared, and "said that he considered the prosecution's "witnesses had been most badly examined, "and wished to recall and re-cross-examine "them." This refers to the cross-examination which had taken place before the charge was framed—a cross-examination which, according to the decision reported in the 17 Weekly Reporter, p. 51, did not alone have the effect of barring the accused from his right of having the witnesses recalled and cross-examined after the charge was framed. The Magistrate proceeds: "The men had gone "to their homes, the case must have been "adjourned, fresh summons issued, and, in "fact, almost re-tried." No doubt, this was an inconvenience which well might make the Magistrate hesitate to allow the recall of these witnesses. But it suggests the further question—how came it that these witnesses had been allowed to go to their homes before the trial was completed? If a trial is likely to continue over many days, or any lengthened period, it may be great harassment and vexation to the witnesses that they should all be compelled to remain at the place of trial until its termination, and it is right and proper that the Court should permit them to go home as soon as their attendance at Court has become unnecessary. But it is incumbent upon the Court, when it discharges a witness from the duty of attendance before the trial is ended, to ascertain from the accused person whether he has, or is likely to have, any need of the witness's testimony; and if he has such need, then to take such steps for insuring the presence of the witness at the required time as may be necessary. If a Magistrate, before discharging a witness, obtains the assent of the accused person to his going away without any order for his re-appearance, then, no doubt, such assent would be the best possible evidence of waiver of the accused person's right to cross-examine. It seems to me that, in the present case, the ordinary course of procedure of a criminal trial has been in some degree departed from by the Court itself. In my judgment, the Legislature has not made it a rigid rule that the only time at which the accused person can ask for the recall of the witnesses for the prosecution is the time when he is called upon to enter upon his defence. The Magistrate never, at any time during the trial, told the accused person that the opportunity for doing this had arrived. The accused person was not informed, when the case of the prosecution ended, and the adjournment was granted, that the witnesses for the prosecution would be then discharged from attendance, unless he desired to cross-examine them; and when the case of the accused person was entered upon on the 25th, it does not appear that he was made aware that, by so doing, he waived his right to cross-examine the witnesses for the prosecution. Neither is it said that there was a well-known rule of practice in the Magistrate's Court, which was equivalent to notice on these points; and the fact remains that the accused person has not been permitted to cross-examine the witnesses for the prosecution, although he asked to be allowed to do so before the trial ended, and nothing is shown to have been done or omitted on his part which can reasonably be construed into a waiver of his right to cross-examine those witnesses. Under these circumstances, I think the accused ought to have given to him the opportunity, which he desires, of cross-examining the witnesses, and that, for

this purpose, the conviction and the sentence should be set aside, and the case sent back to the Magistrate, in order that such witnesses on the part of the prosecution as the accused person may require should be recalled and cross-examined.

Morris, J.—It appears to me that Section 215, Criminal Procedure Code, points out pretty clearly the time in the course of the trial when the accused may, if he so wishes, recall the witnesses for the prosecution, and cross-examine them. That time is immediately after he has been called to plead to the charge, and to enter upon his defence. At the same time, I am disposed to think with my learned colleague that the law does not lay down any hard and fast rule on the subject. The accused has, after the charge has been drawn up against him, an undoubted right to recall and cross-examine the witnesses for the prosecution, and that right remains, unless he himself chooses to waive it. In the present instance, there is nothing to show that the accused made any waiver of his right in this respect, and I, therefore, concur in the order which is proposed to be made.

The 29th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Creditor—Debt—Compromise—Dishonestly—Fraudulently—Act XLV. of 1860, Section 422.

(Miscellaneous Case.)

Nobin Chunder Mudduck, *Petitioner.*

Mr. Mun Mohun Ghose and *Baboo Biprodass Mookerjee* for the Petitioner.

Where A entered into an agreement with B not to compromise a case with C, because he had assigned the benefit of the suit to B as a security for the due payment of some monthly instalment of money, and A notwithstanding did afterwards compromise the suit with C, it was held that A could not be convicted under Section 422 of the Penal Code, unless the compromise with C was made dishonestly or fraudulently towards B.

Phear, J.—It appears to us that, on the facts found by the Lower Courts, the conviction cannot be sustained. The accused appears to have entered on a date mentioned into an agreement with the prosecutor, to the effect that he would not compromise a certain suit between himself and another party which was then pending, and the reason why he entered into this contract was that he had assigned the benefit of this suit to the prosecutor as a security for the due payment of some monthly instalment of money. Notwithstanding this agreement, however, he did afterwards compromise the suit: and for this breach of contract he has been found guilty of an offence under Section 422 of the Indian Penal Code, that is, he has been found guilty of having dishonestly or fraudulently prevented a debt or demand due to himself from being made available according to law for payment of his debts.

Now, it is perhaps enough to say that it is much more than doubtful whether a suit of such a kind as that which was compromised by the accused could be rightly held to be even a claim for a debt or a demand within the meaning of those words, as they are used in this Section. We are told that the suit which he compromised was a suit for unliquidated damages: but we are not sufficiently informed as to its exact nature, and the facts upon which it stood, to be able to judge whether it was possible that the subject of it should fall within those words. But even assuming that it did, then it is further necessary, in order to constitute the compromise complained of an offence under this Section, that that compromise should have been made dishonestly or fraudulently towards the prosecutor. The Penal Code contains a definition of the words "dishonestly" and "fraudulently," and there is nothing in the case which has come up to us to indicate that the compromise in question was either dishonest or fraudulent within the meaning of that definition. It does not appear that it was effected for the purpose of bringing wrongful gain to the accused, or for doing wrongful injury to the prosecutor; still less, that it was come to with the intention of effecting any fraud in its general sense upon the prosecutor. For all that appears in the case, it may have been quite the right thing for the accused person to have done. If the action which he had brought, and which he thus compromised, was an ill-advised action, or if, for any reason, it was not likely that he should succeed in it, it was not only best for himself, but probably would be best also for the prosecutor, that it should be compromised, and put an end to. It seems to us, therefore, on the facts which have been found in the judgments of the Lower Courts, that this conviction is wrong, and should be set aside. Accordingly, the conviction and sentence are set aside, and the prisoner must be released, far so as the present charge is concerned.

The 30th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Nuisance—Jury—Act X. of 1872, Section 521.

(Miscellaneous Case.)

Brindabun Dutt, *Petitioner,*

versus

Dwarka Nath Sein, *Opposite Party.*

Baboo Aukhil Chunder Sein for the Petitioner.

In a case in which a party, on whom an order had been made for abatement of nuisance, applied, under Section 523, Code of Criminal Procedure, for the appointment of a Jury, the Magistrate appointed the complainant and two of his witnesses to be—the former the foreman, and the latter two of the members of the Jury.

HELD that the Jury so constituted by the Magistrate was not a proper tribunal under Section 523, Code of Criminal Procedure, and the proceedings, &c., were accordingly set aside, and the Magistrate directed to appoint a fresh Jury.

Phear, J.—IN this case, upon a complaint being made to the Joint Magistrate by one Dwarka Nath Sein, to the effect that Brindabun Dutt had obstructed a public thoroughfare, the Joint Magistrate passed an order in due form for the abatement or removal of the obstruction in pursuance of the provisions of Section 521 of the Criminal Procedure Code. And within the time limited for the purpose, Brindabun Dutt, availing himself of the right given him by Section 523, applied to the Magistrate to have a Jury appointed, in order to try whether the order which had been passed was a reasonable and proper order or not. Upon this application, the Magistrate appointed the complainant Dwarka Nath Sein himself as foreman of the Jury, and two other persons who, Brindabun Dutt says, were witnesses of Dwarka Nath Sein, as Jurors; and the petitioner Brindabun Dutt, on his part, appointed two persons to make up the Jury of five prescribed by Section 523. When Brindabun Dutt discovered that the persons appointed by the Magistrate, namely, the foreman and two other Jurors, were respectively complainant himself and his two witnesses, he preferred the following petition to the Magistrate:—

"The humble petition of Brindabun Dutt, "defendant, sheweth—

"That, in obedience to an order in the "above case from your honor under Section "521, Criminal Procedure Code, your "petitioner, by his petition dated the 18th "instant, claimed exemption from that order, "and applied, under Section 522, to your "honor for an order for a Jury to be appointed "to try whether his objections to the order "were reasonable or not.

2. "On receiving the application, your "honor appointed the "marginally noted "persons to form the "Jury, Nos. 4 and 5 "having been nominated by your petitioner.

1. Dwarka Nath Sein, *juror* and *foreman.*
2. Prankrisna Kobiraj.
3. Raj Bullub Boshu.
4. Ishwar Chunder Boshu, *head-master.*
5. Tara Kinkur Dutt, *vakeel.*

3. "Your petitioner now submits that "the appointment of the complainant Dwarka "Nath Sein to be foreman, and his (com-"plainant's) witnesses Prankrisna and Raj "Bullub to be Jurors, is not legal. The "complainant has a direct interest in the "order being declared reasonable and proper, "and is, therefore, not a fit person to try the "reasonableness or otherwise of it. And the "complainant's witnesses (Prankrisna is "complainant's cousin, Raj Bullub is former "complainant Tara Churn's uncle) are the "very persons whose evidence the Jurors "will take into consideration in the trial of "this case, and those witnesses cannot, there-"fore, be members of the Jury.

4. "Your petitioner further submits "that the object of the Legislature in grant-"ing the defendant in such case the benefit "of a trial by Jury will be defeated, if the "complainants and their witnesses be Jurors. "Your petitioner, therefore, very humbly "prays that your honor will be pleased to "appoint three independent and respectable "men as Jurors instead of the complainant "and his two witnesses. And your petitioner, "as in duty bound, will ever pray."

If the statements in this petition were correct, then the prayer with which it terminated was most reasonable and proper, and ought to have been complied with. There cannot be the slightest doubt that the Jury, as so constituted by the Magistrate, was not a proper tribunal under Section 523. It is not competent to any one to exercise the authority of a public Court of Justice as Judge in his own cause. And it is plainly against the most elementary principles of right and equity that an applicant for justice to a Criminal Court, or indeed to any other Court, should be compelled to submit his case to the arbitration of his adversary.

If, then, the facts stated in his petition do not admit of being controverted, and it seems that they do not, one would have expected that the Joint Magistrate would have at once

complied with the prayer of the petitioner. Instead of that, however, we find, to our extreme surprise, the following passage endorsed on the petition: "There is "nothing in the Section giving the person to "whom the order has been issued the power "of challenging the Magistrate's appoint-"ment." This is signed by the Joint Magistrate, and we understand that, notwithstanding the objection of the petitioner, the case proceeded; the Jury, constituted as described by the petitioner, heard the evidence put before them, and as might have been confidently expected *à priori*, the decision of the majority of the Jury, consisting of the foreman and his two partizans, was that the order which the Magistrate had made in his favor was reasonable and proper. In truth, a trial under such conditions was but the mockery of a trial, and it appears to us beyond all question or doubt that this verdict is not a lawful verdict, and that the order of the Magistrate, which was passed upon the footing of it, is without validity, and must be set aside. The order, accordingly, is set aside, and the Magistrate is directed to appoint a fresh Jury, and to take the requisite steps for having the matter tried afresh.

The 30th July 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Obstruction—Nuisance—Jurisdiction—Act X. of 1872, Section 532.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of the 24-Pergunnahs.

Rosik Lall Nundi

versus

Kartik Shaut.

In order to found the jurisdiction of a Magistrate to take action under Section 532 of the Code of Criminal Procedure, it is necessary that a dispute exist between two persons concerning the right to the use of any land or water, or any right of way; the jurisdiction is intended for the purpose of preserving the public peace.

Reference.—It was reported to the Magistrate, Mr. Verner, on the 24th March, that Kartik Shaut had filled up a public drain, and notice was issued to him, under Act VI. (B.C.) of 1868, to clear out the drain under threat of proceedings according to that Act.

Kartik Shaut filed a written statement on the 15th April, claiming the drain as his private property, upon which date Mr. Verner recorded an opinion, after personal inspection, that it was "a very gross case of obstructing the public drain," and Kartik Shaut was prosecuted under Section 432, Indian Penal Code.

The charge was dismissed by a Bench of Magistrates on which Mr. Verner sat by an order dated 29th April, which directed that the case should be renewed under Section 532, Criminal Procedure Code. Proceedings were taken and evidence recorded, and on 10th June Mr. Verner passed an order, finding that the drain was "open to the use of the public in that neighbourhood," and directing, in the terms of Section 532, "that "possession of the drain shall not be retained "by Kartik Shaut, or by any one else, to the "exclusion of the public, until the person "claiming such possession shall obtain the "decision of a competent Civil Court, &c., "&c."

Kartik Shaut now invokes the interference of the High Court under Section 297, Criminal Procedure Code; and I beg to submit the case for orders, as I believe the Magistrate's proceedings to be illegal.

Section 532 does not, in my opinion, apply to the case of obstructing a public drain, which is what the Magistrate finds has been done. This has been held in the analogous case of a public thoroughfare (5 W. R. 51; neither does filling up a drain come under the category of exclusive possession of the drain. The nature of the property is changed by the obstruction, and the drain must be re-opened and made available for the passage of water before it can be used at all. The Magistrate's written order does not provide for the removal of the obstruction; and if nothing further had taken place, I should be of opinion that his declaration and order would be a mere *brutum fulmen* and inoperative. I am, however, informed that the drain has been cleared out by the Municipality at the public expense since the date of the Magistrate's order.

It seems to me that the Magistrate might have acted under Act VI. (B. C.) of 1868, Schedule K, Clause 1, as was first contemplated. If he did not adopt that course, he should have proceeded under Section 521, Criminal Procedure Code, and in that case the aggrieved person would have had a right to apply for a Jury under Section 523. Failing obedience to the order or application for a Jury, the Magistrate might have carried out his order under Section 525; but if what is stated is true, the Magistrate has adopted the

course laid down in Section 525 without the preliminary proceedings under Section 521.

I have, therefore, to move the Court to direct the recall of the order under Section 532, or to issue such other orders as it may think fit.

Judgment of the High Court.

Phear, J.—Without expressing any opinion as to whether Section 532 of the Criminal Procedure Code applies to the facts of this case or not, we think it is enough to say that, in our opinion, it is necessary, in order to found the jurisdiction of the Magistrate to take action under that Section, that a dispute should exist between two persons concerning the right to the use of any land or water, or any right of way; the one claiming the right, either as a private right in himself personally, or as a public right attaching to himself as a member of the public, and the other resisting the claim. The object of the Section is not to prevent the mischief or injury which may accrue by reason of the disturbance or assertion of the right to the persons who are disputing about it, but to stop the public manifestation of the dispute itself. The jurisdiction which is given to the Magistrate by this Section is a jurisdiction which is intended for the purpose of preserving the public peace. It does not convert the Magistrate into a Court, which is to determine rights between parties, or to consider and discuss any questions of proprietary damage alone to individuals. But in the case which is before us on the judgment of the Magistrate himself, it appears plain that no dispute of the kind which has just been mentioned does exist. The action which has been taken in the matter by the Magistrate has been the result of representations made by the police in reference to the mischief which may be caused to unnamed and unknown persons, if the drain is not kept open. The order which the Magistrate has made is not founded upon, and directed to remove, the existence of any dispute between the petitioner and any other individual, grounded on the assertion of a personal right, whether of a private or of a public nature. We therefore think, though for other reasons than those mentioned by the Judge in his letter of reference, that the order of the Magistrate cannot be sustained upon the facts found by him, and must be set aside.

As stated above, we express no opinion as to the soundness of the grounds upon which the Judge has made the reference to this Court.

The 30th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

False evidence—Jurisdiction—Procedure—Act X. of 1872, Sections 471, 473.

(Miscellaneous Case.)

Sufatoollah, *Petitioner.*

Baboo Joy Gobind Shome for the Petitioner.

A witness charged with having given false evidence in a criminal proceeding before a Magistrate of the first class was tried and convicted of that charge by that Magistrate, and the conviction was confirmed on appea by the Sessions Judge.

HELD that the jurisdiction of the Magistrate was not barred by the operation of Section 473, Act X. of 1872, the giving of false evidence in the presence of a Court not being an offence committed in contempt of the authority of the Court within the meaning of that Section.

The Magistrate's jurisdiction in such a case was, however, held barred by Section 471 of the Code, the Magistrate being bound, under that Section, either to commit or send the case for enquiry to another Magistrate.

Jackson, J.—THE petitioner before us, Sufatoollah, was a witness in a certain criminal proceeding before Mr. J. Posford, who appears to be a Magistrate of the first class in the District of Sylhet, and in that criminal proceeding the petitioner is alleged to have given false evidence before Mr. Posford. The criminal proceeding, which was the case of Ameer Khan against Bukhtear Khan, and in which the evidence was given, has not been disposed of. The Joint Magistrate took up the charge of giving false evidence against the petitioner, and tried him upon that charge, and, under the powers lately conferred upon First-class Magistrates in that behalf by the Code of Criminal Procedure, convicted and sentenced Sufatoollah to imprisonment for eighteen months. Sufatoollah appealed to the Court of Session, and there the sentence was affirmed. He now comes by petition before this Court, and his pleader contends that the conviction is bad in law, inasmuch as the Joint Magistrate, being the Magistrate before whom the alleged offence of giving false evidence was committed, had no jurisdiction to try the prisoner for such offence.

In this contention, the pleader relies upon Section 473 of Act X. of 1872, which declares: "Except as provided in Sec-"tions 435, 436, and 472, no Court "shall try any person for an offence com-"mitted in contempt of its own authority." It is contended that giving of false evidence in the presence of a Court is an offence committed in contempt of the authority of that Court. There are no rulings of this

Court precisely in point. There is a case decided by the High Court in Bombay, to be found in 10 Bombay High Court Reports 73, the case of Queen *v.* Navranbeg Dala Beg. In that case, the learned Judges held: "Every attempt to pervert the proceedings "of a Court to an improper end is a contempt "of its authority, and giving false evidence is "such an attempt. The offence, therefore, if "committed before a Magistrate, cannot be "tried by him;" and they quashed the conviction, annulled the trial, and ordered a new trial before a competent Court, that is to say, either a First-class Magistrate or the Court of Session. The same view appears to have been taken by the Madras High Court, and these decisions, of course, add great weight to the arguments addressed to us; but, as at present advised, I am not of opinion that, by the words "in contempt of "its own authority" in Section 473, the Legislature intended any offence which may be construed into a contempt of the authority of the Court, but that they intended such offences as are ordinarily considered and are classed in the Indian Penal Code as offences against the authority of a Court, that is to say, the offences mentioned in Chapter X. of the Indian Penal Code, and probably also the offence mentioned in Section 228 of the Indian Penal Code, that being the intentional offering of an insult to a public servant, which might well be regarded as an offence committed in contempt of its authority, although formally included in Chapter XI., which relates to false evidence and offences against public justice; and I think there is an obvious reason in favor of that construction, for that is a class of offences in which, from the nature of the case, the feelings of the Judge, whose authority has been condemned, must necessarily be, to some extent, involved; and the Legislature may have properly thought it advisable that the presiding officer of the Court against whom such contempt has been committed should not be placed, except where an immediate example is required under Section 435, Code of Criminal Procedure, in the position of having himself to punish the offender. Now, in the case of giving false evidence, I think it would be hard to say that the offender, in giving such offence, had it in his mind that he was committing a contempt of Court. That which he intentionally did was to make a false statement with the intention of perverting justice, of doing an injury to some person, or of screening some person from punishment. I do not at present think, therefore, that the jurisdiction of the Magistrate is barred by the operation of that Section. But I think there is another Section which is applicable to the case, and which by the directions contained in it, sufficiently indicates that the Magistrate before whom the false evidence is given is not to take upon himself the trial of the offender. That is Section 471. Section 471 provides: "When any Court, Civil or Criminal, is of "opinion that there is sufficient ground for "enquiring into any charge mentioned in "Sections 467, 468, and 469, such Court, "after making such preliminary enquiry as "may be necessary, may either commit the "case itself, or may send the case for enquiry "to any Magistrate having power to try, or "commit for trial, the accused person for the "offence charged." That, therefore, seems to require that the Criminal Court, whether the Court of a First-class Magistrate or any other Magistrate, if it thinks proper to institute an enquiry in the case of giving false evidence committed before itself, must either commit the case itself, or send the case for enquiry to any Magistrate having power to try or commit for trial. By Section 472, the Court of Session is exempted from the operation of the previous Section in respect of all offences triable by the Court of Session exclusively. That exemption formerly extended to such cases as are before us, but the Legislature, by the Act of 1872, thought fit to declare that the offence should no longer be triable by the Court of Session exclusively. That circumstance, however, *viz.*, that a First-class Magistrate may try the offence of giving false evidence, certainly would not operate to give such Magistrate a power which the Court of Session itself no longer exercises. The Magistrate is, I think, either bound to commit or send the case for enquiry to another Magistrate. In that view, it appears to me that the order of the Magistrate, Mr. Posford, must be set aside. It has been suggested that the prisoner has been four months in jail. But if the offence which he has committed is that of giving false evidence, I do not think it can be said that he has at all received his just deserts. Instead, therefore, of ordering his discharge, we direct that the sentence be quashed, and that the Magistrate either commit him for trial, or send him before another Magistrate having power to try or commit him for trial. In either case, however, of course, the imprisonment which the petitioner has already undergone will be taken into consideration.

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The 30th July 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Right of defence—Act XLV. of 1860, Sections 100 & 103.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of culpable homicide not amounting to murder, &c.

The Queen

versus

Ram Lall Singh and others, *Appellants.*

Baboo Tarinee Kant Bhuttacharjee for Appellants.

Under the facts of this case, a person was held to have rightly exercised the right of private defence as contemplated in Clause 2, Section 100, and Clause 4, Section 103, Penal Code, though, in the exercise of such right, he killed one of his aggressors.

McDonell, J.—This is a case in which the accused were charged with murder and with rioting armed with deadly weapons. They were held to be not guilty of murder, but the Sessions Judge, differing from the assessors, has convicted Ram Lall (appellant No. 5), under Section 304, Indian Penal Code, of culpable homicide not amounting to murder, and, concurring with one assessor, has convicted the other five appellants, under Section 148 of the Indian Penal Code, of rioting, being armed with deadly weapons, and sentenced Ram Lall to seven years', and the others each to three years' rigorous imprisonment.

It appears that, in the village of Mirzapore, in which the riot took place, there had been for some time an ill-feeling between the zemindars and the ryots. On the night of the 28th of Kartick, a body of up-countrymen (some eight in number) had arrived at the zemindaree-cutcherry, the ostensible object of their visit being to escort a sum of Rs. 2,000 to Mirzapore, and their real object, it may fairly be inferred, being to occupy and defend the cutcherry which was threatened by the villagers.

On the morning of the 29th Kartick, a pony, belonging to Hera Singh, one of the up-countrymen, had strayed into the crop, and the ryots, making this a pretext, assembled in large numbers, and on Hera Singh's going out to recover his pony, they attacked him in force, so that he had to make a speedy retreat towards the cutcherry. Finding that the ryots were getting too close to him—in fact, that they had almost surrounded him—Hera Singh called out for assistance, and his companions came to his rescue, but being only eight against a large mob, they were beaten and driven back, and the ryots had actually entered the cutcherry-premises, when Ram Lall rushed into an inner apartment, and brought out a loaded gun; and as the ryots still continued to advance, fired off both barrels, killing one man, and wounding others. The above have been found to be the facts both by the Judge and the assessors; and in the counter-case in which the ryots were tried and convicted of rioting, the same conclusions were arrived at, and the Judge's decision in that case has been upheld by this Court on appeal. Consequently, the other party having been found to be the aggressors, the real question in the present case is whether Ram Lall, in firing off the gun, only exercised a legal right of private defence, or whether he had exceeded it. From a perusal of the judgment in the counter-case, it is seen that the Judge and assessors there held, not only that the ryots were the aggressors, and that they did trespass into the cutcherry-premises, but that they were armed with deadly weapons, and that force was used by many of their body, and that they advanced in a manner no provocation they might have received could justify, and that their common object was to drive the up-country men from the cutcherry. Now, as this was the common object, the up-countrymen were certainly justified in trying, not only to defend themselves, but to protect their master's property. It is argued that Ram Lall, by firing his gun, exceeded his right of private defence, but, under all the circumstances, we hold that he was justified in so doing. It is shown from the evidence that, when he went out to the rescue of Hera, he did not take the gun with him. It was only after his party had been beaten back, and when the ryots had actually trespassed upon the cutcherry-premises in hot pursuit, that he ran into an inner room, and brought out the gun. He asserts that even then he did not intend to fire it off, but that it went off by accident, whilst he was being beaten by the ryots; but even if he fired it off intentionally, which, we apprehend, is more probable, we hold that he did not exceed the right of private defence, and that he only exercised the right as contemplated in Clause 2 of Section 100, and Clause 4 of Section 103; for the aggressors, armed with deadly weapons, having actually committed house-trespass, he might reason-

ably, under the circumstances, apprehend that death or grievous hurt to himself and his companions would be the consequence, if such right of private defence were not exercised. In taking this view of the case, we follow the rulings cited from Weekly Reporter, Vol. III., p. 42; Vol. VII, p. 113; Vol. XI., p. 42; and Vol. XIV., p. 70.

As regards the other appellants, we are of opinion that they are not guilty under Section 148. Their attempting to protect themselves and their master's property, or even their going to the rescue of their comrade, cannot, under the circumstances, be held to have made them guilty of the offence of rioting, in that their assembly has not been found to have been an unlawful one.

All the appellants must, therefore, be acquitted and released.

The 5th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Civil Court—Commitment—Forgery—False evidence—Preliminary enquiry—Act XLV. of 1860, Sections 471, 465, & 193.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Judicial Commissioner of Assam.

The Queen

versus

Rungatoonee and others.

A Civil Court has no power to order the commitment of persons for offences under Sections 471, 465, and 193 of the Penal Code, without holding the preliminary enquiry required by Section 474 of the Criminal Procedure Code.

Reference.—A COMMITMENT has been made to this Court by Baboo Hurkantha Surma, Extra Assistant Commissioner at Mungledai, of three persons respectively charged under Sections 471, 465, and 193 of the Indian Penal Code, merely upon the proceedings held by him in his capacity of Moonsiff, without any preliminary enquiry; and as it has been ruled that such commitments are illegal, I have the honor to ask the Court to quash the commitment, and order a preliminary enquiry to be made. The Extra Assistant Commissioner's order is as follows: "For the reasons given, I dismiss the claim "with costs, and the costs of the defendant "will be borne by the plaintiff, and I direct "that the plaintiff be tried by the Court of "Session for using as genuine a forged "document, knowing it to be forged; that "the witness Opoti be tried by the said "Court for giving false evidence; and that "Rungatoonee, *alias* Rooprai, be tried for "forging the bond and receipt:" and he entirely overlooked the obligation imposed upon him by law, either to hold a preliminary enquiry himself, or send the case to a Magistrate for enquiry.

Judgment of the High Court.

Mitter, J.—The commitment of the Extra Assistant Commissioner at Mungledai is illegal. He does not appear to have held a preliminary enquiry as required by Section 474 of the Criminal Procedure Code. We therefore quash the order of commitment in this case.

The 12th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

High Court—Public health—Sanitation—Cantonments—Act X. of 1872, Section 518.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Patna.

Afzoo, *Petitioner.*

Where a Cantonment Joint Magistrate, acting on the advice of the Station Staff Surgeon, ordered a person to desist storing hides in the station, and directed him to remove the hides to a place distant from the town, the High Court held that the order appeared to be one under Section 518, Code of Criminal Procedure, and therefore it could not interfere with it under the law.

Reference.—THE Cantonment Magistrate of Dinapore, in a vernacular proceeding, of which the accompanying paper marked A is a translation, has ordered the petitioner to cease storing hides in his godown at Dinapore, and that he should carry on his storing at a distance from the town. There is nothing to show under what law the Cantonment Magistrate considered himself to be acting. In the letter in which I asked him for the record of the case and any explanation he might wish to offer, I also asked him to specify the law or Section of the Criminal Procedure under which he acted, but he has given no explanation, and made no allusion to the law under which the order

was passed. The history of the godown in question is contained in the accompanying paper. It would appear that conflicting opinions have been held by previous Cantonment Magistrates as to the propriety of continuing the godown; and on the 19th March last, Captain Playfair, the late Cantonment Magistrate, allowed him to store dry hides in the godown; the present order of Captain Hopkinson amounts to a rescission of that of Captain Playfair.

I think, considering the length of time that petitioner appears to have had his godown in its present position, a summary order for its removal was not the proper course to pursue. (Explanation 1 to Section 518.)

The ground on which I consider the order should be reversed is this, that the case plainly came within the provisions of Section 521, and inasmuch as proceedings were not taken in accordance with that Section, the summary order of the Cantonment Magistrate was made without jurisdiction.

It is impossible to say under what law or in what capacity the Cantonment Magistrate passed this order, but it is clear that it was not under Section 521, in accordance with which, as I conceive, the proceeding should have been conducted.

Document A mentioned in the reference.

Afzoo, petitioner, solicits permission for storing hides in his godown in Poorana Dinapore.

On the 15th April 1874, a petition was presented by Nund Lall and others, praying for the issue of an order for the removal of hides from Afzoo's godown, on the plea that it was prejudicial to public health, and the subject of public annoyance. The petition was sent to the police for enquiry, and on the 21st April 1874, Purtab Narain, Sub-Inspector of the Dinapore Police Station, reported that he personally inspected the godown, and found an offensive smell in it; and he further stated that the carriage of hides to and from the godown through a narrow lane which intersects the houses of many of the Hindoo residents of the neighbourhood, and the consequent blowing off of hide-dust, coupled with an offensive smell, were very obnoxious to the Hindoos living there. On the same date, the police were ordered to warn the owner of the hides to remove the hides with the least possible delay.

On a reference to the old records bearing Mr. Hime's order, it appears that the said Nund Lall and others had presented a similar petition to Mr. Hime, who personally visited the locality in question on the 3rd July 1873, and on the score of public health he ordered, under Section 518, Act X. of 1872, that all the hides and horns should be removed within three days of the order, on the expiry of which the police were to report whether the order was duly carried out. Afzoo then applied for fifteen days' time for the removal of the hides, &c., which was, accordingly, granted on the 8th July 1873. As Mr. Hime was transferred from Dinapore before the expiry of the time which was given him (Afzoo), he took the advantage of Mr. Hime's departure, and presented another petition to his successor, Captain Playfair, on the 26th July 1873, praying for hides being allowed to be kept in the same godown, but his prayer was rejected, as orders had already been passed on the subject, and the issue of a fresh order considered unnecessary. Again, on the 16th March 1874, Nund Lall and others petitioned to the effect that Afzoo was about to file a fresh petition with the perfidious intention of obtaining an order for storing hides in the prohibited locality. On the 17th March, Afzoo applied for permission to store hides in the godown in question, when an order was given for the production of the old records, and on the 19th March an order was passed by Captain Playfair that, as there were two more hide-godowns close to the one belonging to the petitioner Afzoo, and against which no objection was raised by any one, the objection against Afzoo's godown was based on enmity, hence Afzoo should store dry hides in his godown same as others do in theirs, and that serious notice would be taken if Afzoo would keep raw or uncured hides in his godown.

Since the 21st April last, Afzoo filed several applications for storing hides in the godown in question, but it was explained to him that his prayer could not be admitted on public grounds. An order was, however, issued for the production of old records, from which it was observed that a proceeding was held by Colonel Emerson on the 1st March 1872, authorizing the removal of hides and horns from the cantonments on sanitary grounds, and the orders which Mr. Hime had passed on the subject were consistent with Colonel Emerson's orders; but as Captain Playfair had issued an order contrary to those that were previously passed, I asked the Station Staff Surgeon to give his opinion on the subject, and he convinced me that the storing of hides in the aforesaid locality was objectionable on a sanitary point of view.

As the storing of hides is strictly prohibited in cantonments on the score of public health, I think it would be absurd to allow the storage of hides in the nizamut portion of the town, and I therefore

ORDER

That the petitioner Afzoo must desist from storing hides in his godown at Poorana Dinapore, and remove the hides to the field distant from the town.

(Sd.) W. HOPKINSON, CAPT.,

Cantonment Magistrate, Dinapore.

Dated 4th June 1874.

Judgment of the High Court.

Markby, J.—This appears to be an order under Section 518, and neither the Sessions Judge nor this Court have any power under the law to interfere.

The 13th August 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Criminal Procedure Code (Act X. of 1872)—Jurisdiction over European British subjects—IndianCouncils Act, 1861—High Courts Act.

The Queen

versus

Gerald Meares, *Appellant.*

Messrs. Lowe and *Evans* for the Appellant.

Baboo Juggadanund Mookerjee for the Crown.

The provisions in the new Criminal Procedure Code (Act X. of 1872) giving jurisdiction to Magistrates over European British subjects do not come within the words in the 24 & 25 Vic., Cap. 47, Section 22, "affecting the provisions of any Act," which mean provisions of the Act itself, and not of Letters Patent issued under the Act.

The jurisdiction given by the Letters Patent, issued under the 24 & 25 Vict., Cap. 104, to the High Court, beyond the local limits of its ordinary original civil jurisdiction, is subject to the legislative powers of the Governor-General in Council.

Morris, J.—THIS is an appeal, preferred under the provisions of Section 79, Criminal Procedure Code, against an order of the Magistrate of Jessore, who has convicted G. Meares, a European British subject, of the offence of causing hurt, without grave or sudden provocation, to one Panchoo, a dâk-runner, and has sentenced him to two months' rigorous imprisonment.

The beating of which Panchoo complains occurred, according to him, late in the afternoon or in the evening of Sunday, the 7th June last, at Kuthlamaree Factory. He lodged his complaint the next day, the 8th, before the Deputy Magistrate at Jhenidah, which is close by. The District Superintendent of Police, Mr. Harris, made a local enquiry on the 13th idem, and the District Magistrate had all the parties before him, and tried the case on the 25th idem.

For the prosecution two witnesses, Boodai and Modhoo Sheikh, were produced, who profess to have been passing by Kuthlamaree Factory at the time that Panchoo was beaten. I may at once say that I disbelieve these witnesses *in toto.* They were not cited by complainant as his witnesses in the first instance. On the contrary, two other persons were named by him, one of whom has appeared, and denied all knowledge of the affair. Boodai deposes that he was returning home in the evening when he saw Panchoo, who was in front of him, and coming in his direction, seized by four persons, of whom he only recognized one, Nujeeb Biswas, and taken by them to the Kuthlamaree Sahib, who called to them to bring him. He, Boodai, stood for about half a dund, or about ten minutes, but did not see Panchoo beaten, though he heard him call "*Duhai* Sahib." He goes on to say that it was then about evening, but not very dark, and that, in consequence of his agitation about the disturbance at the factory, he did not go and see his uncle, as he had intended, that night, but went straight home. In spite, however, of this agitation, he adds: "I did not remember to tell at "Panchoo's house when I got home. I did "not tell any one of what I had seen at the "factory. I did not hear any golmal that "night in the village. I heard the next "day, *i.e.*, Monday, of Panchoo having been "beaten." And yet it was not till the evening of the next day, Tuesday (as Panchoo himself says), that Boodai communicated to Panchoo what he had thus seen, and so enabled Panchoo to produce him as his witness. The other witness, Modhoo Sheikh, says that he was returning home in the evening alone when, near the factory, he heard screaming, and recognized the

voice of Panchoo Harkara, but did not go inside, and did not see Panchoo. He adds: "I went on homewards. I did not tell "the people at Panchoo's house. I did not "go to Panchoo's house that evening. I "told Panchoo on Tuesday evening when he "came back from Jhenidah." As, however, this witness has stated to the District Superintendent of Police that, after hearing the complainant's screams, he walked straight home, and went to the complainant's house, and informed his father-in-law of what he had heard, he was cross-examined on the point. His answer is: "Yes, I told Sonaullah, "Panchoo's brother-in-law (sombundee). He "was at my house when I came home, and I "told him;" and on being asked what Sonaullah did, he replies: "He went away from "my house towards Panchoo's, but I don't "know what he did." This witness, therefore, is manifestly not telling the truth. It seems extraordinary that Boodai and Modhoo Sheikh saw nothing of each other, for on their own showing to the District Superintendent of Police each stood and heard the cries of Panchoo from the very same spot. They both live within a short distance of the house of Panchoo, and yet, as opposed to the other neighbours, who were attracted by the noise of Panchoo's mother crying, and came at once and saw Panchoo, they were not aware of any unusual stir that evening in the village, and kept out of the way. Their conduct, as well as the character of their depositions, convinces me that they are witnesses prepared for the occasion, and I, therefore, reject their testimony altogether. The District Magistrate endeavours to reconcile the statements made by these two men, but he evidently mistrusts them; for he says: "I see no reason to disbelieve what these "witnesses say; but even if we reject them, "there is no good reason for discrediting "Panchoo's own statement." The case, therefore, seems to me to turn practically upon the degree of credit to be attached to the word of Panchoo himself. And here I may observe that the case against the appellant, G. Meares, divides itself into two distinct parts. There is the case of the prosecution resting entirely upon the statement of Panchoo, and there is the corroboration supposed to be afforded to it by the weak defence of the accused. The complainant Panchoo has given three detailed accounts of the transaction: *1st*, on Monday, the 8th June, to the Deputy Magistrate; *2nd*, on the 13th idem, to Mr. Harris, District Superintendent of Police; and *3rd*, on the 25th idem, to the District Magistrate. Indeed, he has given a fourth account in a letter marked exhibit A, admittedly written by him, on Tuesday, the 9th, to his landlord, Mr. Tweedie.

It is remarkable that all these accounts differ in most important particulars, and that each stage of the occurrence in his different narrations is presented to us under the altered conditions of a new set of facts. Thus, at the opening of his tale, he said to the Deputy Magistrate: "Yesterday, as the sun was "setting, I was going along near the Kuthla-"maree factory. In the road near the fac-"tory, Nujeeb Biswas, resident of Ashushani, "a factory-servant, said to the Sahib of the "factory, whose name is Meares Sahib, the "harkara who laid a complaint against you "is going by. On this, the Sahib gave the "order—'Seize and bring him here.'" But before the District Magistrate he says: "Last "Sunday fortnight, at four dunds remaining "of day, I was going to my father, and wore "my badge. I had left my village, and on the "mât (or plain) I met Nujeeb, and went on, "and was passing near Kuthlamaree. Nujeeb "seized me. He came from the dwelling-"house. The Sahib was standing, and gave "the order. I saw the Sahib. I did not "hear the order, however." Thus, it would seem by the first account that Nujeeb Biswas, whom he had passed on the plain, over took him close to the factory, and from the road called to the Sahib, who at once cried out to seize him. But by the second account it is clear that Nujeeb Biswas had preceded him, reaching the factory first; that he was not on the road at the time, but came from the factory itself; and that the conversation between Nujeeb Biswas and the Sahib, and the consequent order of the Sahib, are pure matters of invention.

Again, as respects the seizure and beating, he said to the Deputy Magistrate: "On that," *i.e.*, on the Sahib's order, "Pyar Chowkeydar "and three coolies, whose names I do not "know, and Nujeeb came and seized me, and "took me to the Sahib's room." After a few words had passed between the Sahib and him, which he gives, he goes on to say: "The Sahib "seized my arms (or hands), and the Sahib's "orderly or khansama bound them with my "cloth, and fastened me to a post, and another "servant of the Sahib beat me with a leather-"bound ratan, till no breath was left in me. "Then the Sahib himself forced water "into my mouth from a soorai, after which "the beating was renewed, till I lost my senses. "I was then let go. Being unable to "move, a servant of the Sahib, whose name

"I do not know, dragged me off." But this story is wonderfully altered before the District Magistrate. It is no longer Pyar Chowkeydar and three coolies, whom he does not know, who together with Nujeeb Biswas seized him, but the three natives accused, *viz.*, Umachurn, the personal bearer of G. Meares, and his two syces Mungloo and Goggun, and an orderly, name unknown. It has not been made clear to us from the record how these three persons were originally charged by Panchoo with the assault, but it is evident from their being brought to trial that he must have so charged them between the 8th and 25th of June, and, when examined by the District Magistrate, he has no hesitation in pointing them out as his assailants. The District Magistrate, however, did not credit Panchoo in this particular. He discharged these accused, because he thought Panchoo was mistaken in his recognition of them. But I cannot believe that this was a mere error of recognition on Panchoo's part. The syce Goggun he admittedly knew before, because the house of both of them is in the same place, *viz*, Jhenidah, and it is incredible that he should mistake the bearer and syce for common boona coolies. Indeed, he admits that he knew the bearer well by sight. Why then does Panchoo accuse these men? The reason seems obvious, and says much for the character of the man. He was aware that G. Meares had set up the defence of having gone to Lokenathpore on the Sunday afternoon, and as the two syces and bearer would naturally be called to support the alibi, he adopted a not unusual course taken by natives of shutting an opponent's mouth, *viz.*, he converted into accused those who would otherwise have been witnesses for defence. But to continue the comparison, instead of it being the Sahib's orderly and khansama who bound his hands, it is Umachurn Bearer and Mungloo Syce who bound him to the pillar; and whereas before it was another servant of the Sahib who beat him, it is now Mungloo Syce specifically. And in this connection there is still greater contradiction, for before the District Superintendent of Police he said distinctly: "I was beaten by a boona, and was held up "to the pillar by two other boonas." And further, even in the matter of the water, he is not consistent. After telling the Deputy Magistrate that the Sahib himself forced water into his mouth, he improves upon this before Mr. Harris, saying: "The Sahib poured some water on my head, and said it was sweeper's water." But ten days after, before the District Magistrate he alters this to: "The Sahib ordered to give me water. "I said I would take it. A person, I can't "say who, brought water." It is also not a little singular that in the letter A addressed to Mr. Tweedie on the Tuesday, Panchoo says that, after the beating, the Sahib ordered his servants to throw him into the water, as though the intention was to fling him into a tank.

Lastly, in the description of his mode of departure from the factory, there is a discrepancy. Before the Deputy Magistrate he says: "Being unable to move, a "servant of the Sahib, whose name I know "not, dragged me off; on my chest the marks "of the dragging are still visible." To Mr. Harris it is: "I was led out by two of the men "who had held me up, *i.e.*, two boonas, to the "gate of the factory. I then went home. "I was quite unable to walk. I had to crawl "home on my belly. I arrived about 8 or 9 "P.M. at my house, which is about two miles "from the factory." Before the District Magistrate this is reduced to: "Two people "came, took my hands, and led me away to "a jhow-tree (the very jhow-tree, it would "seem, which was the post of observation of "his two witnesses). Thence they went "back to the house, and I went away slowly "to my house." The conversation also which passed between Panchoo and G. Meares assumes a very different form and expression before the District Magistrate on the 25th June to what it did before the Deputy Magistrate on the 8th idem. It is unnecessary here to quote the words at length. To my mind these variations of statement are most significant. They are not such as any truthful-minded witness might make, nor are they confined to mere minor matters of detail. They are variations which go to the very root of the case. They speak too clearly of construction and design, and betray, not only a strong imagination, but a memory and recollection that grow in intensity, as the occurrence becomes more distant in point of time. The conclusion, then, that may be fairly drawn from the different narratives is, that in every essential particular of this alleged beating the complainant Panchoo is so contradictory that he cannot be regarded as a trustworthy witness. No doubt, in connection with the charge, there are other important matters which require to be taken into consideration. For example, there is the fact supported by the medical evidence and otherwise that Panchoo sustained a severe beating; the marks on Panchoo's body

correspond to a certain extent with the character of the beating as described by him. From the first Panchoo has named G. Meares as the principal offender; he charged him the very next day with the assault before the proper authorities, and it can well be understood that Meares might have been irritated by the previous conduct of Panchoo, and so had a motive in beating him; but these are only, so to speak, collateral matters; they are not sufficient in themselves, taken either singly or collectively, to fix the guilt of the accused. They require to be supported by substantive and reliable proof. And the question to be decided is whether Panchoo's testimony supplies such proof? As has already been observed, he is the sole witness of fact, and I find myself unable to believe him, because it seems to me that, in producing Boodai and Modhoo as his witnesses, he has really suborned witnesses to testify to facts which obviously never came within their observation; he has falsely accused persons of taking part in the transaction, evidently with a view to prevent their appearing as witnesses in favor of G. Meares; and he has given extremely varying and contradictory accounts of the assault itself. It is impossible to say that Panchoo is a witness of truth, and it would be, therefore, in my opinion, most unsafe, in the absence of independent corroborative evidence, to throw aside the greater portion of his story as false and fabricated, and at the same time to accept as true that single portion of it which affects the appellant G. Meares. A complainant, who may have suffered a real injury, cannot be surprised if he fails to obtain the redress he seeks, when exaggeration, contradiction, misrepresentation, and false testimony, cast a cloud over the real merits of his case.

I now address myself to the second part of the case, that which concerns the defence of the accused. To Mr. Harris, District Superintendent of Police, G. Meares made the following explanation on the 13th June: "I "did not beat Panchoo Harkara. I was at "Kuthlamaree on Sunday, the 7th instant, up "to 2 P.M. After tiffin, I started for Loke-"nathpore. I went *viâ* Dhurumtollah. I "reached Lokenathpore at 5 P.M. I rode a "bay pony from here to Dhurumtollah. "From thence I rode a grey Cabul to Loke-"nathpore." At the trial before the District Magistrate, after the examination of the complainant and his witnesses, and on the charge being read to him, G. Meares pleaded not guilty, and declined to enter any statement. He cited as witnesses Mr. Harris, the result of whose enquiry was favorable to him, and a few native witnesses, apparently to impeach the testimony of Boodai, and to prove that Nujeeb Biswas was not at Kuthlamaree Factory on the Sunday afternoon or evening in question. The District Magistrate draws unfavorable conclusions from the conduct of G. Meares in making no statement, and showing, as he says, a reluctance to prove an alibi, by citing as witnesses his two brothers and Mr. Glascott. But it seems to me that this is hardly just. G. Meares was defended by a pleader of the Court; and if he, either advisedly, as we may presume he did, rested his defence on the weakness of the case against him, or for reasons of his own which are not disclosed, and which at the best can be only matter of guess, declined to say anything in addition to what he had already said to Mr. Harris, the Court will remember that he acted entirely on his right. It will not necessarily presume that his silence or apparent want of candour and explicitness before the Magistrate is a sure indication of his guilt. The Magistrate says in his judgment: "When on being asked in the usual "way if he would make any statement after "hearing the charge, he refused to make any. "After the Court suggested that he should "call them, he still refused, and he only did so "as a last resource." It seems pretty evident from this that it was solely at the instance of the Court and from unmistakable indications of the temper of the Court that G. Meares summoned his brothers. I think it would have been better had the Magistrate confined himself to making the suggestion to summon the brothers, and on its refusal made a note of the fact. He should either have decided the case as it then stood, and as the accused wished to have it, or if he, the Magistrate, entertained doubts which he desired to clear, he should have exercised the power which he possessed of putting to the accused such questions as he considered necessary, or of summoning and examining any person whose evidence he considered essential to the enquiry.

What, however, was the result of summoning Mr. Glascott and the two brother Meares? When put upon his oath, Mr. Glascott deposed as follows: "I recollect "Mr. Meares being at dinner at Lokenath-"pore on the 7th June. We dined at the "usual time, between 7 and 8 o'clock. I "can't say at what hour Mr. Meares arrived at "Lokenathpore;" and of the brothers Meares, Charles deposes: "I was at Lokenath-"pore on the 7th June. My brother Gerald

"Meares was there. He came over in the "evening. It was late in the evening. I "should say it was about 6 o'clock, but "I cannot be positive as to the time. I am "pretty certain it was before 6. It was "before dusk. It was some time before dusk. "It may have been half an hour before "dusk." And so too Henry Meares: "I was "at Lokenathpore on Sunday, the 7th June. "I recollect my brother G. Meares being "there. He arrived about 6 o'clock. I saw "my brother arrive. It might have been "an hour or so before sundown. I am quite "certain it was." This evidence is clear and decisive as to the fact that G. Meares was at Lokenathpore on Sunday, the 7th June, at any rate before sundown; and if this evidence be believed, it is impossible, considering the distance between the two factories, *viz.*, from 20 to 23 miles, and the fact that, on the 7th June last, the sun set at 20 minutes to 7 P.M., that he could have participated in the assault on Panchoo at Kuthlamaree about sunset of that day. And how is this evidence impeached? There is no reason to doubt that Mr. Glascott did in effect answer the District Superintendent of Police on the 6th June, as recorded in that officer's diary, *viz.*, that he, Mr. Glascott, did not know when Mr. G. Meares came over; that he could not say whether he was at Lokenathpore on Sunday, the 7th June; and that he could not remember whether he saw him at dinner on that date. When put upon his oath, Mr. Glascott does not attempt to say that Mr. Harris has recorded answers which he never made. His explanation is that he did not wish to be called to Jessore to give evidence at that particular time. His words are: "I said I "would give no evidence. I did not wish to "be mixed up with the case at all. It was "my busy time of year, and I did not wish "to be at the trouble of going to Court." In other words, Mr. Glascott gives the Court to understand that, for reasons of his own, he desired to avoid being made a witness in the case, and so did not hesitate to tell Mr. Harris what was not the truth. When, however, put upon his oath, Mr. Glascott declared that G. Meares was at Lokenathpore to dinner on the evening of the 7th June. It is naturally open to question whether, under these circumstances, Mr. Glascott is more to be believed upon his oath than upon his bare word. It has been argued before us that Mr. Glascott, to suit his own convenience, told what may be termed a conventional untruth to Mr. Harris, but that he may be fully believed when he speaks under the obligation of an oath. This is not an unreasonable view which the Court is asked to take of his conduct: It is intelligible that the motive to conceal the truth in the first instance may have been overpowered by the superior obligation to tell the truth in the second. I am unable, therefore, to believe that Mr. Glascott, knowing the position in which he stood, has wilfully perjured himself. It is much to be regretted that the Magistrate did not subject Mr. Glascott to a searching examination in regard to all that occurred within his recollection at Lokenathpore Factory on the afternoon and evening of the 7th June. Had he done this, all doubts as to the character of Mr. Glascott's evidence would have been cleared up. As it is, this evidence is so extremely bald and meagre that it undoubtedly creates an unfavorable impression on the mind. But inasmuch as this is rather the fault of the examiner than of the person examined, the Court can only look to the evidence as it stands, and from this the legitimate conclusion arises that G. Meares was certainly at Lokenathpore Factory on the 7th June last between the hours of 7 and 8 P.M. No imputation, however, rests on the evidence of the brothers Meares. The Magistrate himself throws no discredit on their testimony. On the contrary, accepting their statements as made in all honesty and truth, he endeavours to reconcile them with the case for the prosecution by a theory of his own; but this theory is clearly untenable. He says: "Native ideas of time are never very accu-"rate, and though there are in the evidence "statements showing that the occurrence "took place towards evening, it may have "been really earlier than the witnesses "thought; and on the other hand, though "Mr. Meares's brothers may be desiring to "speak in all honesty, the time of reaching "Lokenathpore may have been somewhat "later than they think it was." But the words used by Panchoo himself from the very first, as well as that used by his witnesses, leave no doubt as to the real time of the assault. On the 8th June, Panchoo says: "Doobee doobee," *i.e.*, "as the sun "was setting, I passed near Kuthlamaree "Factory." To Mr. Harris he said that "it was in the evening;" while to the Magistrate he said that he left home at four dunds remaining of day; that it takes an able man two dunds of time to walk from his house to Kuthlamaree Factory; and that he stopped by the way one dund talking to a cowherd, so that it must have been at the last dund

of day, or about sunset, that he reached the factory. As, moreover, on his own showing, he reached home after the beating, between 8 and 9 P.M., it is impossible, on the Magistrate's theory, to account for the long interval that elapsed between the seizure and the return home again. Both the witnesses called by Panchoo, and whom he asks the Court to believe, speak of the occurrence as "in the evening;" and one of them, Modhoo Sheikh, explains that he was unable to see to any distance owing to the darkness. When, therefore, the two brothers Meares say distinctly that they saw G. Meares at Lokenathpore before sundown, their statements to this effect cannot, by any possibility, be reconciled with that of the complainant and his witnesses. On a consideration, therefore, of the entire case, I am of opinion that the evidence, as presented to us in the record, fails to establish the guilt of the accused. The complainant has thrown discredit on his own story by palpably concocting false evidence, and charging innocent persons with participating in the offence with the evident intention of preventing their appearing as witnesses in favor of G. Meares. He has also told the story of his beating, no doubt in some respects, in a graphic and natural manner, but with so many discrepancies and contradictions that I am unable to pick out one portion of it, and pronounce it to be true, and to say that the accused can be fairly condemned upon it. There is also, on the other hand, evidence, which, so far as it goes, appears to me to be unimpeachable, and which proves that, on the day in question, G. Meares was at Lokenathpore at the very time when, as complainant says, the beating occurred at Kuthlamaree. I, therefore, hold that the charge is not substantiated, and that appellant ought to be acquitted and discharged.

In the view which I take on the merits, it is unnecessary for me to say more on the question of jurisdiction that has been raised than that, in my opinion, the Magistrate had jurisdiction to try the case.

Couch, C.J.—Before giving my opinion as to whether the conviction ought to be reversed, I will dispose of the question of the jurisdiction of the Magistrate.

By the Indian Councils Act, 1861 (24 & 25 Vic., Cap. 67), Section 22, it is provided that the Governor-General in Council shall have power, at meetings for the purpose of making laws and regulations, and, subject to the provisions therein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever then in force, or thereafter to be in force, in the Indian territories then under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever, within the said territories, and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty.

These words are as general as they can well be, and undoubtedly gave to the Legislative Council of the Governor-General power to make laws for all Courts of justice including the High Court, and for all persons whether British or native. It is then provided that the Governor-General in Council should not have the power of making any laws or regulations which shall repeal, or in any way affect, any of the provisions of that Act, or any provisions of certain other Acts which are named, or of any Act passed in that Session of Parliament, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof.

Now, the Act for establishing the High Courts was passed in the same Session of Parliament; and the question is whether the provisions in the new Criminal Procedure Code giving jurisdiction to Magistrates over European British subjects come within the words "affecting the provisions of any Act," passed in the Session of Parliament in which the Indian Councils Act was passed. The 9th Section of the 24 & 25 Vic., Cap. 104, the Act for establishing High Courts of Judicature in India, provides that each of the High Courts to be established under the Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the presidency for which it is established, as Her Majesty may, by Letters Patent, grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the presidency-towns, as may be prescribed thereby, and, save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established

in each presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under the Act at the time of the abolition of such last-mentioned Courts. According to the grammatical construction of this Section, the words "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council" apply to the provision that the High Court shall have and exercise the jurisdiction of the Supreme Court which was abolished under the Act. They do not apply to the former part of the Section. The question then arises, whether the provisions in the Letters Patent as to the jurisdiction of the High Court are to be considered as provisions of the Act, and therefore coming within the proviso which I have read, that the Governor-General in Council should not have the power of making any laws or regulations which should repeal, or in any way affect, any of its provisions. Now, the Letters Patent, which were issued after the passing of this Act, provide in the 21st Clause that the High Court shall, in respect of all persons beyond the limits of its ordinary original civil jurisdiction, have the jurisdiction which the Supreme Court at Calcutta then had The Letters Patent did no more than would have been done by the latter part of Section 9, if they had been silent as to the jurisdiction beyond the local limits of the ordinary original jurisdiction. If Her Majesty had said nothing about the jurisdiction beyond those limits, the jurisdiction of the High Court over European British subjects would have been given by the Act by the words which say that the High Court shall have and exercise all jurisdiction which was vested in the abolished Courts. And by the very words of Section 9, if that had been the case, the jurisdiction over European British subjects would have been subject to the legislative powers of the Governor-General in Council. It appears to me to be unlikely that the Legislature intended that, if the jurisdiction was given by the Letters Patent, it should not be subject to the legislative powers of the Governor-General in Council, and could only be altered by an Act of the Imperial Legislature; but if the Letters Patent omitted to mention it, and it was given by the High Courts Act itself, that it should be subject to these legislative powers. That appears to me to be unlikely. Still, if we gather from the Act that this was the intention, and it appears plainly to be so, we should be obliged to give effect to it. After consideration of this question, I think that the meaning of the words "any provisions of any Act passed in the present Session of Parliament, or hereafter to be passed," is provisions in the Act itself. For instance, there is the qualification of the Judges of the High Court. The Governor-General in Council has not power to make an alteration in that. There is an express provision of the Act upon the subject. So also in Section 15 there is a provision giving to the High Court superintendence over the Courts which are subject to its appellate jurisdiction. That again is a provision in the Act which cannot be affected or altered by the Governor-General in Council. But I am of opinion that the words "provisions in the Act" do not apply to what is not in the Act itself, but only in the Letters Patent, which the Act authorizes to be issued, and which can only be said to be a "provision of the Act" by relation; by what is rather a forced construction, namely, that, as the Section says that the Courts shall have all the jurisdiction which shall be given by the Letters Patent, whatever is given by them becomes fixed, and is in the same state as if the words in the Letters Patent had been in the Act itself. I think that was not the intention of the Legislature, and what has occurred subsequently confirms me in that opinion. By Section 42 of the Indian Councils Act, power to make laws and regulations was given to the Governors in Council of the other two presidencies, and it was provided that they should not have the power of making any laws or regulations which shall in any way affect any of the provisions of that Act, or of any other Act of Parliament in force, or thereafter to be in force, in such presidency. The difference with respect to them being that they cannot pass an Act which will affect any Act of the English Legislature in force in India; whereas the Governor-General in Council can do so.

Two of the Judges of the High Court at Bombay, in the case of The Queen *v.* Reay, reported in the 7th volume of the Bombay High Court Reports, Crown Cases, p. 6, held that the Legislative Council of Bombay had not power to confer criminal jurisdiction upon Magistrates in the mofussil over British-born subjects. One of them considered that the jurisdiction over British-born subjects was given exclusively, first, to

the Recorder's Court, and through that to the Supreme Court, by the Statute 37 George III., Cap. 142, Section 10; and he held that the Act of the Bombay Legislative Council affected the provisions of that Act. The other learned Judge, Sir Charles Sargent, appears to have rested his decision upon the ground that the Act of the Bombay Legislative Council affected the provisions of the High Courts Act. But they both agreed in holding that the Act of the Bombay Legislative Council was void. Upon this, an Act was passed by the Legislative Council of the Governor-General (Act XXII. of 1870). In that it is recited that "the Governors of the Presidencies of Fort St. George and Bombay in Council, and the Lieutenant-Governor of Bengal in Council, have severally passed divers Acts purporting to apply generally to all persons within the local extent of the said Acts;" and that "doubts have been raised as to the validity of such Acts in so far as they affect to render European British subjects liable to be convicted and punished by tribunals other than the High Courts of Judicature at Fort William, Madras, and Bombay;" and for the purpose of removing such doubts, it is enacted as follows: "Every such Act passed by the Governor of the Presidency of Madras in Council, or by the Governor of the Presidency of Bombay in Council, or by the Lieutenant-Governor of Bengal in Council, shall, so far as regards the liability of European British subjects to be convicted and punished thereunder, be, and be deemed to have been, as valid as if it had been passed by the Governor-General of India in Council at a meeting for the purpose of making laws and regulations." The Legislative Council of India—doubts having arisen in consequence of the decision of the Bombay High Court as to the power of the local Legislature to make European British subjects liable to be convicted and punished by other tribunals than the High Courts, by declaring those Acts to be valid, as they had been passed by the Governor-General in Council—assumes that it has the power to subject British subjects to a jurisdiction other than that of the High Courts. This having been done, but there being still a difficulty as to the further exercise of the power by the local Legislatures, Act XXII. of 1870 only making valid Acts which had been passed, an Act of the Imperial Legislature was passed, namely, the 34 & 35 Vic., Cap. 34. This recites that "it is expedient that the power of making laws and regulations conferred on Governors of Presidencies in India in Council by the Indian Councils Act 24 & 25 Vic., Cap. 67, Section 42, should in certain respects be extended," and it provides in the 1st Section that "no law or regulation heretofore made, or hereafter to be made, by any Governor or Lieutenant-Governor in Council in India in manner prescribed by the aforesaid Act, shall be invalid only by reason that it confers on Magistrates, being Justices of the Peace, the same jurisdiction over European British subjects as such Governor or Lieutenant-Governor in Council, by regulations made as aforesaid, could have lawfully conferred, or could lawfully confer, on Magistrates in the exercise of authority over natives in the like cases." Now, if it had been supposed by the Imperial Legislature that the Legislative Council of the Governor-General had not the power which it had to alter or affect the jurisdiction over European British subjects, we should expect to find it conferred by this Act, because it cannot be supposed that the Imperial Legislature would give to the Governors in Council of Madras and Bombay a power which it did not intend the Governor-General in Council to have. But not only is this not done, but the Act XXII. of 1870 of the Governor-General in Council is noticed in Section 3, and its validity is recognized by its being provided that the Governors of Madras and Bombay and the Lieutenant-Governor of Bengal in Council shall have power to repeal or amend any of the Acts declared by it to be valid. So there is in this Act, 34 and 35 Vic., Cap. 34, to my mind a clear recognition of the existence of the power of the Governor-General of India in Council to subject European British subjects to a jurisdiction other than that of the High Courts. It appears to me to be a legislative exposition of the meaning of the words in the Indian Councils Act, "provisions of the Act, or of any Act hereafter to be passed."

I am, therefore, of opinion that there was power to make the provisions in the new Code of Criminal Procedure relating to European British subjects.

An allusion was made in the course of the argument to a Clause in the 2nd Letters Patent of this Court, issued in 1865, by which Her Majesty declared that the provisions of that Charter are subject to the legislative powers of the Governor-General in Council. It appears to me, as I intimated in the course of the argument, that this is only

a declaration what the law was, inserted perhaps for the purpose of clearly showing that the jurisdiction was subject to the Indian Legislature. If the decision of the question depended upon whether Her Majesty had power to make this provision, and to subject the provisions in the Letters Patent to the legislative powers of the Governor-General, there would be much greater difficulty in it. But my judgment is not founded upon that. I think it is no more than a declaration of what was the state of the law, and what it would have been whether that Clause had not been in the Letters Patent.

I have now to state my opinion upon the question whether the conviction appealed against ought to be reversed. The case does not come before us upon a first or original trial, but upon an appeal from a conviction by a Magistrate who has had experience in the mofussil, and saw the witnesses. I do not propose, after the very full statement of the evidence which has been made by Mr. Justice Morris, to go over it again; but only to give my reasons for saying that the conviction ought not to be reversed. I have come to this conclusion after an anxious consideration of the evidence in the case, and frequently thinking of it.

Now, the case depends upon the evidence of Panchoo. I agree with Mr. Justice Morris in thinking that the evidence of the other two witnesses ought not to be believed. I think that, if the one of them had seen what he says he did, and had, as he says, given information about it when he got home—information, in fact, to the members of the family of Panchoo—that it is impossible that it would not have come to the knowledge of Panchoo, and that he would not have named that person as one of his witnesses when he made his statement on the next day to the Deputy Magistrate. And as to the other, I think there is evidence which shows that he could not have been present to witness what he says he did.

The decision of the case depends upon whether, looking at all the circumstances, and taking into account, as I have, the discrepancies in the several statements of Panchoo, looking at all this, Panchoo is a witness whose statement in the main and substantial part is to be believed. Now, that he was beaten, and beaten in the manner that he describes, seems to be beyond question. That he had the same kind of beating as he says he had appears from the evidence of the native doctor who examined him on the next day. So evident was this that one of the learned Counsel for Mr. Meares asked us to suppose, or suggested, that the beating might have taken place at the factory; that he might have been beaten by the people at the factory in the absence of Mr. Meares, and so the evidence, except the statement of the part which Mr. G. Meares took in the transaction, might be made consistent.

Now, on the 8th of June, and within less than 24 hours of the time when Panchoo says he was beaten, he made a complaint to the Deputy Magistrate. His statement, then, which I read from what Mr. Justice Morris has kindly given to me, and which he took down when the case was first heard, is this: "Yesterday, as the sun was setting, I was going along near the Kuthlamaree Factory. In the road near the factory, Nujeeb Biswas, resident of Ashushani, a factory-servant, said to the Sahib of the factory, whose name is Meares Sahib, the harkara who laid a complaint against you is going by. On this, the Sahib gave the order—'Seize and bring him here.'" Subsequently, before the District Magistrate he said that "he did not hear the order given." I do not understand the statement to the Deputy Magistrate as that he actually heard the order given. I think it is simply the inference which the man drew from what occurred immediately afterwards. In making the statement to the Deputy Magistrate, unless the question was put to him, "Did you hear the order given," he might very well have spoken in this way: "The Sahib gave the order to arrest me, and bring me here." The statement then proceeds: "On that, Pyar Chowkeydar and three coolies, whose names I do not know, and Nujeeb came and seized me, and took me to the Sahib's room. He said to me, 'Did you make a complaint against me?' I said, 'Yes, I did.' He said, 'Why did you do so?' I replied, 'You struck me, and therefore I complained.' On that he said, 'What will it be to me to kill such a man as you?' Saying this, and repeating the word 'lagao' (lay on, lay on), the Sahib seized my arms or hands, and the Sahib's orderly and khansama bound them with my cloth, and fastened me to a post, and another servant of the Sahib beat me with a long leather-bound ratan till no breath was left in me. On my throat becoming dry, the Sahib then himself forced water into my mouth from a soorai. After which, the beating was renewed, till I lost my senses. I was then let go. Being unable to move, a servant of the Sahib, whose name I do not know, dragged me off. On my chest there are still visible the marks of dragging,

as well as the marks of beating on my backside."

This appears to me to be a true account of what took place. There is no exaggeration, nor introduction of things that he might imagine, but an account of a transaction which, considering what had previously occurred, was not unlikely to take place. And I do not attribute the weight which Mr. Justice Morris attributes to his having varied from this in the accounts which he gave afterwards. I should have been surprised if such a man as this, having been beaten in the way here described, did not, when he came to relate it subsequently, make some additions to it. It is almost certain, I think, that a man whose mind was dwelling upon this, would make some additions, and would exaggerate, or to some extent alter, what he had previously stated, and would be likely, as he appears to have done, to give the names of persons afterwards as having been parties in the offence whom he did not in the first instance accuse. As to them, of course, it could not be said that his evidence would be satisfactory. But the question seems to me to be, whether this account given immediately to the Deputy Magistrate does not state what really took place, and is substantially true.

Now, as to the suggestion that he might have been beaten by the factory-people when G. Meares was not present, we have to consider whether that is probable or not. It is true, as Mr. Evans remarked, that, if they had beaten him in this way, it is not likely that they would come forward and acknowledge it. But why is it probable that they would, without any direction from their master, take upon themselves to treat this man in the way in which he was, no doubt, treated? They do not appear to have had any quarrel with him Nor does he appear to have done anything to offend them. There is no evidence, nor any suggestion, that there had been a quarrel between him and the factory-people, or that there was any ill-will towards him other than what, perhaps, might have existed in their minds, if they knew or thought that their master had an ill-will towards him. It appears to me that he had not the time to, nor was it likely that, during the time between his being beaten and making his statement to the Deputy Magistrate, he would conceive a design of making a false charge against Mr. G. Meares of connecting him with the beating which he had received when he had nothing whatever to do with it. I think if he had conceived any design of that kind it would have taken him longer to form it in his mind; and more than that, I think, he would have been careful to bring forward a case which would be better supported by evidence than the present case is, that he would not have presented himself to the Deputy Magistrate with only his own unsupported testimony to charge this gentleman with what is a serious offence. Then we have not only the improbability of the factory-people doing it when their master took no part, but we have, what appears to me to be a probability, that G. Meares would do something of this kind; that he would be inclined to inflict some punishment upon this man, for there is no doubt that he had offended Mr. Meares, and had done what was probably considered an insult to him. And besides that, he had subjected him to considerable inconvenience, and to what he would most likely consider an annoyance, by having made a complaint against him, upon which he had been summoned to appear.

Looking at the probabilities of the case, there is a probability that Panchoo's story is true, and that the beating was given to him at the instigation of G. Meares. I am unable to agree in the opinion that he must be taken to have suborned the witnesses, and that we must look upon him as a man who would strive to support his case by procuring false evidence. I do not think there is evidence in the case from which we can assume that he suborned the two witnesses who are not to be believed. To my mind it is possible that those witnesses came forward of their own accord, and made their statements, and caused themselves to be examined, and that Panchoo had not suggested to them, or procured them, to give false evidence. That appears to be the only circumstance that can be suggested against the man's character. The Magistrate before whom he gave his evidence appears not to have seen anything in his conduct to lead him to think that he ought not to be believed, and I suppose that the Deputy Magistrate thought the same.

Thus, the case stands as regards the evidence for the prosecution.

The Magistrate has remarked, and I think not improperly, upon the conduct of Mr. Meares when the case was being tried. The evidence for the prosecution having been taken, the Magistrate, according to the Code of Criminal Procedure, framed the charge. And it was one which could not be treated lightly, being a charge under Section 323 of the Penal Code, of volun-

tarily causing hurt. Now, Mr. Meares, upon the charge having been explained to him, did not make any statement, but he asked that certain witnesses might be sent for. I do not attach much weight to his not having made any statement, because he had already made a statement to Mr. Harris, the District Superintendent of Police, and as he asked to have him summoned, he may have thought that the statement would come from him, and perhaps it would be a better statement for him to use, being one which he had made at an earlier period, namely, on the 13th. But if he knew that he left the Kuthlamaree Factory, and arrived at Lokenathpore at such an hour that he could not have been present when the beating took place, I think that the natural conduct of a man conscious of his innocence would have been to have said: "I wish to have my two brothers examined, and I wish to have Mr. Glascott examined, to prove that I was not there; that I could not have been there at the time he (Panchoo) says I was." But it is said that he had a native pleader. I can scarcely suppose that a gentleman in the position he was in would have been so influenced by the advice of his native pleader as not to have done what would have occurred to an innocent man to do. But, instead of asking to have Mr. Glascott and his two brothers examined, he asked to have the District Superintendent of Police examined. Now, all that Mr. Harris could prove was that G. Meares had made a statement to him, and that he had made enquiries, and, as he says, was of opinion that there was no evidence, and discharged the accused (meaning, I presume, that he did not proceed further with the charge). I cannot understand why Mr. Harris should have been treated as an important witness instead of Mr. Glascott and the brothers, unless it was supposed that the evidence of the District Superintendent of Police would have great weight with the Magistrate, and he would have acquitted the accused. But the Magistrate appears not to have taken that view of the matter. He appears to have thought, and properly, that the witnesses who were named were not the witnesses who would be useful to meet the case for the prosecution; and that the persons who were really required as witnesses, if the statement to Mr. Harris were true, were Mr. Glascott and the two brothers. Accordingly, they were called as witnesses. The evidence, no doubt, is to the effect that G. Meares arrived at Lokenathpore at an hour when, if Panchoo spoke correctly as to the time, it would have been impossible for him to have been then at Kuthlamaree Factory. There is an inconsistency between Panchoo's evidence and their evidence, which it is extremely difficult to reconcile. I do not know that it can be reconciled. The Magistrate seems to have thought that it was proper to endeavour to do so. But the question is whether, notwithstanding what they have stated, we ought not to believe the account which Panchoo gave. It was pressed upon us by the learned Counsel that, if we do not reverse the conviction, we shall be pronouncing these two gentlemen, the brothers, to be guilty of wilful perjury. I do not think that this necessarily follows from the conviction. I certainly do not assent to it. The learned Counsel is of that opinion; he can be so. But what I say is, that, after an anxious consideration of the case, I can only say that I am not satisfied that G. Meares arrived at Lokenathpore Factory at the time he is said to have arrived.

Considering the whole of the evidence, I think this is not a conviction which ought to be reversed.

Phear, J.—I entirely concur with the Chief Justice on the question of jurisdiction; and the conclusions as to the facts of the case at which he has arrived are so very nearly the same as those to which the evidence has led me, that I think it is unnecessary for me to give a detailed expression of my own view of them. While I assent, as I undoubtedly do, to much of the criticism upon the evidence which has been effected by my learned brother, Mr. Justice Morris, yet the tale told by Panchoo in its essential particulars remains such that I cannot refuse my belief to it. I think it almost impossible that he should have invented those details of conversation which he said he had with Mr. Meares preliminary to the beating, and of the language of Mr. Meares during the beating, both of which are not only graphically given, but also appear to me to bear an unmistakably English character. In short, although there are parts of Panchoo's story which are obviously untrue, still, on the whole, I feel obliged to agree in the opinion formed by the Magistrate, who heard and saw the witnesses, that the story is in the main true; and the evidence of alibi, considered in connection with the circumstances under which it has grown to be what it is, does nothing to make me doubt it. It appears to me that the conviction which has been come to below is sound, and must be upheld.

b

The 13th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Procedure—Summary trial—Theft—Jurisdiction—Act X. of 1872, Section 222.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Tipperah.

The Queen

versus

Buzleh Ali, *Prisoner.*

Moonshee Serajul Islam for the Prisoner.

In a case in which the accused was charged with theft of a box containing Rs. 50 in cash and of the box worth 8 annas 6 pie, the Magistrate considered the box to be of no value, and struck out the 8 annas 6 pie, and thereupon tried the case summarily under Section 222 of the Code of Criminal Procedure.

HELD that the Magistrate was not at liberty, upon his own authority, and without taking evidence, to throw the box entirely out of consideration, as upon that depended his jurisdiction to dispose of the case summarily; such evidence should have been taken precisely in the same way as evidence upon the merits of the case; and as it was not taken, the Court held that the Magistrate had no jurisdiction in this case.

Reference.—I HAVE the honor to forward, for the consideration and orders of the High Court, the proceedings of the Magistrate in a case of theft tried by him under Section 381. The case was tried by him summarily under the provisions of Section 222 of the new Code of Criminal Procedure, which lays down that a case of theft can be summarily tried, if the amount stolen does not exceed Rs. 50. The accused is a khansamah of Mr. J. P. Leicester, residing in this station; and the charge against him was that he had stolen a box containing Rs. 50 in cash, and the box worth 8 annas 6 pie. The value of the property, therefore, which the prosecutor said he had stolen was worth Rs. 50-8-6. The Magistrate, however, struck out the 8 annas 6 pie, and by so doing empowered himself to try the case summarily; and after convicting the accused sentenced him to three months' rigorous imprisonment. The prisoner appealed to this Court, on the ground that he had been illegally tried and convicted, and also on the ground that there was no evidence against him upon which to ground a conviction. I, therefore, sent for the proceedings under the provisions of Section 295, and also requested the Magistrate to remark on the allegation made in regard to the value of the property. His reply is with the records, from which it will be seen that he considered the box of no value, because it was thrown away by the thief, who had no object in stealing the box. This argument is not sound, I think. The box formed a portion of the property stolen, and was valued by the prosecutor, and which brought the value up to a sum exceeding Rs. 50, and therefore took the case out of the provisions relating to summary trials. The sum may be, as in this instance, small, but this cannot affect the question in the least, and I do not think that the Magistrate had the power to try the case summarily.

It has been urged also that there was no evidence upon which a conviction could be properly had, and that the Magistrate erred in saying that the "cash-box was last seen in his charge, and he was the only person likely to have been able to take it out of the almirah," inasmuch as the cash-box was never put in his charge at all, he having only general charge of the house at the time of the supposed theft, and that the finding of the box in the river was not nearer the prisoner's house than that of many others. The Magistrate's remarks to these allegations are herewith appended. As the trial was a summary one, nothing can be obtained from the records; but, under the circumstances, I think the summary proceedings should be quashed, and another trial directed, not only on account of what has been remarked above, but on the inadequacy of the sentence passed by the Magistrate. If the offence of which the appellant has been charged is proved, three months' imprisonment is one very inadequate; but from the Magistrate's judgment it would appear that the evidence against him is by no means conclusive.

Judgment of the High Court.

Markby, J.—In this case, the Sessions Judge of Tipperah has reported to us that a prisoner had been tried by the Magistrate, on a charge of theft as a servant, under Section 381 of the Indian Penal Code, and

that the prisoner was convicted summarily under the provisions of Section 222 of the Code of Criminal Procedure. He says that the charge against the prisoner was that he had stolen a box containing Rs. 50, and that the box was valued at 8 annas and 6 pie. The District Judge then says that the prisoner applied to him, complaining that his conviction was illegal, and also that there was no evidence to support the conviction. The Judge thereupon sent for the proceedings, and, in doing so, he drew the special attention of the Magistrate to the allegation, which, it appears, the prisoner had made in his petition, that the property was worth more than Rs. 50, and that, therefore, this was not a case which could be summarily disposed of. The District Judge does not consider the explanation of the Magistrate upon the question of value to be satisfactory. He also expresses considerable doubt as to the propriety of the conviction, observing also that, if the offence of which the prisoner, who appears to have been a khansamah, has been convicted, was really committed, the punishment is inadequate, and he has sent up the case to us, under Sections 295 and 296 of the Code of Criminal Procedure, for our orders.

Now, we think we must presume in this case that the opinion of the Sessions Judge upon the merits of the case is correct, and that justice has not been done, either as regards the prisoner, if he be innocent, or as regards the public at large, if he be guilty. There can also be no doubt that the question of the value of the property in a case of this kind is one of considerable importance, because not only does the right of the Magistrate to try the prisoner in this summary manner depend upon it, but also the right of the prisoner to question the decision of the Magistrate by appeal. Now, the explanation which the Magistrate has thought it right to give to the Sessions Judge under these circumstances is simply this, that, whereas in the first information the value of the property stolen was stated to be 50 rupees 8 annas and 6 pie, namely, Rs. 50 cash and the value of the box and a pencil 8 annas and 6 pie, in his opinion the box was of no value, as it was thrown away by the thief. Upon the other points mentioned in the Judge's letter, the Magistrate has not given any information, and we have nothing before us but the formal statement made strictly according to the requirements of Section 227. Now, under these circumstances, we are placed in a position of some difficulty. We are bound by the law to interfere on behalf of any person who appears to us to have been unjustly convicted, if that unjust conviction has in any way arisen from an error in law or in the proceedings which has prejudiced the prisoner, or from an assumption by a judicial officer of jurisdiction which he does not possess; and the question which we have to determine is whether, upon the facts established, the Magistrate in this case had jurisdiction to dispose of this case summarily. Now, in this case, we do not understand that the Magistrate suggests any doubt that the box was stolen. There could be no possible doubt about that matter, and presumably, until there is something shown to the contrary, the box in which the money was kept is of some value. Moreover, the Magistrate does not state that there was any evidence before him upon which he came to the conclusion that the box and pencil were of no value. The exceedingly brief explanation which he has given rather leads us to suppose that that was an opinion which he himself formed. We should, of course, be exceedingly unwilling to make any sort of presumption that an error had been committed by the Magistrate; but with the exceedingly meagre information which we have, and which, in a case of this kind, we are bound to act upon, we must come to the best conclusion we can. Upon the whole, it seems to us that the view taken by the Magistrate was that he was at liberty, upon his own authority, and without taking evidence, to throw the box entirely out of consideration. Now, that course would clearly be illegal, for, as I have said before, *primâ facie* the box and pencil were of some value, and although the Magistrate would have a right to inquire into the facts in order to see whether he had jurisdiction, those facts would have to be inquired into by taking evidence precisely in the same way as he would take evidence upon the merits of the case. Under these circumstances, we are compelled to come to the conclusion that the Magistrate had no jurisdiction in this case, and that, therefore, the conviction ought to be quashed.

We may add that, in this case, we should probably have directed some further inquiry to be made, but it appears that the prisoner has already been in jail since the 22nd June last upon a sentence of three months' imprisonment; and therefore, if any further inquiry be now made, the time for which he has been sentenced will expire before the case can be finally disposed of.

d

The 13th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Sessions Judge—Commitment—Discharge—Procedure—Act X. of 1872, Section 296.

(Miscellaneous Case.)

Bundhoo and another, *Petitioners.*

Mr. C. Gregory for the Petitioners.

The Sessions Judge, under Section 296, Criminal Procedure Code, made an order upon the Deputy Magistrate for the commitment of the accused who had previously been discharged by the Deputy Magistrate, but it was alleged that such order of the Sessions Judge was made without calling upon the petitioners to show cause in the matter.

HELD that, although there is nothing in Section 296 with regard to summoning or giving notice to the accused person, no person should be affected in his personal liberty without having opportunity given him to answer the charge for which he is arrested and put into prison. The Court accordingly were of opinion that, if the accused had no opportunity given them of meeting the charge, the commitment was not a good commitment.

Phear, J.—ACCORDING to the petition which has been presented to us in this case, two persons, Lukput and Ramdani, complained against the petitioners and others that they had got up a false charge against Lukput. This complaint was made to the Deputy Magistrate on the 17th November last. The Deputy Magistrate summoned the petitioners to answer this complaint, and upon the day appointed the petitioners' statements were taken. After this, on the 13th April 1874, the Deputy Magistrate discharged the petitioners But on the 27th of the following month, Lukput made an application to the Judge under Section 296 of the Criminal Procedure Code, which provides that, "in "Sessions cases, if a Court of Session or "Magistrate of the District consider that a "complaint has been improperly dismissed, "or that an accused person has been impro-"perly discharged, by a Subordinate Court, "such Court or Magistrate may direct the "accused person to be committed for trial "upon" (as the Section now runs) "the matter "of such complaint, or of which the accused "person has been, in the opinion of the Court "or Magistrate, improperly discharged."

The Judge, upon receiving this application, procuring the recorded depositions, and giving consideration to the evidence so brought under his notice, made an order upon the Deputy Magistrate for the commitment of the petitioners. We are now asked to set aside this commitment upon various grounds. The last of them is thus stated: "That the "learned Judge was wrong in making any "orders against your petitioners in their "absence, and without calling upon them to "appear and show cause in the matter."

We have not the record of the case or all the papers in the case before us, and we are unable at present to satisfy ourselves whether the statement of fact upon which this objection is founded is correct or not. But, assuming it to be correct, we are of opinion that the order for commitment was wrongly made. There is nothing said in the Section which has just been quoted, and which gives the Judge power in this matter, with regard to summoning or giving notice to the accused person. But the matter stands thus. The accused person was summoned before the Deputy Magistrate. He there made his answer to the charge or complaint which was made against him, and his answer was successful. The Deputy Magistrate dismissed the complaint, and discharged the accused from responsibility in respect to the matter of it. Therefore, he then became a free man without any charge against him. If the statement now made by the petitioners is correct, and the Judge has, on the application of the accuser alone, without giving the petitioners an opportunity of being heard, directed them to be committed for trial at the Sessions Court, then the petitioners, while free men and at large, have had their liberty taken away, and have been sent to prison by the Judge on hearing the accuser only. Apart from any legislative enactment, we may venture to say it is a general principle of English law that no person shall be affected in his personal liberty without having opportunity given him to answer the charge or matter of complaint for which he is arrested and put into prison.

In the Section following that which has been read, namely, the 297th Section of the Criminal Procedure Code, power is given to the High Court to call for, or to take cognizance of, any proceedings which have taken place in the Subordinate Courts with a view to making a right and proper order thereon; and in the last Clause of the Section it is enacted that "no person has "any right to be heard before any High Court, "in the exercise of its powers of revision, "either personally or by agent; but the High "Court may, if it thinks fit, hear such "person either personally or by agent." I need hardly say that, notwithstanding this Clause, the High Court, guided by the general principle just referred to, almost

The 21st August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Security—Breach of the peace—Witnesses—Act X. of 1872, Section 491.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Gya.

The Queen

versus

Cheyt Singh and another, *Petitioners.*

Where parties required, on the 1st July, to show cause on the 9th, under Section 491, Code of Criminal Procedure, why they should not furnish security for breach of the peace, were served on the 5th and 7th idem, it was held that they had not had sufficient time allowed them for the purpose, and the order requiring security was accordingly set aside.

A Magistrate is bound to assist both parties in a case under Section 491, Code of Criminal Procedure, in bringing in their witnesses by issuing summonses to attend.

Reference.—THE facts of the case are that a petition was presented to the Magistrate of the District by one Sobhun Singh, on which the Magistrate ordered an enquiry to be made by the police. On receiving the police-report, the Magistrate recorded a proceeding, dated July 1st, 1874, in which he stated that, there being apprehension of a breach of the peace on account of a dispute about some land, summons to show cause on July 8th why security should not be given should be issued under Section 491 of the Criminal Procedure Code to Cheyt Singh and Omrao Singh. Summonses were accordingly issued, and served on Cheyt Singh and Omrao Singh on July 7th and July 5th respectively. On the 9th July, the Magistrate, after taking evidence adduced by Sobhun Singh, passed orders requiring the two persons Cheyt Singh and Omrao Singh above named to furnish security to the amount specified in his order.

I am of opinion that the Magistrate's order of July 9th is illegal, and should be set aside for the following reasons, *viz.*:—

1st.—That the time allowed to Cheyt Singh to show cause was not sufficient.

The place where the land is situated is about 18 or 19 miles from the sudder station of Gya. The summons was served on Cheyt Singh at Gya on July 7th, and it was almost an impossibility for him to have his proof ready on the following day, July 8th. He did not produce any proof, and his application for summons to witnesses was refused by the Magistrate. With reference to this point, I would cite the cases noted in the margin.

20 W. R., p. 18; 20 W. R., p. 36.

This ground of reference applies to Cheyt Singh only.

2ndly.—It appears to me that the Magistrate should have proceeded under Section 530 of the Criminal Procedure Code before passing orders under Section 491.

The Magistrate in his explanation says:—

(1) That it is discretionary with him to decide under which Section action shall be taken; (2) that he was not satisfied that any dispute as to possession of land existed: (3) that possession had been admittedly given to Sobhun Singh by decree of a Civil Court; and (4) that the land being joint undivided land, Section 530 would not apply. As to the first of these statements, it appears to me that a special provision like that contained in Section 530 should override a general provision like that contained in Section 491, and that it would be hard if a person in actual possession of land should be bound over to keep the peace, because another person might threaten to oust him. On this point I would cite the High Court's ruling noted in the margin. As to the second statement of the Magistrate, he appears to have overlooked the fact that, in his proceeding of July 1st, he has recorded the fact of a dispute about land as his ground for proceeding under Section 491. As to the third statement, I find that there was no admission (but the contrary) so far as the record shows; and as to the fourth statement, it appears from the record that the land, though admittedly joint undivided land as between Cheyt Singh, Omrao Singh, and others, is not admitted to be held jointly with Sobhun Singh, and the principle relied on by the Magistrate will, therefore, not apply to the case.

19 W. R., p. 46—Kashi Chunder Das, petitioner.

It might be said in respect to my first ground of reference that Cheyt Singh and Omrao Singh have shown by their petition of July 4th that they were then aware of the necessity of filing proof on July 8th. This is true, but still it appears to me that a person is not bound to take steps for showing cause until the summons be actually served on him, and he would, I think, find it more than usually difficult to bring forward his witnesses, unless he could show them that he had actually been served with a summons.

The petitioners have contended that the Magistrate was bound to summon their witnesses, but I have decided this point against them under Section 361 of the Criminal Procedure Code.

Judgment of the High Court.

Markby, J.—We think the order of the Magistrate of the 9th July must be set aside as illegal.

The order of the Magistrate of the 4th of July, on which date application was made on behalf of the defendants for summons for witnesses to attend on their part on the 9th, itself shows that the time allowed was too short. There was no time lost in making that application, and yet the Magistrate says that the summons could not be served in time for the witnesses to attend on the day fixed for hearing.

We also think that the Magistrate has taken an erroneous view of the law as to the issue of summons on witnesses. The law (Section 491) prohibits him from binding any one over to keep the peace "until he has adjudicated on evidence before him;" and, under ordinary circumstances, the Magistrate is bound to assist both parties in bringing in their witnesses by issuing summons to attend. The Magistrate must be aware that a party would practically be unable to produce his witnesses unless he could obtain the assistance of the Court.

We think the proceedings of the Magistrate in this case have been altogether erroneous, and that his order of the 9th July, requiring Cheyt Singh and Omrao Singh to find sureties, must be set aside.

The 22nd August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Salt—Rowannah—Act VII. of 1864, Section 16.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Midnapore.

The Queen

versus

Chundee Churn Dass, *Petitioner.*

Baboo Bhoyrub Chunder Banerjee for the Petitioner.

Where a person, who had taken a quantity of salt under a rowannah for transit from Calcutta to his golah, part of the journey to be performed by water and part by land, conveyed a portion of it to his golah where the rowannah was, and was conveying the rest in two separate batches by land, it was held that he could not be convicted under Act VII. of 1864, Section 16.

Reference.—One Chundee Churn Dass took 350 maunds of salt under a rowannah, which specified that the salt was to be conveyed from Calcutta to his golah, and that part of the journey was to be performed on pack bullocks.

When the boat had gone as far as it could, the transit by bullocks commenced. The police then appeared on the spot, and found some of the salt in the golah, and some on two separate batches of bullocks. The boat was about 2 miles from the golah, and the police who asked for the covering rowannah had to go to the boat before they could find the rowannah; it was then produced.

Chundee Churn Dass was then prosecuted for having in his possession contraband salt, and the Deputy Magistrate convicted him, being of opinion that the salt in transit on the bullocks and in the golah was contraband, as the rowannah was not with it.

Chundee Churn appealed to me, and I upheld the conviction. But the matter has again been argued before me, and I am now of opinion that the conviction was wrong in law.

It is not denied that the salt found on the road and in the golah was part of that mentioned in the rowannah, and therefore, under Section 16, Act VII. of 1864, it cannot be held to be contraband. The conviction was under this Section.

There is no doubt that Chundee Churn committed a breach of Rules 33 and 34 issued by the Government, but there is no penalty provided for a breach of those Rules, and therefore I am of opinion that the conviction and sentence should be set aside.

Judgment of the High Court.

Phear, J.—We are of opinion, on the facts which the Judge states in his letter of reference, and which appear on the record, that no breach, either of the Salt Act or of the Government Rules, was committed by the accused. The conviction and sentence must, therefore, be set aside; and if the fine has been paid, it must be refunded, and the property confiscated must be restored.

The 22nd August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Deaf and dumb person—Act X. of 1872, Section 186.

Reference to the High Court, under Section 186 of the Code of Criminal Procedure, by the Magistrate of Purneah.

The Queen

versus

Bowka.

Under the circumstances of this case, in which a prisoner, who was deaf and dumb, had a further opportunity given him of being heard in defence, the Court, under Section 186 of the Code of Criminal Procedure, confirmed the conviction by the Magistrate.

Phear, J.—We have given consideration to the return of the Magistrate now before us;* and although the prisoner has not been able to defend himself, or perhaps entirely to understand the proceedings of the trial, yet, on the whole, we think that there can be no reasonable doubt of his having been very well aware of what he was about at the time when he was apprehended; and on the second limited inquiry before the Magistrate, it was pretty clear from the evidence given by the prisoner's brother that the prisoner knew that he was called upon to defend himself, and that in substance he asserted his innocence; in other words, he pleaded so far as he could plead to the charge.

We learn further that, at the trial, he had the separate assistance of an experienced vakeel, and we think that the evidence which was adduced at the trial under the circumstances described to us, and which was carefully watched and tested by this vakeel, may be treated as good and sound materials whereon to form an opinion as to the truth of the charge against the prisoner, notwithstanding the fact which has already been mentioned that he was unable to take that personal part in the proceedings which an accused person is always expected to take, in order that they may be fair and just towards him. Then, if we look at the evidence and accept it as trustworthy, there can be no doubt whatever that the prisoner was taken in the very act of committing burglary together with others, and that, upon his being seized, he defended himself with a latee, knocked down the father of the prosecutor, and very nearly succeeded in getting away. This of itself goes far to show that he was aware of the criminality of his conduct, and, on the whole, we see no reasonable ground upon which he can be acquitted of the charge upon which his companion has been found guilty. Therefore, in exercise of the discretion which is reposed in us by Section 186 of the Criminal Procedure Code, we confirm the conviction of the prisoner of the offence of burglary under Section 457 of the Penal Code, which was made by the Joint Magistrate, and sentence him to suffer rigorous imprisonment for one year to be reckoned from the date of trial in the Magistrate's Court.

* *Vide ante*, p. 35.

The 24th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Married woman, Enticing away—Alternative finding—Act XLV. of 1860, Section 498.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of enticing or taking away, or detaining with a criminal intent, a married woman.

The Queen

versus

Mothoora Nath Roy, *Appellant.*

Baboo Kalee Mohun Dass for the Appellant.

A finding exactly in the words of Section 498 of the Penal Code—that the prisoner took or enticed away a married woman from her husband, or some person having the care of her on his behalf, with intent that she may have illicit intercourse with any person, or concealed or detained such woman with a like intent—though not actually illegal, when it is doubtful which of the several offences has been committed, is a finding which ought not to be resorted to if it can be avoided, and it can be determined under which part of the Section the prisoner is guilty.

Markby, J.—The conviction of the prisoner in this case follows almost exactly the

words of Section 498 of the Indian Penal Code, adopting all the different alternatives in that Section, and finding that the prisoner took or enticed away a married woman from her husband, or some person having the care of her on his behalf, with intent that she may have illicit intercourse with any person, or concealed or detained such woman with a like intent. A finding in that form, although perhaps not actually illegal under certain circumstances, namely, when it is doubtful which of the several offences had been committed, is nevertheless a finding which ought not to have been resorted to if it could possibly be avoided ; and it was clearly unnecessary in this case, because, when we turn to the judgment of the Court below, we find that it is only upon the latter part of the Section that the conviction turned. What the Judge clearly intended to find was that the prisoner concealed or detained the woman with the intent mentioned in the Section. And a closer examination of the judgment also leaves no doubt on our minds that of those two alternatives it was the concealment which the Sessions Judge really intended to find to have taken place. We shall, therefore, treat this case as if the finding had been in accordance with the judgment, namely, that the prisoner had concealed a woman whom he knew, or had reason to believe, to be the wife of another person, with an intent of having illicit intercourse with her. Now, that the woman in question had been married to the prosecutor is beyond dispute; it is proved, both by the witnesses for the prosecution and by the witnesses for the defence, nor have we any doubt whatsoever, although, as found by the Court below, the prisoner never had, in fact, illicit intercourse with the woman, that his object was to have illicit intercourse with her. The question, therefore, is whether he did, within the meaning of that Section, conceal the woman, knowing, or having reason to believe, her to be the wife of another man. Now, with regard to the concealment, the view that the Sessions Judge has taken is that, inasmuch as the husband was diligently searching for the wife in the neighbourhood, where she was ultimately found in the prisoner's house, and had taken out a warrant against her (on what ground it does not exactly appear), his object being to recover her person, the prisoner must have known all that; and that, therefore, it must be presumed that he concealed her from her husband. Now, the only evidence that we have in this case as to the steps that were taken by the husband to search for his wife is that which comes from the husband himself. If this had been a case in which the husband and wife had lived for a considerable period continuously and on good terms together, and the wife had now left the husband for the first time, we might have been satisfied that the husband was really and vigorously searching for his wife, and possibly the inference drawn by the Sessions Judge would have been justified. But it is impossible not to bear in mind that this Section contains provisions of the law, which, although they may serve very useful purposes to protect the husband, may also be used by unscrupulous persons for purposes of a totally different kind; and looking to all the facts, to the whole history of the married life of these parties as disclosed by the evidence, to the character of the husband and the wife, and to the previous relations between them, we think that it requires great caution in coming to the conclusion that the husband, although he may have been desirous to give some color to the assertion that he was seeking for his wife, was really anxious to recover her. The inference, therefore, which is drawn from the husband's conduct, unfavorable to the prisoner, appears to us, in this case, to rest upon very insecure ground. If the husband had really been anxious to recover his wife, as he would wish us to believe, it would have been very easy to show by the evidence of the other witnesses, who were actually called, what inquiries he had made for her in that neighbourhood. It would seem most probable that he would make some inquiry of the prisoner himself, upon whom his suspicions had fallen. Several persons, friends of the prosecutor, and who were acquainted also with the prisoner, were called as witnesses for the prosecution; but no attempt was made to show from them what the prosecutor really had done to recover his wife. That statement rests wholly upon his assertion, and it is upon that assertion alone that the inference is drawn that Mothoora Nath, the prisoner, must have known that he was seeking for his wife. The mere fact that the prisoner kept his relations with this woman secret would afford no inference against him; that, as a Hindoo, he would naturally do.

There is also another part of the case, upon which we think a very great doubt rests. We are not prepared to say upon this evidence that there had been a divorce; but it is admitted that, since the marriage, the parties had been separated for considerable

periods; once as long as six years, and the evidence of their having lived together at all of late years is very vague. It is also perfectly certain that, long prior to this occurrence, it had been asserted by the woman's uncle that a divorce had taken place; and that the uncle successfully prosecuted the husband for attempting to take the woman away from his house, which was the occasion on which it was alleged that she was no longer the prosecutor's wife. Of course, that does not establish, nor do we say it establishes, that a divorce actually took place; but it shows that there was certainly some talk about a divorce. No doubt, there is some force in the observation of the Sessions Judge that, at the very commencement of this charge, the statement was not made by the prisoner that he believed the divorce to be a real one; but, immediately after that, he corrected the error, and it appears from the judgment that he made a special application to the Magistrate to add that to his defence. Under all the circumstances of this case, we do not think it would be safe to infer that, at the time when these parties, the prisoner and the woman, were together, he knew or believed her to be then a married woman. No doubt, we should generally be very unwilling to interfere with a concurrent finding of the District Judge and two assessors, who have heard the witnesses; but, as regards the second point particularly, it is not a question which turns so much upon the credibility of the witnesses, as what is the proper inference to be drawn from the facts which they stated. Considering that there had been an undoubted assertion long before this case on the part of one of the relatives of the woman that a divorce had taken place, and that that assertion is still persisted in by others of her relatives, we think it would not be safe to assume that the prisoner, at the time when the woman was with him, knew or believed that she was a married woman. Under all the circumstances of the case, we do not consider that the evidence is such as to justify the conviction. We, therefore, set aside the conviction and sentence, and order the prisoner to be acquitted and released. I have only to add that the District Judge seems to have placed some reliance upon an alleged attempt of the prisoner to procure evidence which was false. That was not in any way established at the trial, and therefore we have put that part of the case entirely out of our consideration.

The 24th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Recognizances—Surety—Act X. of 1872, Sections 125, 396, and 397.

(Miscellaneous Case.)

Kristo Prosad Mundle, *Petitioner.*

Baboo Doorga Mohun Dass for the Petitioner.

The powers contained in Sections 396 and 397 of the Code of Criminal Procedure extend, not only to recognizances taken by a Magistrate for the appearance of an accused person by a surety under Section 125, but also to such recognizances when taken by a police-officer.

Markby, J.—THERE is only one point for our consideration in this case, and that is, whether the powers contained in Sections 396 and 397 of the Criminal Procedure Code apply to a case in which a recognizance had been given to the police for the appearance of an accused person by a surety under Section 125. The terms of Section 398, we think, make it quite clear that those two preceding Sections extend, not only to recognizances taken by a Magistrate, but also to recognizances taken by a police-officer.

The application must, therefore, be dismissed.

The 27th August 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Recognizance—Surety—Act X. of 1872, Section 493.

(Miscellaneous Cases.)

Baboo Futteh Bahadoor, *Petitioner,*

versus

Mr. Gibbon, *Opposite Party.*

Mr. J. H. A. Branson and *Baboo Chunder Madhub Ghose* for the Petitioner.

The Advocate-General and *Moonshee Mahomed Yusoof* for Opposite Party.

Lall Mahomed, *Petitioner,*

versus

Mr. Gibbon, *Opposite Party.*

Mr. J. H. A. Branson and *Baboo Mohesh Chunder Chowdhry* for the Petitioner.

The Advocate-General and *Moonshee Mahomed Yusoof* for Opposite Party.

The High Court reduced the amount of recognizances required in this case, as it was very much in excess of,

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and out of proportion to, the means of the party accused, Section 493 of the Code of Criminal Procedure requiring that the Magistrate should look to the means of the party ordered to find sureties.

Markby, J.—In the first of these two cases, namely, that in which Baboo Futteh Bahadoor has been called upon to find sureties to keep the peace, we think that the order of the Magistrate must be quashed. The law now is clear and express upon the point that the Magistrate, although he may, upon any information or report which is reasonably credible, issue summons, must, before he binds over a person, adjudicate upon the evidence before him. Now, in the case of Futteh Bahadoor, it does not appear that any evidence was before him. There had been another case connected with this in which he had taken evidence, but the Magistrate could not use the evidence taken in that case as evidence in this, where the parties were different. Therefore, that order must be quashed.

As regards the case of Lall Mahomed, as has been observed by the Sessions Judge, there is evidence upon the record under Section 297 of the Criminal Procedure Code, and we should not be justified in interfering with the conclusion which the Magistrate has come to upon the evidence. But it appears to us that the amount in which the petitioner has been bound over is altogether beyond what the Magistrate was justified in requiring. The petitioner in this case appears to be a servant of Futteh Bahadoor, and he has been ordered to enter into a personal recognizance in the sum of 10,000 rupees, and to find two sureties, each for 5,000 rupees. He has put in an affidavit, which was wholly uncontradicted, and in which he states that his whole property in the world is worth less than 1,000 rupees; and although it appears that his master, in order to procure his liberation, furnished the necessary security pending this inquiry, yet it does not at all follow, nor have we any reason to suppose, that he would be willing to enter into that security for any longer period.

We are disposed to think that the Magistrate has rather looked to the means of the master than (as required by Section 493) to the means of the party himself, who was ordered to find sureties. Of course, we should very seldom interfere in a matter like this, which is generally a matter entirely within the discretion of the Magistrate; but we think that, in this case, the amount of security is altogether out of proportion to the means of the party, and that, in fact, the order of the Magistrate is tantamount to an order for imprisonment. It could not possibly be expected that this man, Lall Mahomed, could comply with this order. Under these peculiar circumstances, we think we ought to reduce the amount of security. We have the opinion of the Sessions Judge, from which we see no reason to differ, as to what would be a reasonable amount, and we think that the petitioner Lall Mahomed should be required to enter into his own personal recognizance for 1,000 rupees, and to find either one surety for 1,000 rupees, or two sureties for 500 rupees each. The order of the Magistrate is set aside, and the above order is made in lieu thereof.

The 29th August 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Trial of case—Prosecution—Appeal—Magistrate.

(Miscellaneous Case.)

Het Lall Roy, *Petitioner.*

Mr. M. M. Ghose and *Baboo Doorga Mohun Dass* for Petitioner.

Where a Magistrate took an active part in the prosecution of the prisoners, and recorded the evidence of the material witnesses preliminary to deciding whether the case should go to trial or not, and by whom it should be tried, it was held that he was not a proper Court to hear the appeal from the conviction come to in the case.

Phear, J.—We think that, regard being had to the circumstances of these prosecutions and the facts which have occurred, we shall promote the ends of justice by ordering that the three appeals which are pending before the Magistrate of Furreedpore should be transferred to the Judge of Backergunge for trial. According to the explanation which has been sent to us by the Magistrate, it appears very plain that he took an active part, if not in actually instituting each prosecution, yet in inviting in a somewhat special manner, and in procuring the evidence upon which the prosecution was to be placed, and was, in fact, afterwards instituted. He has also done much in the way of directing the course of the prosecutions, as well as in a certain sense acted as a committing officer; that is, he has in each case taken the deposition of the material witnesses, and in view of these depositions decided

whether the case should go to trial or not, and by whom it should be tried. In a certain sense, he has committed each case to the different judicial officers for trial. It is, therefore, not desirable, and would be hardly fair to the Magistrate himself, that he should be the Appellate Court, which is to hear and determine the appeals preferred against the convictions, which have been come to in these different cases. These remarks apply, of course, only to those cases which are pending in appeal before the Magistrate himself, or which are likely so to come before the Magistrate, arising out of the prosecutions which have been spoken of. But the Magistrate has caused two appeals which had been preferred to the Additional Judge of Furreedpore to be sent up to this Court, although no order was made by this Court to that end, and these, no doubt, are not affected by the foregoing considerations. However, as these cases are very nearly connected with the other cases, and the records of all are now here, it will, we think, be most convenient that all should be dealt with together. We, therefore, direct that the five appeals be sent to the Judge of Backergunge for trial. And the same order will be made with reference to all other appeals which may arise out of this set of prosecutions.

Pending appeal, let the prisoner be released on the same amount of bail that was taken by the Officiating Magistrate, namely, Rs. 300 in each of the five cases.

The 4th September 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Summary procedure—Tolls—Extortionately—Act X. of 1872, Chapter XVIII.—Act VIII. of 1851, Sections 3 and 6.

(Miscellaneous Case.)

Uttom Chunder Gangooly, *Petitioner,*

versus

Issur Chunder Mookerjee, *Opposite Party.*

Baboo Umbica Churn Bose for Petitioner.

Baboo Juggadanund Mookerjee for Opposite Party.

A charge of an illegal demand of toll under Act VIII. of 1851, Section 6, ought not to be dealt with summarily under Chapter XVIII. of the Code of Criminal Procedure.

The power of levying tolls under Act VIII. of 1851 is vested in the Lieutenant-Governor of Bengal, and is restricted to levying tolls only at the toll-bar: the establishment of a toll must be by some distinct resolution of the Government notified in some way or other by the Government.

The word "extortionately" in Section 6, Act VIII. of 1851, is not used in the same sense as it is used in the Penal Code, but as meaning an unlawful demand of toll accompanied by pressure; the pressure in this case being the exercise of the powers indicated in Section 3 of the Act by seizing the complainant's horses and carts, and detaining them until the toll was paid.

Markby, J.—This case comes before us, the record having been sent for under Section 279 of the Code of Criminal Procedure. The proceedings relate to a complaint made by Uttom Chunder Gangooly to the Magistrate of Howrah, which was disposed of summarily by the Deputy Magistrate, Mr. Ricketts, and the complaint related to an illegal demand of toll upon a highway. Now, at the outset, there seems to have been an error in the proceedings. The real complaint in this case was not of extortion in the sense in which that word is used in the Penal Code, which includes, as one of the elements, dishonesty. No dishonest proceedings were charged against the defendant. The charge was really one of an illegal demand of toll under Section 6 of Act VIII. of 1851, although that provision of the law was not alluded to in the petition. The case ought not, therefore, to have been dealt with summarily; that was an oversight; but that is not the question upon which the proceedings were sent for by us. The ground upon which the proceedings were sent for by us was that the view of the law relating to this matter, as stated by the Deputy Magistrate in his judgment, did not appear to us to be correct. He states that the charge was of illegally demanding and taking toll on account of two carts travelling on the Benares road about a mile from the toll-bar. That is how the Deputy Magistrate states the charge. Then he says that the defendant admits having taken toll, and produces his authority from the Chairman to the Howrah Municipality for having done so. The Deputy Magistrate then finds that the authority produced by the defendant empowers him to collect toll on carts on the Benares road, without specifying any limit or distance from the toll-bar; and he states his opinion that, inasmuch as the authority is so worded, the defendant has a right to demand and take tolls on the Benares road within the Howrah district, thereby evidently meaning anywhere on the Benares road within the Howrah district. It appearing to us to be very doubtful whether any such power as that could exist, we called

upon the defendant Issur Chunder Mookerjee, to whom notice had been given, and who has now appeared before us through the junior Government Pleader, to show that he has such power as there alleged. Now, so far from showing that he has any such general power to collect tolls anywhere upon the Benares road as is here stated, we feel bound to say that, so far as we have seen at present, it has not been shown that this toll has ever been legally constituted at all. Of course, in expressing this opinion, we desire it to be distinctly understood that we express it only upon the documents which have been produced before us. The origin of the right to collect tolls is admitted to be Act VIII. of 1851 of the Acts of the Governor-General in Council. That Act, by Section 2, empowers the Governor of the Presidency of Fort William in Bengal to cause such rates of toll, not exceeding the rates mentioned in the schedule, as he thinks fit to be levied upon any road or bridge which has been, or shall thereafter be, made or repaired at the expense of the Government. It is conceded, and as far as we see rightly conceded, that the powers contained in the Act are now vested in the Lieutenant-Governor of Bengal, who, for a great many purposes, has been substituted for the Governor of Bengal; and although it does not appear that this particular road is now maintained at the expense of the Government, as far as we have seen there is no reason why the Lieutenant-Governor of Bengal should not still exercise the powers which he has under this Act with reference to this road. The maintenance of the road is provided for by the Government through the Municipality of Howrah, and, at any rate, we see no reason at present to doubt that the Government may still exercise their power of fixing tolls upon this road, provided they do so in a proper way. What has not been shown to us is that the Lieutenant-Governor ever has, by a proper and formal act, created this particular toll. All that has been shown to us is two letters from the Junior Secretary to the Government of Bengal to an officer called Officiating Chief Engineer, dated respectively the 13th September 1858 and 20th November 1858, stating generally the decision of the Lieutenant-Governor to assess tolls upon certain roads. But we do not consider that that alone would be sufficient to establish this toll. The establishment of a toll must be by some distinct resolution of the Government come to for that purpose, and in some way or other notified by the Government. Of course, we must not be understood as now laying down any special form which the Government is bound to adopt; all that we say is that the mere production of these two letters is not sufficient to show that this toll has ever been legally established. It has been distinctly admitted in the letter of the 13th March 1874 that the toll was not established until after the 20th June 1865. It could not, therefore, have been an old toll established during the time when these powers were vested in the Governor-General in Council. It is a new toll, that is to say, a toll established since 1865, and the proper mode of showing that that toll was legally established would have been to produce the order of the Government establishing such toll. That has not been done, and, therefore, the legal origin of the toll has not been shown to us. It is, I repeat, to be fully understood that we express this opinion only upon the documents which are now before us.

But, further than that, it has been contended that, under this Act, the Lieutenant-Governor has no authority to direct tolls to be levied at any other place than at the toll-bar; and, after hearing the arguments, we concur in that view of the law. In the first place, it seems to us that any other view of the law would be unreasonable, and would lead to the greatest confusion. The object of a toll-bar is to inform the public of the place at which the toll is to be demanded; and if persons can be authorized to stop a carriage at any spot in the road and demand toll there, then constant doubts and disputes would arise, and the toll-bars would become perfectly useless. Now this, which is a reasonable view of the matter independently of the Act, is, we think, borne out by the Act itself, and also (as far as we have been able to see) by the practice which has been pursued under the Act.

Section 7 of Act VIII. of 1851 clearly contemplates the taking of tolls at the toll-bar. It provides that a table of the tolls authorized to be taken at any toll-gate or station shall be put up in a conspicuous place near such gate or station, and so forth. That provision of the Act would be quite nugatory, if the tolls can be taken at any other place except the toll-gate. Then we also find that, in a resolution of the Lieutenant-Governor of Bengal of the 31st January 1862, which has been read to us, it is laid down, as a general rule applicable to all tolls on public roads throughout the districts under the Lieutenant-Governor of Bengal, that the tolls are to be levied at each time of

passing the toll-gate, thereby clearly indicating that they are not to be levied at any other time or place. Further than that, when we look to this defendant's own lease, we find that that was drawn precisely with the same view. It says that Issur Chunder Mookerjee is authorized to collect tolls under the provisions of Acts VIII. of 1851 and XV. of 1864 "at the Benares road toll-bar." There is nothing whatever in this lease to authorize the defendant to collect tolls at any other place. It seems to us, therefore, upon a reasonable view of the matter, upon the words of the Act, and also upon the practice pursued under the Act, that it is at the toll-bar alone that the tolls can be collected.

The only other question which requires any observation is as to the meaning of the word "extortionately" in Section 6 of Act VIII. of 1851. It was conceded very properly by Baboo Umbica Churn Bose, who appears for the petitioner, that no dishonesty was charged against the defendant in this case, and therefore, as I have said before, the offence of extortion under the Penal Code could not be proved. But in Section 6 of Act VIII. of 1851, the word "extortionately" is also used. It is, therefore, necessary to consider whether, after that admission, the offence under Section 6 could be proved. We think it could, because, in our opinion, the word "extortionately" in Section 6 of Act VIII. of 1851 is not used in the same sense as it is used in the Penal Code. What we think to be the meaning of the word "extortionately" in Section 6 of Act VIII. of 1851 is an unlawful demand of toll accompanied by the sort of pressure which was alleged in this case, namely, the exercise of the powers indicated in Section 3 of this Act, by seizing the complainant's horses and carts, and detaining them until the toll was paid. That would not be extortion, if it was not done dishonestly, within the meaning of the Penal Code; but we think that, if the taking of the toll was unlawful, and the seizure of the carts was also unlawful, that would be an unlawful and extortionate act within the meaning of Section 6 of Act VIII. of 1851.

If the complainant desires it, the case must be sent back to the Magistrate of the District, to be re-investigated with this expression of our opinion. No doubt, questions other than those upon which we have expressed an opinion will arise, and will have to be enquired into. We decide only those questions which were raised before us.

The 5th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

High Court Charter Act, Section 15—Judicial proceeding—Act X. of 1872, Section 297.

(Miscellaneous Case.)

Chunder Coomar Roy and others, *Petitioners.*

versus

Omesh Chunder Mojoomdar and others. *Opposite Party.*

The Advocate-General for the Petitioners.

Mr. J. S. Rochfort for the Opposite Party.

Baboo Juggadanund Mookerjee for the Crown.

The fact that an order of the Magistrate is not a judicial proceeding, and therefore not one which the High Court can revise under Section 297 of the Code of Criminal Procedure, does not have the effect of removing the Magistrate from the general superintendence of that Court under Section 15 of its Charter Act.

Phear, J.—We are of opinion that the fact (assuming it to be so) of the order complained of not being a judicial proceeding, and therefore not an order which we can revise under Section 297 of the Criminal Procedure Code, does not have the effect of removing the Magistrate in regard to this matter from the general superintendence of this Court, which is given by Section 15 of the Charter Act; and we have on former occasions given our reasons for thinking that it is especially necessary for this Court, in the exercise of the power of superintendence, to see that Magistrates who profess to act under the provisions of Section 518 take care that those conditions upon which alone their orders under that Section can be legal are fulfilled. In the present instance, as in two others which had been brought before this Court, and formed the subject of decisions passed by this Division Bench, not only does the Magistrate entirely abstain from expressing any opinion to the effect that such delay as would be occasioned by a resort to the procedure contained in the Sections which follow Section 518 of the Criminal Procedure Code would occasion a greater evil than that to be suffered by the person upon whom his order under Section 518 was to be made, but we cannot infer that he entertained such an opinion, because there is no ground

apparent in the facts found by the Magistrate upon which it could reasonably be based. The very course which he has taken in this matter from beginning to end shows that there was no such emergency as could justify the making of an order under Section 518, subject to the limitation expressly prescribed by the Legislature itself.

We are, therefore, of opinion that the order is bad in law, and must be quashed.

The 12th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Breach of the peace—Evidence—Act X. of 1872, Section 491.

(Miscellaneous Cases Nos. 123 and 124 of 1874.)

Rajah Run Bahadoor Singh and others, *Petitioners,*

versus

Ranee Tilessuree Koer, *Opposite Party.*

The Advocate-General and *Mr. C. Gregory* for the Petitioner.

Mr. G. H. P. Evans for the Opposite Party.

It is only evidence of specific conduct on the part of the accused, from which the reasonable and immediate inference is that they are likely to commit a breach of the peace, which will justify a Magistrate in adjudicating under Section 491 of the Code of Criminal Procedure.

Phear, J.—We think that there is no evidence in this case to support the order. The Police Sub-Inspector and the constable who gave their testimony only say that the relation between the contending and opposing parties is such that, in their opinion, it is most probable that a breach of the peace will be committed by that party who is out of possession. This is not evidence of specific conduct on the part of Run Bahadoor Singh and Dost Mahomed from which the reasonable and immediate inference is that they are very likely to commit a breach of the peace. And it is only evidence of the latter kind that will justify a Magistrate in adjudicating under Section 491 that they were likely to commit a breach of the peace. Accordingly, we think that this order is bad, and must be set aside, that is, the rule will be made absolute.

The 12th September 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Breach of the peace—Evidence—Extra-judicial knowledge—Act X. of 1872, Section 491.

(Miscellaneous Cases Nos. 127 and 128 of 1874.)

Rajah Run Bahadoor Singh and another, *Petitioners,*

versus

Rance Tilessuree Koer, *Opposite Party.*

The Advocate-General and *Mr. C. Gregory* for the Petitioner.

Mr. G. H. P. Evans for the Opposite Party.

Where a Magistrate, instead of proceeding upon evidence judicially taken before him sufficient to show that the accused were contemplating acts which would amount to a breach of the peace, acted upon his extra-judicial knowledge, the High Court set aside his order under Section 491, Code of Criminal Procedure, requiring the accused to furnish recognizance.

Phear, J.—Case No. 127.—The Magistrate in this case says: "The only point to "be looked to in this case is the necessity of "taking security from the accused to keep "the peace." Now, the accused persons of whom he spoke were not the present petitioner on whose behalf the rule has been granted—namely, Run Bahadoor Singh—but his servants. The Magistrate goes on to say: "The complainant has shown ample "cause why recognizances should be taken. "The accused offer evidence to show that "there has been no disturbance, and that, as "they are in possession, no breach of the "peace on their part need be anticipated. "On this point I have to adjudicate." Then the Magistrate proceeds to deal with certain objections which had been made to his entertaining the case. And finally he says, after overruling these objections: "From "the evidence recorded in this case, and still "more from the extra-judicial knowledge "which every sub-divisional officer brings "to bear on the affairs of his sub-division, "I am convinced that recognizance must "be taken in this case. I know that "Hurdyal Singh is in possession, and "always has been. I know that Baboo Run "Bahadoor Singh is most anxious to gain "possession, and that he is not likely to stick "at anything in the prosecution of this "object. I know that the accused are in "his pay and interest, and it is perfectly

"clear that, since Hurdyal Singh is in possession, any attempt made by another person "(however good his title) to collect rents, or "to appropriate crops, or to interfere in any "manner with his administration of the "village, must be criminal, until Hurdyal "Singh has been ousted by the order of a "competent Court. I am convinced that "there is every probability of the persons "complained against making an attempt to "oust Hurdyal Singh, and thus causing a "breach of the peace, and I accordingly find "it necessary to take recognizances from "them."

It is apparent from this judgment of the Magistrate that he has proceeded more upon the foundation of his own "extra-judicial knowledge" than upon conclusions which he has drawn from the evidence adduced before him. In fact, the principal conclusions upon which he based his judgment are expressly stated by him to be drawn from his own knowledge: "I know that Baboo Run "Bahadoor Singh is most anxious to gain "possession, and that he is not likely to stick "at anything in the prosecution of this "object. I know that the accused are in his "pay and interest."

This link in his chain of reasoning is necessary to lead him up to the decision at which he finally arrived. But it need hardly be said that a judicial decision cannot be allowed to stand upon such a foundation as this. We have had the evidence read to us by the learned Counsel who has appeared on behalf of the respondent. And although it is not our province to judge of the value and force of that evidence, we cannot avoid perceiving that it does not directly implicate the petitioner in any way. It cannot, indeed, be asserted that even the acts which are by that evidence attributed to the persons called the accused might not be honest acts, done in assertion of a supposed claim of right, without any intention of afterwards proceeding to criminal conduct in the shape of a breach of the peace. The witnesses state that the accused came to the kutchery, and wanted to turn them, the witnesses, out of it; that they went to the kulyan, and attempted to take grain from off the threshing floor. But the same witnesses also say, by implication at any rate, if not expressly, that the accused, on being resisted, went away, and, so far as we can gather from the depositions, there is no witness who speaks to the threatening of force on the part of the accused. But, however this may be, it is quite clear that none of the evidence given by the witnesses goes in any way to show that the petitioner Run Bahadoor Singh was contemplating acts which would amount to a breach of the peace, unless this be inferred from the statement that the accused were his servants, and publicly exhibited a red seal, which was supposed to be his seal.

Now, on reference to Section 491 of the Criminal Procedure Code, under which the order of the Magistrate has been made, we find that, although the Magistrate is justified in first taking action upon any information which he thinks credible, to the effect that any person—whom in this instance we may identify with Run Bahadoor—is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, he cannot bind over that person to keep the peace until he has adjudicated the facts which constitute the material facts of the information on evidence before him. In other words, the Magistrate could not lawfully, in the present case, bind over Run Bahadoor to keep the peace until he had, upon evidence taken before him, adjudicated facts such in nature as proximately to give rise to the belief that Run Bahadoor was likely to commit a breach of the peace, or to do some act which might probably occasion a breach of the peace. But the Magistrate has not adjudicated to this effect upon evidence taken before him; he has adjudicated generally upon the footing of that which he terms his "extra-judicial knowledge:" "I know that Baboo "Run Bahadoor Singh is most anxious to "gain possession, and that he is not likely to "stick at anything in the prosecution of this "object," that is, he is likely to commit a breach of the peace, because further "I "know that Hurdyal Singh is in possession;" and, as has already been remarked, the evidence itself, when referred to, does not, whatever it may be intrinsically worth, go directly to show that Run Bahadoor Singh had exhibited conduct from which it could with reason be immediately inferred that he was likely to commit a breach of the peace, or to do any specific act which might occasion a breach of the peace.

We think, therefore, that the order of the Magistrate is bad in law, and must be set aside.

It is admitted by the learned Counsel on both sides that no distinction can be drawn between the case of Dost Mahomed and the case of Run Bahadoor Singh; the order of the Magistrate, therefore, as regards Dost Mahomed, must also be set aside.

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Case No. 128.—This case, which may be termed the case of the servants, as contradistinguished from that of the masters, no doubt, does differ to some extent from the two last cases. It cannot be said that there is no evidence whatever tending to show that the persons who have been bound down were likely to commit a breach of the peace. That evidence, however, as has already been remarked, is exceedingly feeble; and on the other hand, there is evidence also adduced by the present petitioners to rebut it. And it seems to us that the Magistrate did not consider and weigh this evidence together, but was guided to his decision mainly by that "extra-judicial knowledge" which he had so markedly pointed at in his judgment. We cannot help seeing that his judgment would probably have been very different, indeed, in this case from that which it now appears, if he had rested his decision simply upon the evidence which was properly before him, instead of having recourse, as he avowedly had in a greater degree, to the "extra-judicial knowledge," which he possessed by virtue of his position as a divisional officer.

We, therefore, think that this order is also bad, and must be set aside.

The 14th September 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Breach of the peace—Irregularity—Act X. of 1872, Sections 283 and 530.

(Miscellaneous Case.)

Gour Mohun Majee, *Petitioner*,

versus

Doollubh Majee, *Opposite Party*.

Baboo Bungsheedhur Sen for the Petitioner.

Mr. J. S. Rochfort and *Baboo Greeja Sunkur Mozoomdar* for the Opposite Party.

When a person summoned to answer to a charge of criminal trespass appeared and filed a written statement, and the Magistrate proceeded accordingly without recording a proceeding under Section 530 of the Code of Criminal Procedure, it was held that the irregularity was covered by Section 283 of the Code, the rule therein laid down being intended to extend to all proceedings before Magistrates.

Couch, C. J.—It is true that the applicant was summoned by the Deputy Magistrate to answer to a charge of criminal trespass; but when he appeared before the Deputy Magistrate, he put in a petition, stating his claim to possession in the same manner as if the Magistrate had recorded a proceeding under Section 530 of the Criminal Procedure Code, and had called upon the parties to give in written statements of their claims. In fact, it appears (and this is probable from what had occurred previously) that the parties looked upon the case as a question of possession; and the Magistrate acted accordingly. Having before him the statement of the applicant of his claim to possession, and having examined the evidence which the applicant produced in support of it, the Magistrate made the order under Section 530.

In neither of the cases which have been referred to (one in III. Weekly Reporter, p. 9, and the other in IV. Weekly Reporter, p. 26), does it appear that there was this fact, that a written statement had been put in as if a proceeding had been duly recorded by the Magistrate. Here the person, having acted in this way, cannot, I think, complain that the Magistrate had not recorded a proceeding. It appears to me to be only an irregularity; but it is an irregularity which might in some cases do substantial injustice, for, if the person summoned did not come prepared to prove his possession, and did not put in a statement of his claim, it might operate very injuriously to him if an order was made under Section 530. Moreover, since the decisions of this Court, Section 283 of the new Code of Criminal Procedure contains a provision which was not in the former Code. This is that "no irregularity in the proceedings up to trial is a sufficient ground for reversing any judgment, sentence, or order made or passed in a trial properly held." It appears to me that this is a rule which is intended to extend to all proceedings before Magistrates. What we have to do in all these cases is to see whether there is an irregularity which has caused substantial injury. Here the question has been fairly and properly determined, and the parties have had an opportunity of contesting it before the Deputy Magistrate. This is not a case in which this Court ought to set aside the proceedings.

The fact of the petition stating the applicant's claim to possession having been presented was not before the learned Judges when they sent for the papers. Probably, they would not have sent for them if they had known that.

The papers must be returned, but we make no order.

The 15th September 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Contraband salt—Act VII. of 1864, Section 16.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Midnapore.

The Queen

versus

Chundro Mohun Bhooya.

In a case of a conviction under Section 16, Act VII. of 1864, for having in possession contraband salt, the Sessions Judge recommended that it should be set aside on the ground that the salt had already reached its destination, and was not *en route*; Section 18 consequently not applying. The High Court set aside the conviction accordingly.

Reference.—THE defendant in this case conveyed his salt under a rowannah which described the route through certain khals and canals. When he arrived at one of these khals, he found it closed, and he then transported his salt for the remainder of the distance on bullocks.

About 26 days after the salt had thus been safely stored in the golah, the police took up the matter, and prosecuted the defendant, and the Deputy Magistrate has confiscated the salt under Section 18, Act VII. of 1864, and fined the owner under Section 16 of the same law.

It seems to me the sentence is illegal, because Section 18 does not apply. Under that Section, I think the salt must be seized while it is being conveyed, and then the penalties can follow. But here the salt was seized, not *en route*, but in the golah many days after it had reached its destination, and, therefore, I think there is no case against the defendant.

On these grounds, I would recommend that the Deputy Magistrate's order be set aside.

Judgment of the High Court.

Couch, C. J.—The order of the Deputy Magistrate is annulled, and the fine is ordered to be refunded.

The 15th September 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Cheating—Wrongful loss—Wrongful gain—Act XLV. of 1860, Sections 415 and 420.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Purneah.

The Queen

versus

Lal Mahomed and another.

A person who purchased rice from a famine-relief officer at a certain rate (16 seers to the rupee), on condition that he should sell it at a seer the rupee less, was convicted of cheating under Section 420 of the Penal Code, because he did not sell it at the rate agreed on, but at 12 seers to the rupee.

Held that, as within the meaning of Sections 23 and 24 of the Penal Code there had been no wrongful gain or wrongful loss to any one, no offence had been committed under Section 415 of the Penal Code.

Reference.—UNDER the provisions of Section 296 of the Criminal Procedure Code, I have the honor to submit the record of a case (Queen *versus* Lal Mahomed and Mahomed Muzhur), in which it seems to me that Mr. Meiklejohn, Joint Magistrate attached to this district, has passed an illegal sentence of imprisonment for one month against each of the accused persons. As the term is within the limit of unappealable sentences, I am obliged to make this reference. The facts are the following :—

The accused Mahomed Muzhur was a clerk under Mr. Thornton, an officer in charge of certain relief works in this district. At Mr. Thornton's bidding, he brought forward a number of men (among whom was the accused Lal Mahomed), who were willing to serve as relief moodies, *i. e*, to buy Government rice from Mr. Thornton, and to retail it to consumers at a specified profit. Lal Mahomed bought a quantity of rice at the rate of 16 seers per rupee, on the condition that he should sell it at the rate of 15 seers. Some 26 days after his having received it, it was found that he had sold a large portion of it at the rate of 12 seers. The Magistrate has convicted him of "cheating" under Section 420 of the Penal Code.

As the rice was sold outright to Lal Mahomed, it is quite clear to me that the breach of contract which he has committed is not of itself a criminal offence. I admit that, if there had been facts which led to the

irresistible inference that he had the intention of breaking the conditions at the time that he accepted them, Section 420 might apply, but those facts should have been defined and *quasi* put in issue ; for instance, a contract made by him prior to his acceptance for retail-sale at a higher rate than that covenanted, or an actual retail-sale made at a higher rate within a few hours of his acceptance, might have been quoted to show his intentions at the time ; but such contract or such sale should have been specified, and should have formed the main and salient point of judicial enquiry. In the present case, there is no definition of the acts by which criminality may be inferred, and the conviction seems to me bad.

Mahomed Muzhur has been convicted of abetting Lal Mahomed. If Lal Mahomed has committed no crime, the charge must, of course, fall; but even granting that the offence of "cheating" be proved against Lal Mahomed, all that there is against Mahomed Muzhur is that he recommended him, amongst several others, in obedience to a demand which necessitated his recommending some one, and that he was on terms of intimacy with him. If such a conviction were upheld, no man could assist another, for fear of identifying himself with him, and becoming liable for any criminal acts which he might be tempted to commit.

Under the provisions of Section 390, I have released the accused persons on bail, and they await the decision of the Court. The records of the case, including Mr. Meiklejohn's explanation, have been despatched this day under another cover.

Judgment of the High Court.

Couch, C.J.—The conviction of the Joint Magistrate is annulled. Supposing that the evidence of the witness, Sunder Kumaree, shows that Lal Mahomed, at the time he obtained the rice, intended to sell it at the higher price, the facts do not show the committing an offence within Section 415. From the illustrations to that Section, the word *fraudulently* seems to be used in the same sense as *dishonestly ;* and the person accused must have dishonestly induced the other to deliver the property to him. Dishonestly, by Section 24 of the Penal Code, is said to be doing a thing with the intention of causing wrongful gain to one person, or wrongful loss to another. And by Section 23, wrongful gain is defined to be gain by unlawful means of property to which the person gaining is not legally entitled ; and wrongful loss is the loss by unlawful means of property to which the person losing is legally entitled. In this case, there was not a wrongful loss by the Relief Superintendent, nor was there a gain on the part of Lal Mahomed by unlawful means. The rice having been sold to him, and he having paid for it, it was not unlawful for him to sell it again at such prices as he thought fit.

As to the other accused, Mahomed Muzhur, there is no evidence whatever from which abetment of the offence of cheating can be inferred.

The 17th September 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

False evidence — Witness — Compounding — Stopping proceedings—Complaint — Punishment—Act X. of 1872, Section 473—Procedure.

Reference to the High Court by the Sessions Judge of Bhaugulpore.

The Queen

versus

Dudraj Dosadh.

A Joint Magistrate, having directed a recusant witness in a trial before him to be put on his trial for giving false evidence, subsequently, on the 9th May, on hearing the statement of the witness, confessing that what he had stated was false, and that he had wilfully withheld what he knew, recorded a proceeding, stating that the case would not be proceeded with, and directing the discharge of the accused witness.

HELD that, as the Joint Magistrate could not himself try the case by virtue of Section 473 of the Code of Criminal Procedure, his proceeding of the 9th May was either a part of an inquiry into a case triable by a Court of Session, or of some proceeding before a Magistrate other than such inquiry in respect of an offence which the inquiring Magistrate was not competent to try, and that, in either case, the Joint Magistrate had no authority to discharge the accused.

When once a complaint of an offence, which cannot be legally compounded, is before a Magistrate, he is bound (unless proceeding under Section 146) to make a complete inquiry, and to see that the accused, if guilty, is brought to punishment.

Reference.—I BEG to refer a point on which I find myself differing from the Joint Magistrate of Jumoye, and on which I would be glad to obtain the opinion of the Court.

The Joint Magistrate was trying a case in which public feeling was apparently strongly in favor of the accused.

One of the witnesses for the prosecution, when he came to give his evidence, denied that he knew anything against the accused, or that he ever gave any information to the police tending to implicate him.

The Joint Magistrate then and there recorded a vernacular proceeding, dated May 6th, 1874, directing that the recusant witness be put on his trial for giving false evidence.

The Joint Magistrate, three days after, called on him to make any statement he had to make with regard to the case of perjury brought against him.

The man then confessed that what he had said was false, and that he had wilfully withheld what he knew.

The Joint Magistrate, on this, recorded a proceeding, stating that the case would not be proceeded with, and directing that the man should be discharged.

It appeared to me that the Joint Magistrate's conduct was open to censure: *first*, in taking up and disposing of a case which, under Section 471, Code of Criminal Procedure, he was bound to refer for decision to another Magistrate; and, *secondly*, after having instituted proceedings, in discharging the accused on the face of his own confession of guilt.

I administered a somewhat sharp rebuke, as the Joint Magistrate had already had his attention drawn to the provisions of the law in this respect.

I beg to forward the Joint Magistrate's explanation.

What he says is that he did not try the case, but that he merely made the preliminary enquiry which Section 471 authorized him to make; that, finding the accused was penitent, he did not care to press the charge, and released him—a course which, he contends, he had a perfect right to follow.

As the Joint Magistrate distinctly states that he was not holding a trial, but merely making a preliminary enquiry, I can only express my regret that I formed an erroneous opinion of his conduct—I was misled by the wording of the various proceedings taken by the Joint Magistrate.

The main question, however, remains, and it is on it that I would specially ask the opinion of the Court, namely, whether a Magistrate, having once taken the step of instituting against any one so grave a charge as that of giving false evidence, is authorized in dropping the prosecution.

The object of the Legislature in framing the provisions contained in the concluding part of Section 471, no doubt, was to guard against the hasty, and perhaps unjust, convictions to which witnesses might be liable, were they tried and punished by the same tribunal which accused them of giving false evidence.

It appears to me that, if the procedure adopted by the Joint Magistrate in this present case is not discouraged, a practice might spring up by which witnesses giving evidence before a Magistrate will, to a great extent, be deprived of the protection which the law has, by the above provisions, extended to them.

The power which the Joint Magistrate contends should be conceded to the Magistrate is that of putting on his trial, or rather placing under preliminary enquiry, any witness who appears to him to be recusant: and when he has, by thus proceeding, elicited what he supposes the witness has been withholding, he has the power of dropping the proceedings, and releasing the accused.

The discretion which the Joint Magistrate claims is not, perhaps, likely to be frequently, mischievously or oppressively used, but it is easy to see that it might soon come to be employed for the purpose of extorting statements, and that it could be made to controvert a most wise provision provided in the law.

The Joint Magistrate's reference to complaints under Section 467 and the power of withdrawal in no way applies to the present case.

If a witness has given evidence so palpably and persistently false that the Court, before whom such evidence is given, after due deliberation, considers that such witness ought to be tried and punished for the offence, the case, once a prosecution has commenced, ought to proceed, and no withdrawal should be permitted till the accused is either convicted or acquitted.

In cases of contempt, the case is altogether different. They, like summons-cases, might very reasonably be withdrawn at the discretion of the Court instituting them, and with the concurrence of the Court trying them.

With serious accusations such as the giving of false evidence, such discretion ought not, in my opinion, to be admitted.

Judgment of the High Court.

Ainslie, J.—The Joint Magistrate asserts that this was a preliminary enquiry, and not a trial, as a trial is, by Section 4, defined to

mean the proceedings taken in Court after a charge has been drawn up, and he had not prepared a charge under Section 216 of the Procedure Code.

As it was not (under Section 473) in the Joint Magistrate's power to try the accused himself, and as, under the procedure for commitment to the Sessions, a Magistrate does not take any answer of an accused to the charge, but merely reads and explains it,* and calls upon him † to give in a list of the witnesses whom he wishes to have summoned to give evidence on his trial before the Court of Session, it would seem that, technically, the accusation set out at length on the 9th May was not a charge, but was only an examination under Section 193, as, indeed, the heading in the vernacular shows. It is there called "Istifsar," which is always used to distinguish the examination from a defence or answer to a charge, termed "Juwab."

The meaning of the word "trial" given in Section 4 is inconsistent with the use of the same word in Chapter XVII., which is headed—"Of the trial of warrant-cases by Magistrates." Section 213 contains the following words: "The following procedure shall be observed by Magistrates in the *trial* of warrant-cases," and Section 214 includes within that procedure the examination of complainant and his witnesses under Section 191, and the examination of the accused under Section 193.

But as the Joint Magistrate was forbidden to try the case himself by Section 473, it may be conceded that the examination made on the 9th May was not made under Chapter XVII. as part of the proceedings on a trial before a Magistrate. It was, therefore, either a part of an enquiry into a case triable by a Court of Session, or of some proceeding before a Magistrate, other than such inquiry, in respect of an offence which the inquiring Magistrate was not competent to try. In either case, the Joint Magistrate had no authority to discharge the accused.

If the matter be dealt with as an inquiry into a case triable by the Court of Session, the Magistrate was authorized to discharge the accused, only if he found that there were not sufficient grounds for committing him to take his trial, or for remanding him. The accused had confessed the offence; therefore, there were sufficient grounds for at least a remand. The Magistrate being himself the complainant, his declining to go on with the prosecution, the offence not being one capable of being compounded, was not a ground on which the trial could be stopped. (Section 195, Explanation I.) Explanation III. of the same Section says that an order of discharge shall not ordinarily be made until the evidence of the witnesses named for the prosecution has been taken. This, no doubt, gives a discretion to the inquiring Magistrate to stop his proceedings; but, as in all other cases of discretionary power, it must be exercised reasonably, and not capriciously; a refusal to continue the inquiry, after receiving a complaint, and recording a confession, can only be treated as unreasonable and capricious.

If the inquiry was not preliminary to commitment, it was a proceeding in respect of an offence before a Magistrate not competent to try it, his power to do so being taken away by Section 473. It would then be governed by Section 45, for undeniably there was evidence before the Magistrate warranting a presumption that the accused had been guilty of an offence under Section 193 of the Penal Code, namely, his own confession; in such a case, the Magistrate, who is not competent to try, has no power to discharge.

The case cannot be brought under Chapter XVII., but, if this could be done, the result would be the same; there would be no power to stop the proceedings without completing the trial.

The Legislature has not left it to the will of a Magistrate to proceed or not as he thinks fit with cases which cannot be legally compounded; it requires him, when once the complaint of such an offence is before him (unless he proceed under Section 146, which cannot apply to the present case), to make a complete enquiry, and to see that the accused, if guilty, is brought to punishment.

Prosecutions by the Court should not be commenced hastily and without full consideration. If this prosecution was one which it was not fit to proceed with, it ought not to have been started. The confession and contrition of a man whose offence is detected, and appears capable of positive proof, independently of anything he may say, is hardly to be taken as sufficient to relieve him from standing his trial for the offence of attempting to defeat the ends of justice by giving false evidence, even if the law allowed the Magistrate to stop the prosecution.

The order of the Joint Magistrate, dated 9th May 1874, directing the discharge of Dudraj Dosadh, is set aside, and he is directed to proceed against him according to law.

* Section 199.
† Section 200.

The 8th October 1874.

Present :

The Hon'ble W. Markby and W. F. McDonell, *Judges.*

Thoroughfare—Jury—Act X. of 1872, Sections 523 and 526.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge.

Nyan, *Petitioner,*

versus

Sher Ali and others, *Opposite Party.*

A Magistrate, who, on the application of the party called on, refers a matter as to whether a pathway is a thoroughfare or not for the consideration of a Jury under Section 523 of the Code of Criminal Procedure, is bound to make an order upon the report of the Jury, and in accordance with their decision, as required by Section 526 of the Code.

Reference.—Both parties to this case are inhabitants of Tengrakhally, a village within the jurisdiction of the station and sub-division of Perozepore. Nyan, the petitioner, complained to the Sub-Divisional Deputy Magistrate that the opposite party had unjustly closed up a thoroughfare in the village, and prayed, under Section 521, Code of Criminal Procedure, for orders to have it re-opened. The Deputy Magistrate called upon the opposite party to show cause; whereupon some of them appeared, and, denying the existence of the thoroughfare, applied for the appointment of a Jury under Section 523. The application was complied with; and the Jury appointed visited the spot, and reported the previous existence of the thoroughfare, and its being recently closed up by the opposite party. But the Deputy Magistrate, in opposition to the said report, subsequently thought that the pathway in dispute was not a thoroughfare, and dismissed the application.

The Deputy Magistrate's order dismissing the application seems to me to be illegal, because Section 523, Code of Criminal Procedure, lays down that, "when the Jury have made their report, the order of the Magistrate must be founded thereon." The Deputy Magistrate, therefore, had no discretion to ignore the report of the Jury. If it were the case, as stated by the Deputy Magistrate in his order that the case had been taken up under Section 521 by mistake, the pathway not being a thoroughfare, I should be inclined to decline interference. But this statement seems to be unfounded, for the Jury who visited the spot distinctly report that the place was a thoroughfare, used by the complainant and others. I, therefore, recommend that the order may be set aside, and the Deputy Magistrate directed to pass orders according to law.

Judgment of the High Court.

Markby, J.—We understand that the order of the Deputy Magistrate which was referred to the consideration of the Jury was that the road should be opened, and that the Jury considered this order to be reasonable and proper. This being so, the only order which the Magistrate was empowered to make was an order founded upon the report of the Jury, by whose decision he must be guided.

The order of the Deputy Magistrate must be set aside, and he must make an order founded upon the report of the Jury and in accordance with their decision, as required by Section 526.

RULES AND ORDERS OF THE HIGH COURT.

There being no Reformatory at present in Bengal, suggests that sentences of confinement in a Reformatory under section 318, Act X. of 1872, should not be passed.

CRIMINAL CIRCULAR MEMO. No. 2.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 20th May 1874.

(English Department.)

(Criminal.)

In accordance with a representation from the Inspector-General of Jails, the Court are pleased to bring to the notice of Sessions Judges and Magistrates that no reformatory, or part of a prison declared to be a reformatory under the Act, exists in Bengal at present. Sentences of confinement in a reformatory, under section 318, Act X. of 1872, cannot therefore be carried into effect, and it is better to abstain from passing such sentences.

Circulates letter showing how columns 2 and 3, Part II. of Quarterly Statement D, should be filled up.

No. 689.

From

H. J. S. COTTON, Esq.,
Officiating Registrar of the High Court of Judicature at Fort William in Bengal,

To

The Magistrate of Sylhet.

Dated the 3rd June 1874.

(English Department.)

(Criminal.)

Sir,

I am directed to acknowledge the receipt of your letter No. 2546, dated 20th May 1874, in which you state that you had presumed that columns 2 and 3, Part II. of Quarterly Statement D, referred to *cases* of commitment.

2. In reply I am to say that, although your supposition is borne out by the literal wording of the headings of the columns, the intention of the Court was that "persons implicated in commitments," and not the commitments themselves, should be shown in this column, and you are requested to cause the statements to be prepared on this principle in future.

I have, &c.,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIRCULAR MEMO. No. 3.

Dated the 3rd June 1874.

(English Department.)

(Criminal.)

Forwarded to all Sessions Judges and Magistrates for information and guidance.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

In supersession of previous Circular draws attention to provisions in the Criminal Procedure Code, regarding the submission of Criminal Appeals from prisoners.

CIRCULAR ORDER No. 2.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 8th June 1874.

(English Department.)

(Criminal.)

WITH reference to the alteration in section 276 of the Code of Criminal Procedure by Act XI. of 1874 (the Criminal Procedure Amendment Act), the Court are pleased to issue the following Circular Order in supersession of Circular Order No. 1, dated 17th January 1874.*

2. The High Court find it necessary to call the attention of the several subordinate Criminal Courts, and of the Officers in charge of Jails, to the provisions of Act X. of 1872 in respect of the submission of criminal appeals. Section 275 of the present law enacts that "every petition of appeal shall be accompanied by a copy of the *judgment* or order appealed against."

3. What the judgment or final order in the case shall contain is enacted in section 464 of the Code: "The judgment or final order shall contain the point or points for determination, the finding thereupon, and the reasons for the finding." The fourth paragraph of the same section points out that "in trials by jury the Court need not state its reasons for its judgment, but shall record the heads of the charge to the jury." In cases tried by jury, therefore, the heads of the Judge's charge to the jury will take the place of the reasons for the finding.

4. No doubt can exist as to the plain requirements of the law in this matter, and the Court desire that the subordinate Courts will carefully comply with the provisions of the new Code, and discontinue the practice which at present exists in several quarters, of furnishing to the person affected, and sending up to the Appellate Court, a copy of the sentence only with the petition of appeal.

* *Ante*, p. 3.

Prescribes three Special Returns in addition to the Regular Annual Statements.

CIRCULAR ORDER No. 14.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 13th June 1874.

(English Department.)

(Civil.)

THE following special returns are prescribed in addition to the regular annual statements, and it is requested that they may be made without delay for 1873 in the forms appended hereto—

A statement showing for each Court in the district the applications filed during the year, under section 119, Civil Procedure Code, for orders to set aside judgments passed *ex parte* or on default.

A return of decrees satisfied without execution for each Court subordinate to the High Court.

A statement showing on a graduated scale the values of suits in which local inquiry was ordered, and the expenditure of money and time involved therein.

A.

Applications under section 119, Act VIII. of 1859, for an order to set aside an ex-parte judgment or a judgment on default.

Name of Court.	To set aside *ex-parte* judgment.	To set aside judgment on default.	Total.	Applications granted.	Applications rejected.	Total disposed of.	Pending.	REMARKS.

B.

Statement showing decrees satisfied without execution in——— during the year

Denomination of Court.	Number of decrees satisfied.	Amount of decree.	REMARKS.

C.

Statement showing values of the different classes of suits in which local inquiry was ordered during the year———.

Scale of Values.	No.	Aggregate value.	Average value.	Aggregate cost of local inquiry only.	Average cost of local inquiry.	Average time occupied in inquiry.
Cases not exceeding 5 Rs.						
" " 20 "						
" " 50 "						
" " 100 "						
" " 500 "						
" " 1,000 "						
Exceeding 1,000 "						

Circulates letter regarding the forms of Registers of Receipts and Disbursements on account of Civil Court Ameens prescribed by Circular Order No. 11, dated 14th March 1874.

No.—

To

THE JUDGE OF

Dated Calcutta, the 12th June 1874.

THE Court direct me to return herewith your Returns to Circular Order No. 11, dated 14th March 1874,* and to point out that the forms of Registers of Receipts and Disbursements on account of Civil Court Ameens prescribed by that Circular were intended, as stated therein, *to be kept up in all the regular Civil Courts* with a view to furnishing materials for the Returns to the Court under Circular Order No. 12, dated 8th April 1872.†

2. The Statement for the financial year 1873-74, required in the 2nd paragraph of the recent Circular, should be made in the form appended to the Circular No. 12, dated 8th April 1872.

The Statement should accordingly be recast and submitted to this Court at an early date.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

CIRCULAR MEMO. No. 14.

(English Department.)

(Civil.)

COPY forwarded to all District Judges for information and guidance.

* *Ante*, p. 17.
† 17 W. R., *Rules*, p. 11.

Forwards copy of letter to Judge of the 24-Pergunnahs on the subject of Sheriff's fees.

No. 1655.

FROM

H. J. S. COTTON, ESQ.,
Officiating Registrar of the High Court of Judicature at Fort William in Bengal,

TO

THE JUDGE OF 24-PERGUNNAHS.

Dated Calcutta, the 17th June 1874.

(English Department.)

(Civil.)

SIR,

I AM directed to acknowledge the receipt of your letter No. 442, dated 12th May 1874, applying for certain information in connection with Circular Order No. 12, dated 27th March 1874, on the subject of Sheriff's fees.

2. In reply I am to explain that "an ordinary return" is a return of service made under section 49 of Act VIII. of 1859. "A special return" is a return of service made otherwise than under that section. "A citation or summons to appear" is a process issued by the Civil Courts in this country in the exercise of their testamentary and intestate jurisdiction.

3. The only processes issued by the High Court in its original jurisdiction which the Sheriff's officers are required to serve or execute are those specified in the scale of fees which accompanied the Court's Circular Order above alluded to, *viz.*:—

(1.) Summons to a defendant to appear and answer.

(2.) Citation.

(3.) Execution (this includes prohibitory orders).

4. In reply to your third paragraph, I am to point out that the inconvenience of which you complain from not knowing what fee will be required before the return is received may be obviated by your sending with the process the maximum amount of fees chargeable by the Sheriff and his officers under their respective tables of fees. The Sheriff will account to you for whatever excess may be thus entrusted to him.

5. The Court direct me to add for your information, that, as a rule, processes are served, in the case of a European by a European bailiff, and in the case of a native by a native bailiff. A native bailiff is never employed when the person to be served or arrested is a European; a European bailiff may, however, at the request of the suitor, be employed when the person to be served or arrested is a native. This practice should always be remembered when receiving an application for the service of process, as it bears upon the amount of fees to be sent for the service of process by the Sheriff.

I have, &c.,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIRCULAR ORDER No. 15.

Dated Calcutta, the 17th June 1874.

(English Department.)

(Civil.)

COPY of this letter forwarded to all District Judges and to the Judges of the Small Cause Courts of Sealdah and of Howrah, in continuation of the Court's Circular Order No. 12, dated 27th March 1874.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

Cancels Circular Order No. 17 of 17th June 1873.

CIRCULAR ORDER No. 3.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 18th June 1874.

(English Department.)

(Criminal.)

THE Court are pleased to notify, for the information of Judges and Magistrates, that Circular Order No. 17, dated the 17th June 1863, is cancelled.

Forwards copy of letter to Judge of Bhaugulpore, stating that the Return called for in Circular Memo. No. 9, dated 4th May last, should show the Costs incurred in Contested Cases only.

No. 1675.

FROM

H. J. S. COTTON, ESQ.,
Officiating Registrar of the High Court of Judicature at Fort William in Bengal.

TO

THE JUDGE OF BHAUGULPORE.

Dated Calcutta, the 20th June 1874.

(English Department.)

(Civil.)

SIR,

IN reply to your letter No. $\frac{C.D.}{193}$, dated 15th June 1874, I am directed to say that the return called for in Circular Memo. No. 9, dated 4th May 1874, should show the costs incurred in contested cases only.

I have, &c.,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIRCULAR MEMO. No. 15.

Dated Calcutta, the 20th June 1874.

(English Department.)

(Civil.)

FORWARDED to all District Judges and Judicial Commissioners, in continuation of Circular Memo. No. 9, dated 4th May 1874.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

Forwards copy of letter to Officiating Sessions Judge of Chittagong as to the language in which the evidence of witnesses should be recorded in warrant cases.

No. 773.

FROM

H. J. S. COTTON, ESQ.,
Officiating Registrar of the High Court of Judicature at Fort William in Bengal,

TO

THE OFFG. SESSIONS JUDGE OF CHITTAGONG.

Dated Calcutta, the 20th June 1874.

(English Department.)

(Criminal.)

SIR,

I AM directed to acknowledge the receipt of your letter No. 61S, dated 5th June 1874, forwarding a copy of correspondence between yourself and the Magistrate as to the language in which the evidence of witnesses should be recorded in warrant cases.

2. In reply I am to say that your view of the case is correct. The Government Notification dated 30th June 1864, and published at page 1462 of the *Calcutta Gazette* of the 27th July 1864, notified

under section 196 of the old Code of Criminal Procedure (Act XXV. of 1861) "that in every district of the Lower Provinces the evidence of witnesses shall be taken down by the Magistrate with his own hand and in his own vernacular language, unless he be prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court." It was also notified "that if the vernacular language of any Magistrate be neither English nor the language of the district in which his Court is held, he may take down the evidence in English, or in the language of the district, instead of in his own vernacular."

3. Section 335 of the new Code of Criminal Procedure (Act X. of 1872) reproduces section 196 of the old Code, and under the concluding paragraph of section 2 of the new Code, the Government Notification of the 30th June 1864 is as much in force as if it had been published and made under section 335 of that Code.

I have, &c.,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

CIRCULAR MEMO. No. 4.

Dated Calcutta, the 20th June 1874.

(English Department.)

(Criminal.)

COPY of this letter, with the usual number of spare copies, forwarded to all Sessions Judges and Magistrates for information.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

Directs Small Cause Court Judges and Moonsiffs to examine Certificates of Pleaders during the last week of every quarter, and to submit Report thereon to the District Judge.

CIRCULAR ORDER No. 16.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 22nd June 1874.

(English Department.)

(Civil.)

THE Court are pleased to direct that all Small Cause Court Judges and Moonsiffs should examine the certificates of the Pleaders practising in their Courts during the last week of every quarter in the year (with a view to renewal at the proper date and on sufficient stamp), and submit a special report on the result of their inspection to the District Judge at the beginning of the ensuing quarter. It is expected that the District Judges will very carefully examine these reports, and permit no irregularities to occur; and the subject should also receive attention in the District Annual Reports.

District Judges when reporting the Renewal of Pleader's and Mookhtear's Certificates to state the Name of Pleader's or Mookhtear's Father.

CIRCULAR ORDER No. 17.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 23rd June 1874.

(English Department.)

(Civil.)

THE Court are pleased to direct that, in reporting to the Court the renewal of pleader's and mookhtear's certificates under section 8 of Act XX. of 1865, District Judges will, in all cases, state the name of the pleader's or mookhtear's father in order that the pleader or mookhtear may be identified in the rolls in the Court's office.

Draws attention to Provisions of Rent Law regarding Execution of Decrees in rent-suits for amounts not exceeding Rs. 500.

CIRCULAR ORDER No. 18.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 10th July 1874.

(English Department.)

(Civil.)

THE Court having observed that irregularities are committed in the execution of decrees in rent-suits are pleased to direct the attention of District Judges to the positive rule laid down in section 58 of Act VIII. (B. C.) of 1869 as to judgments for amounts not exceeding Rs. 500, and to intimate that the same process of execution cannot be executed more than once, and the Court accordingly direct that the reception of supplementary lists of property to be attached, or other devices by which the provisions of this section are evaded, may be at once put a stop to.

Forwards copy of letter to Superintendent of Stationery regarding alteration in last column of Quarterly Statements A, B, and C.

No. 1867.

FROM

H. J. S. COTTON, ESQ.,
Officiating Registrar of the High Court of Judicature at Fort William in Bengal,

To

THE SUPERINTENDENT OF STATIONERY.

Dated Calcutta, the 14th July 1874.

(English Department.)

(Civil.)

SIR,

(Quarterly Statements A, B, C.)

THE Court having been pleased to direct that the last column of High Court Civil Form 11, 12, and 13 should be headed "Explanations and Remarks" instead of "Remarks" only as heretofore, I have the honor to request that this alteration may be carried out in future reprints of these forms.

I have, &c.,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

Calls for a Statement of Suits and Appeals of the Small Cause Court type not exceeding Rs. 20 in value decided in 1873.

CIRCULAR MEMO. No. 16.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 10th July 1874.

(English Department.)

(Civil.)

DISTRICT JUDGES and Judicial Commissioners are requested to submit, on as early a date as practicable, a return for the year 1873 containing the information indicated in the form given below.

2. The return in question is very urgently required by Government, and the Court trust that no delay will be permitted to occur in its preparation and submission.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

Statement of Suits and Appeals of the Small Cause Court type (section 27, Act XXIII. of 1861) not exceeding Rs. 20 in value decided in 1873.

1	2	3	4	5	6
MOONSIFFEES.	Number of original suits of the Small Cause Court type under Rs. 20 decided.	The proportion they bear to other suits of the same class.	Number of appeals presented in cases of the kind entered in column 2.	The proportion borne by appeals in such cases to appeals in other cases of the Small Cause Court class.	REMARKS.
Moonsiffee of					

CIRCULAR MEMO. No. 17.

Dated Calcutta, the 14th July 1874.

(English Department.)

(Civil.)

COPY forwarded to all Judicial Commissioners and District Judges, who are requested to alter existing copies by hand accordingly.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

Sessions Judges no longer to insert in Statement No. III. any observations in cases of acquittal regarding the Propriety of the Commitment.

CRIMINAL CIRCULAR ORDER No. 4.

(English Department.)

(Criminal.)

Dated Calcutta, the 23rd July 1874.

SESSIONS JUDGES are hereby desired to discontinue the insertion in Sessions Statement No. III. of any observations, in cases of acquittal, regarding the propriety of the commitment.

2. This order supersedes Circular Order No. 2, dated 9th March 1869,* and the last paragraph of Circular Order No. 10, dated 12th July 1870.†

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

Explains Circular Order No. 25, dated 25th July 1872.

CIVIL CIRCULAR ORDER No. 19.

(English Department.)

(Civil.)

Dated Calcutta, the 27th July 1874.

THE High Court are pleased to intimate, for the information of the subordinate Courts, that Circular Order No. 25, dated 25th July 1872,‡ was not intended to be taken as entitling defendants, in cases referred under section 12, Act VIII. of 1859, to show cause by reason of the property in the suit being situated in different districts, when none of the defendants reside beyond the jurisdiction of the Court in which the suit is instituted.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

* 11 W. R., Crim. Cirs., 1.
† 14 W. R., Crim. Cirs., 1.
‡ 18 W. R., Rules, &c., 7.

n continuation of previous Circular draws attention to alterations, &c., in Rules drawn up under clause 2, section 20 and section 22 of the Court Fees Act.

CIVIL CIRCULAR ORDER No. 20.

Dated Calcutta, the 13th August 1874.

(English Department.)

(Civil.)

In continuation of Circular Order No. 10, ated 7th March 1874, the attention of all istrict Judges and District Magistrates, as ell as of the Subordinate Civil and Criinal authorities, is drawn to the annexed terations and additions made by the Court the Rules drawn up under clause 2, ction 20 and section 22 of the Court Fees ct (Act VII. of 1870), and published in the *Calcutta Gazette.*

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

NOTIFICATION.

The following alterations and additions, ade by the High Court to the Rules passed y them under the Court Fees Act of 1870, aving been confirmed by the Lieutenantovernor of Bengal, and sanctioned by the overnor-General of India in Council, are y published.

H. J. S. COTTON,

Officiating Registrar.

30th July 1874.

rations and Additions made by the High urt of Judicature at Fort William in ngal to the Court Fee Rules framed der clause 2, section 20 of Act VII. 1870.

he Districts of Sylhet, Hazareebagh, rdugga, and Maunbhoom are hereby added to the list of districts cited in the margin of Rule VI.

R. COUCH.
F B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
W. MARKBY.
C. PONTIFEX.
W. AINSLIE.
G. G. MORRIS.
R. C. MITTER.
W. F. McDONELL.

Alterations and Additions made by the High Court of Judicature at Fort William in Bengal to the Court Fee Rules framed under section 22 of Act VII. of 1870.

The Districts of Furreedpore, Lohardugga, Hazareebagh, and Maunbhoom are hereby added to the first column of the list marginally given in Rule 5th, and the words "or have to travel to great distances" are hereby inserted in the same Rule after the words "conveyed by boat."

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
W. MARKBY.
C. PONTIFEX.
W. AINSLIE.
G. G. MORRIS.
R. C. MITTER.
W. F. McDONELL.

Subordinate Judges and Moonsiffs to be allowed opportunities of making Observations on the correctness or otherwise of the Returns as to Costs called for by Circular Memo. of 4th May 1874.

CIVIL CIRCULAR MEMO. No. 18.

Dated Calcutta, the 18th August 1874.

(English Department.)

(Civil.)

District Judges and Judicial Commissioners are requested to allow the subordi-

nate Judges and Moonsiffs under their control to have an opportunity of making observations on the correctness or otherwise of the Returns as to costs called for by Circular Memorandum No. 9, dated 4th May 1874.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIRCULAR MEMO.

No. 19.

Calls for Statement showing the number of days given to Civil and Criminal Work and the number of Sessions Trials and Appeals heard by the Judge and Additional Judge in 1873.

Dated Calcutta, the 21st August 1874.

(English Department.)

(Civil and Criminal.)

EVERY District Judge and Judicial Commissioner, subject to the control of the High Court, is requested to forward to this office, with the least possible delay, a statement in the subjoined form showing the number of days given to Civil and Criminal work and the number of Sessions trials and criminal appeals heard by the Judge and Additional Judge in 1873.

Statement showing the number of days given to Civil and Criminal Work and the number of Sessions Trials and Appeals heard in 1873.

Name of Tribunal.	No. of Days given to Civil Work.	No. of Days given to Criminal Work.	No. of Sessions Trials.	No. of Criminal Appeals.	REMARKS.
Judge ...					
Additional Judge ...					

By order of the High Court,

H. J. S. COTTON,
Officiating Registrar.

Rules drawn up in accordance with Section 4, Act XX. of 1865, for the qualification admission, and enrolment of Pleaders and Mookhtears in Mofussil Courts.

I.—GENERAL.

1. THE following rules framed by the High Court of Judicature at Fort William in Bengal, under section 4, Act XX. of 1865, in supersession of previous rules on the same subject, shall take effect from the date of their publication, except so far as they relate to the qualifications required by clause 1 of Rules 7, 9, and 11, respectively, as to which the rules dated 2nd May 1866 shall continue in force until the 1st of January 1875.*

* *Vide* foot-note.

2. Pleaders in the Mofussil Courts of the Regulation Provinces, within the limits of the jurisdiction of the High Court, shall, as regards qualifications for practising in Civil Courts, be of two grades:—

I.—Those of the higher grade shall be competent to appear, plead, and act in any Civil Court subordinate to the High Court.

II.—Those of the lower grade shall be competent to appear, plead, and act in the Courts of Moonsiffs and in Small Cause Courts, and in the Courts of Officers in the District of Cachar and Divisions of Assam, Chota Nagpore, and Cooch Behar, exercising the powers of Moonsiffs under the Bengal Civil Courts Act, 1871.

3. Mookhtears duly admitted and enrolled shall be competent to appear and act in any Civil Court subordinate to the High Court:

4. Provided that no pleader or mookhtear shall be enabled under these rules to practise in every Court except as specified in their certificates.

5. The Examiners hereinafter mentioned shall be the persons to be appointed Examiners by the Lieutenant-Governor of Bengal under the provisions of Act XX. of 1865.

II.—QUALIFICATION FOR PLEADERS OF THE HIGHER GRADE.

6. The following persons may be admitted as pleaders of the higher grade, that is to say:—

1st.—Any person who shall have obtained the Degree of Bachelor-of-Law of one of the Universities of Calcutta, Madras, or Bombay, or shall be a Licentiate in Law of one of the said Universities: Provided that his application for admission as a pleader be made within one year from the time of his obtaining such degree or license, or within such further time as the High Court shall for any special reason allow; or

2nd.—Any person who produced a certificate from the Board of Examiners that he has passed in the first class an examination in the subjects prescribed from time to time by the High Court for the Pleadership Examination.

Such subjects shall, until further order by the Court, be as follow:—

Subjects.	*Regulations, Enactments, and Text-Books.*
1st.—The law of property current in Bengal—	
A.—With reference to the permanent settlement; to the Government lien on land; to claims to hold land exempt from the payment of revenue, and to the mode in which estates can be brought to sale for arrears of revenue.	Regulations (Bengal) I., VIII., X., XIV., XIX., and XLIV., of 1793, and the Regulations and Acts by which the same have been altered; Act XI. of 1859 and the Preamble to Regulation (Bengal) II. of 1793.
B.—The law of under-tenures, and the mode in which the same can be brought to sale for arrears of revenue.	Regulation (Bengal) VIII. of 1819; Act VIII. of 1865 (Bengal Council); Act VIII. of 1869, B. C. (except as to candidates to practise in Orissa, Chota Nagpore, and Assam, who will be required, as heretofore, to pass in Act X. of 1859).
C.—The relation of landlord and tenant.	Act VIII. of 1869 (B. C.), except as above.
D.—Mortgages, Registration of Assurances.	Macpherson on Mortgages; Act VIII. of 1871.
E.—The Hindoo Law of Inheritance, Succession, and Adoption.	Dayabhaga and Mitakshara, Dattaka Chandrika, and Macnaghten's Principles of Hindoo Law, first seven chapters.
F.—Mahomedan Law.	Macnaghten's Principles of Mahomedan Law, except chapter 9.
G.—The Indian Succession Act.	Act X. of 1865; Act XXI. of 1870.
2nd.—Obligations arising from contracts.	Macpherson on Contracts; Act IX. of 1872.
3rd.—Civil Procedure.	Act VIII. of 1859; Act XXIII. of 1861; Act XI. of 1865.
4th.—The Law of Evidence.	Act I. of 1872.
5th.—The Law relating to Stamps.	Act XVIII. of 1869, and Act VII. of 1870.
6th.—The Law of Limitation.	Act IX. of 1871.
7th.—Criminal Law and Procedure.	The Indian Penal Code (Act XLV. of 1860 and Act XXVII. of 1870), and the Code of Criminal Procedure, Act X. of 1872.

7. In order to qualify a person to present himself for the examination mentioned in Rule 6, clause 2nd—

1st.—He must hold a certificate of having passed the First Arts Examination of the University of Calcutta, Madras, or Bombay, or the first public examination before Moderators at Oxford or the previous

examination at Cambridge, or the preliminary examination in Arts in one of the Scotch Universities, or the examination in Arts for the second grade at Durham, or the matriculation examination at the University of Dublin or London, or a certificate of having passed some other public examination which shall be certified by not less than three Judges of the High Court as being in their opinion equivalent to one or other of the above-mentioned examinations.

2nd.—He must hold a certificate of having regularly attended a full course of Lectures in Law at one of the Colleges affiliated to the Calcutta University, or such Law Lectures elsewhere as shall be deemed by the High Court to be sufficient.

3rd.—He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

III.—QUALIFICATION FOR PLEADERS OF THE LOWER GRADE.

8. Every person may be admitted as a pleader of the lower grade who shall produce a certificate from the Board of Examiners that he has passed in the second class the examination mentioned in Rule 6, clause 2nd.

9. In order to qualify a person to present himself for examination for the lower grade—

1st.—He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras, or Bombay, in the first or second class, or the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the preliminary examination in Arts in one of the Scotch Universities, or the examination in Arts for the second grade at Durham, or the matriculation examination at the University of Dublin or London, or a certificate of having passed some other public examination which shall be certified by not less than three Judges of the High Court as being in their opinion equivalent to one or other of the above-mentioned examinations.

2nd.—He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

IV.—QUALIFICATION FOR MOOKHTEARS.

10. Every person may be admitted as a mookhtear who shall be qualified as hereinafter prescribed, that is to say:—

(1.) If he shall be qualified to be admitted as a pleader of either grade: Provided that his application to be admitted as a mookhtear shall be made within one year from the time of his obtaining such degree or license, or within such further time as the Court shall for any special reason allow; or

(2.) If he shall produce a certificate from the Examiners that he has passed an examination in the subjects prescribed from time to time by the High Court for the examination of mookhtears. Such subjects shall, until further notice, be as follow:—

Code of Civil Procedure.	Penal Code.
Law of Limitation.	Code of Criminal Procedure.
Stamp Laws.	Registration Act.
Small Cause Court Act.	Evidence Act.
	Contract Act.

11. In order to qualify a person to present himself for the examination required by these rules for mookhtears—

(1.) He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras, or Bombay, or a certificate of having passed the Vernacular or Minor Scholarship Examination, or some other public examination certified by the Director of Public Instruction or by an Inspector of Schools to be equivalent thereto.

(2.) He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

V.—EXAMINATIONS.

12. Every candidate for examination for pleadership of either grade, or for mookhtearship, shall, on or before the 1st of November in each year, apply to the Board of Examiners for leave to present himself at the ensuing examination, and he shall establish to their satisfaction that he possesses the qualifications prescribed for such candidates.

13. Such application is not to be transmitted to the Board of Examiners direct, but is to be filed before the said first day of November in the Court of the District Judge within whose jurisdiction the candidate resides or is employed (Calcutta, for this purpose, being taken to be within the District of the 24-Pergunnahs), accompanied by the necessary documents and papers. The Judge shall thereupon inquire into the validity of the certificate of character presented

by the candidate, and shall satisfy himself as to the identity of the candidate, and he shall, on or before the 15th November, transmit to the Board of Examiners all such applications with the documents accompanying, together with a list of the applications and annexures, and with his opinion in each case as to the sufficiency of the testimonials produced, and any other information which he may think it needful in any case to communicate.

14. The Board of Examiners shall thereupon take the case of each candidate, with the report of the District Judge, into their consideration, and shall determine whether or not the candidate is possessed of the necessary qualifications. If the candidate is found qualified, the Board shall cause his name, the name of his father, his age and place of residence, and other needful particulars, to be entered in a register, with a declaration that he is permitted to appear at the next ensuing examination at * * * * .

15. An extract from the register shall be forwarded to the District Judge for delivery to the candidate. The Judge shall cause a notice of his having received such extracts to be stuck up in his Court-house, and shall deliver them to the candidates on application.

The District Judge, in carrying out this Rule and Rule 13, shall conform to such instructions as he may receive from the Board of Examiners through their President or Secretary.

16. Before the date of examination, every candidate shall pay into the Government Treasury of the 24-Pergunnahs, or of the place where he is to be examined, the fee prescribed by Rule 22, and shall at the same time present to the officer in charge of the Treasury, the extract from the register furnished to him under Rule 10, and the treasury receipt for the fee shall be endorsed thereon. Every candidate for examination shall produce to the Examiners the extract from the register, with the treasury receipt so endorsed thereon.

VI.—Enrolment.

17. Any person who shall have qualified under these rules, and who shall desire to be admitted to practice, shall pay into the Government Treasury of the district in which he shall intend to practise the fee prescribed by Rule 22, and shall, on presentation of the certificate of the Examiners or of his diploma, and the receipt for the said fee, be entitled to apply to the High Court for admission and enrolment.

18. The application, together with the certificate and receipt required by Rule 17, shall be presented to the Judge of the District in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court, with such remarks as he may think fit to make thereon.

19. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court-house of the Judge to whom the application is sent, and also in the High Court, at least six weeks before the applicant is admitted to practice.

20. The High Court may call for evidence of the respectability of the applicant in any case in which it may be deemed necessary.

21. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the District, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX. of 1865, shall grant him a certificate as required by the said Act.

VII.—Fees.

22. The fees payable previous to examination and on application for enrolment shall be as follows :—

	Pleader, Higher Grade.	Pleader, Lower Grade.	Mookhtar.
	Rs.	Rs.	Rs.
Before examination ...	30	20	15
„ enrolment ...	25	15	10

VIII.—Penalties.

23. If any person having passed the examination entitling him to be admitted and enrolled as a First or Second Grade Pleader or as a Mookhtar, and shall fail to apply for such admission and enrolment for a period of one year from the time of passing the examination, he shall not be admitted and enrolled, unless by special order of the High Court the time for such application shall be extended.

24. If any person having been admitted and enrolled as a pleader or mookhtar shall

neglect to take out a certificate, or, having obtained a certificate, shall fail to renew it for a period of three years, he shall be suspended, and shall not be entitled to receive a certificate, or to have his certificate renewed, without further orders of the High Court.

25. Any person who shall hold any appointment under Government, or shall carry on any trade or other business at the time of his application for the admission as a pleader or mookhtar, shall state the fact in his application for admission, and the High Court may refuse to admit such person, or pass such orders thereon, as it thinks proper.

26. Any person who, having been admitted as a pleader or mookhtar, shall accept any appointment under Government, or shall enter into any trade or other business, shall give notice thereof to the High Court, who may thereupon suspend such pleader or mookhtar from practice, or pass such orders as the said Court may think fit.

27. Any wilful violation of any of the above rules shall subject a pleader or mookhtar to suspension or dismissal.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
W. MARKBY.
C. PONTIFEX.
W. AINSLIE.
G. G. MORRIS.
ROMESH C. MITTER.
W. F. McDONELL.

The 12th September 1874.

The following is a reproduction of such of the Rules of 2nd May 1866 as relate to the qualifications of examinees, and as referred to in Rule 1 of the foregoing Rules :—

9. In order to qualify a person to present himself for the examination required by these Rules for the higher grade—

1st.—He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras, or Bombay, or shall satisfy the High Court that he has received a liberal education elsewhere than in India.

2nd.—He must hold a certificate of having regularly attended a full course of Lectures in Law at one of the Colleges affiliated to the Calcutta University, or such Law Lectures elsewhere as shall be deemed by the High Court to be sufficient.

3rd.—He must hold a satisfactory certificate of good moral character.

4th.—He must be between the ages of 20 and 40 years, unless he shall have been admitted and shall have practised as a pleader of the lower grade previously to his application to be admitted to the examination for the higher grade, in which case he may be admitted to that examination if he shall satisfy the Judge of the District in which he resides that up to the time of the application he has been acting as a pleader of the lower grade, and shall produce a certificate from the Judge or Judges in whose Court he has been practising, that in his or their judgment he is a proper person to be admitted to examination for the higher grade.

21. In order to qualify a person to present himself for examination for the lower grade—

1st.—He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras, or Bombay, or a certificate of having passed the examination for a Government Vernacular Scholarship, or Minor Scholarship.

2nd.—He must hold a satisfactory certificate of good moral character.

3rd.—He must be between the ages of 20 and 35 years.

RULES FOR MOOKHTARS.

29. *1st.*—Any person qualified to be admitted as a pleader of either grade shall be entitled to be admitted as mookhtar.

2nd.—Any person qualified to present himself for examination for a pleadership of either grade may present himself for examination to be admitted as mookhtar.

3rd.—Any person who can satisfy the Judge of the District that he possesses the following qualifications, may be admitted to examination for the office of mookhtar, *viz.*—

A.—That he is a person of good moral character.

B.—That he has received a liberal education.

C.—That he is not above the age of 35 years, unless he has been previously practising as a mookhtar, in which case no limit of age will be prescribed.

REVENUE CIRCULARS.

JUNE 1874.

A. MONEY, ESQ., C.B.

Erratum.

For "Act X. of 1870," in line 7 of Circular No. 4 of June 1874, read "Act VII. of 1870."

HON'BLE V. H. SCHALCH, C.S.I.

Alterations in the Bengali translation of Form No. 20, page 302, Board's Rules.

No. 7.

IT having come to light that the Bengali translation of Form No. 20, page 302 of the Board's Rules, now in use, contained certain inaccurate headings as noted below,* a revised edition of the Form was recently ordered to be printed. As, however, it appears that there is a very large number of copies of the inaccurate Forms still in stock, the Member in charge deems it expedient that these should be used up before the revised Forms are supplied, the necessary corrections being made by hand in the local offices.

JULY 1874.

HON'BLE H. L. DAMPIER.

Circulates copy of correspondence laying down that the limitations governing the travelling allowances of Deputy Collectors apply also to Sub-Deputy Collectors.

No. 1.

WITH reference to the order of the Government of India in the Financial Department,

* In Table I., Column 5—

	For	Read
Former Revenue.	সাবেক জমা	সাবেক সদর জমা

In Table I., Column 6—

	For	Read
Former Rent Roll.	সাবেক তৌজি মত	সাবেক জমাবন্দি মত

In Table I., Column 7—

	For	Read
Former actual Mofussil Collections.	সাবেক যথার্থ আদায়	সাবেক যথার্থ মঃফস্বল আদায়

The following words should be omitted from the heading of 20A—

২০ নং রেজষ্টরির

In 20B, after the word বনকর, the word প্রভৃতি should be added.

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No. 1463, dated 7th July 1873, published at page 899, Part I. of the *Calcutta Gazette* of the 30th idem, copy of the following correspondence, laying down that the limitations governing the travelling allowances of Deputy Collectors are applicable also to Sub-Deputy Collectors, is circulated for information and guidance:—

From T. J. C. GRANT, ESQ., *Officiating Secretary to the Board of Revenue, Lower Provinces, to the Secretary to the Government of Bengal, Revenue Department,—(No. 242A, dated Fort William, the 19th June 1874).*

AT the instance of the Commissioner of Dacca, I am directed by the Member in charge to refer, for the consideration and orders of Government, the question as to whether the limitations governing the travelling allowances of Deputy Collectors should be held equally applicable to Sub-Deputy Collectors.

2. The former class of officers draw Rs. 3 per diem whilst on deputation in the interior of the district, subject to reduction by one-half when halting in any one place for more than a fortnight, and the allowance absolutely ceases when the period of such deputation has exceeded three months.

3. By the orders of the Government of India in the Financial Department, No. 1463, dated 7th July 1873, published at page 899, Part I. of the *Calcutta Gazette* of the 30th idem, Sub-Deputy Collectors are entitled to a travelling allowance of Rs. 1-8 a day, but nothing is laid down as to the limits within which this rate may be claimed.

4. The Commissioner reports that a bill has been submitted to him by a Sub-Deputy Collector who was for several months employed away from the head-quarters of the division of the district to which he was attached, and who, for more than four months, was continuously stationed at one particular place. This officer's salary is only Rs. 100 per mensem, and he considers himself entitled, under the orders above quoted, to a rate of travelling allowance for these four months, which is equivalent to nearly 50 per cent. of his substantive pay.

A Sub-Deputy Collector is necessarily employed from time to time in the interior, and perhaps more continuously so than at the sudder station. It appears, therefore, that to concede to him the right under such circumstances of habitually drawing travelling allowance when in point of fact he is stationary for a long continued period, would have the indirect effect of greatly enhancing the cost of the new establishments. The Member in charge is of opinion that it probably was the intention of Government to apply to the travelling allowance of Sub-Deputy Collectors the same limitations which are placed on the travelling allowance of Deputy Collectors, and he is anxious to have the early orders of Government on the subject.

From L. C. ABBOTT, ESQ., *Under-Secretary to the Government of Bengal, to the Officiating Secretary to the Board of Revenue, Land Revenue Department,—(No. 1514, dated Calcutta, the 7th July 1874).*

I AM directed to acknowledge the receipt of your letter No. 242A, dated the 19th June, and in reply to say that the limitations governing the travelling allowances of Deputy Collectors are applicable also to Sub-Deputy Collectors, and that in the instance given in your 4th paragraph, Rule 4E of the Board's Rules, appears to be applicable.

A. MONEY, ESQ., C.B.

Alterations made in Return No. XXXV.

No. 2.

IN the certificate at foot of the printed form of Return No. XXXV. substitute the words "that I have satisfied myself" for the words "after personal inspection of the accounts;" and in the second line below the heading "Refunds under," expunge "sections 12, 13, and 14," and substitute "sections 13, 14, and 15."

AUGUST 1874.

HON'BLE H. L. DAMPIER.

Alterations in Board's Rules regarding settlements, consequent on Government of Bengal Resolution, cited.

No. 1.

WITH reference to the Resolution of the Government of Bengal, Revenue Department, dated 18th June 1874, subsequently modified by Government Order No. 1617 of 23rd July 1874, the amendments noted below are made in the Board's Rules :—

1st.—For section 9, Chapter VIII. (page 154), which was rescinded by Circular Order No. 2 of September 1872, substitute the following :—

1. "The power of sanctioning permanent settlements and settlements of estates of which the annual jumma is above Rs. 25,000 is reserved to the Government. The power of sanctioning temporary settlements will be exercised as below :—

"If the jumma assessed does not exceed Rs. 2,000, and the term of settlement is for the period fixed for the settlements in the district	By Commissioners of Revenue.
"If the jumma assessed does not exceed Rs. 25,000	By the Board of Revenue.
"All other settlements ...	By Government.

"All orders passed by any authority regarding settlements will be open to appeal according to law, and to revision by superior authority without appeal, unless such revision by executive authority is barred by law.

2. "The orders contained in this section apply to ordinary settlements and re-settlements of estates, and not to first settlements of waste land, which are subject to special rules."

2nd.—Expunge the words "the Collector and" in the first line of clause 18, section 9, Chapter XX. (page 285), and after the word "Commissioner" add "the Board and the Government."

3rd.—For the words "Commissioner's Office to the Board" in the 2nd and 3rd lines of clause 1, section 12, Chapter XX. (page 287), substitute "proper channel to the sanctioning authority."

4th.—Circular Order No. 3 of December 1872 is hereby cancelled, and District Officers are requested to re-submit Return No. XII.

A. MONEY, ESQ., C.B.

In supersession of previous Circulars promulgates New Rules regarding payment of discount on Stamps.

No. 2.

Circular Order No. 3 of January 1871.
Circular Order No. 3 of August 1871.

IN supersession of Circular Orders marginally cited, the following orders are issued for the guidance of Divisional and District Officers :—

2. The existing rules regarding payment of discount contained in clause 1, section 5, Chapter XXI. of the Board's Rules, apply to Stamps of Class II. alluded to in para. 7 of the General Rules issued* by Government under section 48 of Act XVIII. of 1869.

* *Vide* page 1657 of *Calcutta Gazette*, dated 13th September 1870.

3. As regards Stamps of Class I. (adhesive stamps), the rates of discount allowable are those noted in para. 6 of the Rules issued by Government and cited above. Clause 6, section 5, Chapter XXI. of the Board's Rules, is therefore cancelled, except as regards the latter portion added by Circular Order No. 2 of August 1873.

4. As regards para. 11 of the Rules above referred to, the following headings should be adopted, in accordance with the orders of Government, for the form of Register required to be kept by every ex-officio or licensed vendor of stamps :—

Serial Number of Stamp.	Date of Sale.	Value of Stamp.	Name and Residence of Purchaser.	REMARKS.

5. Discount on purchases of Court Fee Stamps is to be paid according to the instructions contained in the Board's Circular Order No. 3 of June 1874.

Additional rule to para. 36 of the Directions under the Land Acquisition Act, showing how the amount of Costs in cases referred to a Court under that Act should be set out in Appendix A.

No. 3.

IN cases referred to the Court under section 15, Act X. of 1870, after the Court's award of compensation has been declared,

the costs of the proceedings are made to fall either on the Collector or the parties interested, according as the amount awarded does or does not exceed the sum tendered by the Collector; and as, in such cases, a want of uniformity of practice exists in the mode of showing the amount of costs in the abstract bill contained in Appendix I. of the Directions for the guidance of the officers of the Revenue Department in the acquisition of land, the Member in charge directs the addition of the following rule to para. 36 of those Directions :—

35*A*.—In cases referred to a Court in which costs have been decreed against Government, the amount of the costs should be entered in the abstract bill in Appendix I., after the item "expenses incurred in taking up the land," under the heading "add amount of costs decreed against Government." Costs decreed to Government, although realized from the owner of the land by deduction from the amount of compensation paid, being of the nature of advances recovered, should not be taken *in abatement of the price paid for the land*, and therefore should not be shown in the body of the abstract. The amount, however, with an explanatory note, should be entered in the column of remarks, and should also be distinctly credited in the treasury cash accounts. Subjoined are specimen forms of bills drawn up in conformity with the above rule.

APPENDIX I.

(SEE PARAGRAPHS 36 AND 37 OF INSTRUCTIONS.)

No. of 187 .

Bill for expenditure incurred by the Collector of for Land taken for under Act X. of 1870, as per Declaration No. of 187 .

Amount of Estimate sanctioned.	Rs.	As.	P.
* Amount of bills already passed on this account. To expenditure incurred in taking up the land, &c., referred to in the undermentioned abstract ...	135	0	0
Total ...	135	0	0

* This need only be inserted when monthly bills are submitted.

Collector.

ABSTRACT.

For what purpose.	Village, zillah, or locality.	Total area of land taken up, in acres.	Nature of Charges.	Total value of the property taken up. Rs.	A.	P.	REMARKS.
			Amount allowed by abatement of revenue ...	0	0	0	
			Amount paid in cash ...	100	0	0	
			Total amount of compensation as per award...	100	0	0	
			Add expenses incurred in taking up the land ...	15	0	0	
			Add amount of costs decreed against Government ...	20	0	0	
			Grand Total...	135	0	0	

Collector.

APPENDIX I.

(SEE PARAGRAPHS 36 AND 37 OF INSTRUCTIONS.)

No. of 187 .

Bill for Expenditure incurred by the Collector of for Land taken for under Act X. of 1870, as per Declaration No. of 187 .

Amount of Estimate sanctioned.	Rs.	As.	P.
* Amount of bills already passed on this account. To expenditure incurred in taking up the land, &c., referred to in the undermentioned abstract ...	115	0	0
Total ...	115	0	0

* This need only be inserted when monthly bills are submitted.

Collector.

b

ABSTRACT.

For what purpose.	Village, zillah, or locality.	Total area of land taken up, in acres.	Nature of Charges.	Total value of the property taken up.			REMARKS.
				Rs.	A.	P.	
			Amount allowed by abatement of revenue ...	0	0	0	The costs decreed to Government amounted to Rs. 20.
			Amount paid in cash ...	100	0	0	
			Total amount of compensation as per award...	100	0	0	
			Add expenses incurred in taking up the land ...	15	0	0	
			Grand Total ...	115	0	0	

Collector.

Draws attention to Rules regarding the weighment of Gunja.

No. 4.

IT having been brought to the notice of the Board that the practice observed in the different districts in weighing gunja exported from Rajshahye is not uniform, the attention of District Officers is called to clause 18, section 17, Chapter V., page 78, Board's Rules, which directs that the gunja bundles should be weighed in the same form as they were despatched from the exporting district.

Lays down Orders regarding the refund of Judicial Stamps when the Applications for refund are unsupported by Certificates.

No. 5.

IT having been decided by Government that refunds of the value of judicial stamps may be allowed under circumstances of special and unusual hardship, the Member in charge requests all Divisional and District Officers to note carefully the following orders for their future guidance.

2. When an unused judicial or Court Fee stamp is tendered to a Collector for a refund of the value, he should ordinarily refuse to comply with the application; if, however, he considers that there are special grounds for allowing the refund, he should receive the stamp and report the case to the Board for the orders of Government, but he should in no case cancel the stamps till the refund has been sanctioned. In the event of the refund being disallowed, the Collector will return the stamp uncancelled to the applicant.

3. It must, however, be borne in mind that the above instructions do not apply to cases in which a Civil Court certificate may be filed according to Government Order* No. 2768, dated 30th April 1874, but refer only to applications unsupported by certificates for the refund of the money-value of Court Fee stamps. The existing rules for the renewal of such stamps remain in force.

* *Calcutta Gazette*, page 831, dated 6th May 1874, Part I.

Communicates Orders of Government in a case of embezzlement of stamps at a Sub-divisional Treasury.

No. 6.

THE Member in charge desires to make known to District and Sub-Divisional Officers, for the sake of putting them on their guard, the orders of Government in a case of embezzlement of stamps, at a Sub-Divisional Treasury, touching the money-responsibility of the officers through whose culpable neglect of rules the frauds were enabled to be committed without immediate detection.

The defalcations, consisting of a series of acts, amounted to Rs. 6,407, and were com-

mitted by the stamp-mohurir, in whose charge the single-lock store of stamp was allowed to remain, in contravention of the rule that the Sub-Divisional Nazir should undertake that duty, and they continued undetected solely in consequence of the complete absence of any supervision on the part of the Sub-Divisional Officer over the stamp-accounts, and of his utter disregard of the Board's Rules for the receipt, custody, and issue of stamps.

Under these rules, on receiving a fresh supply of stamps, that officer's duty was to count them and place them under double locks, and add their quantity and value to the store-account; and when delivering over any portion of his store to his salesman, the stamp-mohurir, he was required to strike a balance, by deducting the quantity delivered from the amount in hand; and before issuing the fresh supply, it was incumbent on him to examine the mohurir's accounts, count the balance of stamps in his hands, and see that it agreed with the entry. He was further required to check daily the balance in the mohurir's Book of Receipts and Issues by comparing it with the Treasury Book, which showed the amounts daily paid into the Treasury by the mohurir. An observance of the first of these rules would have been a sure safe-guard against a portion of the deficit, and the remaining defalcations would have been impossible had the other rules been duly followed.

But the rules were entirely set at naught. Stamps supplied from head-quarters were never brought to credit on the Sub-Divisional books; stamps received from the double-lock store were often not entered in the single-lock account; the sale-proceeds of other stamps, the receipt of which from the double-lock store had been there shown, were not credited; and the daily balance was not attested by the Sub-Divisional Officer.

Of the sum embezzled, Rs. 2,177 were realized from the stamp-mohurir and his surety, leaving a balance of Rs. 4,230, which the Government has now ordered should be recovered from the Sub-Divisional Officer and the Nazir, according to their respective degrees of responsibility, namely, Rs. 3,990 from the former, and Rs. 240 from the latter.

In communicating this order of Government, the Member in charge takes the opportunity of repeating the warning conveyed in previous Circulars that every officer in charge of stamps will be held personally liable for any loss that may occur during his incumbency owing to his neglect of rules.

SEPTEMBER 1874.

Substitutes new Rule for Rule 32A at p the Salt Manual.

A. MONEY, ESQ., C.B.

No. 1.

THE following should be substitut Rule 32A at page 8 of the Salt Manu

32A.—If salt, originally intended taken out of the excepted limits descri clause 4 of the Government Notifica page 2 of the Manual under a special be landed in such limits for the conve of the trade, the alteration in the destin must be reported to the Board's office the special Rowannah returned 48 hours from the time that the salt landed. The owner, however, shall liberty to refer to it in taking out prote documents for such portion of the salt may subsequently determine on remo within limits. Should a portion only o salt, originally covered by the special Ro nah, be landed or sold in the aforesaid cepted limits, an exchange Rowannah, the manner provided in section 28 of t Rules, must be taken out to cover remaining portion of the salt which goes of such limits. Any person failing to co with the provisions of this Rule as reg the return, within the period of 48 hour the office of the Board of Revenue, o special Rowannah in the case hereinbe mentioned, in which this document is longer required as a protection for the specified therein, shall be liable to a fine exceeding Rs. 500.

Certificates taken out for the *removal* salt from shipboard or from bonded *golas*, places within the excepted limits, must al be returned to the Board's office within hours from the time the salt is landed such places; and the holder of any certifi who fails so to return it shall be liable t fine not exceeding Rs. 500.

HON'BLE H. L. DAMPIER.

Rules and Notifications Reprint of Chapter XVIII. of the Board's Rules relating to "Returns."

No. 2.

CHAPTER XVIII. of the Board's Rules relating to "Returns" has become so disfigured by additions and alterations, that the Member in charge considers it necessary to promulgate the accompanying reprint of it, which includes all corrections up to date. In order that the general Index attached to the Board's Rules may still be useful in connection with this chapter as reprinted, the numbering of the pages as it stands in the Index of the Board's Rules has been adhered to. The large figures in the margin of the reprint show the exact place at which each page bearing that number begins in the original edition of the chapter.

In future the sections and clauses of this chapter, as they stand in the reprint, should be referred to; and the reprinted copy should be kept corrected up to date.

Prescribes Monthly Return in substitution of Form B, page 46 of Board's Rules, and makes alterations in Rules in consequence thereof.

No. 3.

THE Monthly Return in the form of Register* No. 31 and the Quarterly Return made to the Legal Remembrancer under clause 26, section 2, Chapter III., page 40 of Board's Rules, are cancelled, and the following Monthly Return substituted for Form B, page 46—

* *Note.*—This does not necessarily dispense with the Register (31), which will still be maintained as required by clause 25, page 40.

Statement of Civil Suit Decrees passed in favour of Government or Court of Wards, realized and outstanding in the District of 187 for the month of

1	2	3	4	5	6				7	8	9	10	11	12	13	14	15	16	17
Number of Case or Appeal and of what Year.	Parties to Suit.	By what Court tried.	Value of Case or Appeal.	Date of Decree.	Amount decreed as per Court's Decree.				Date of Execution.	Costs of Execution.	Further Interest accrued on the Amount in total of column 6 up to Date.	Total of columns 6, 8, 9.	Realized and credited into the Treasury up to the end of the preceding month.	Realized and credited this month.	Total realized.	Balance, difference of columns 10 and 13.	Remitted by the Board or other authority.	Net Balance.	Remarks explaining the steps taken on each occasion for the recovery of the balance in column 16, or why it could not be realized.
					Principal.	Interest.	Costs.	Total Amount decreed.											

N.B.—This statement should include not only the cases decided wholly or in part in favour of Government or the Court of Wards, whether execution has been taken out or not, but of all decrees outstanding, in which the sums decreed have not been realized or remitted. The column of remarks must show, in detail, and with dates, every step taken in the month towards realization, and, if possible, the result of each step. Where there are no unexecuted decrees pending, the statement should be submitted blank.

2. The Table subjoined to clause 26 will now stand thus:—

Description of Returns.	When required.	On what date.	Form.
Statement of civil suit decrees.	Monthly.	Not later than the 15th of the month next ensuing.	Appendix B.
Statement showing the amount expended, &c.	Annually.	Not later than the 30th of the month next ensuing after the close of the year. ...	Do. C.
Abstract statement of outstanding decrees, &c.	Ditto ...	Ditto ...	Do. D.

3. For clause 10, section 4, Chapter III., page 42, read—

"The Legal Remembrancer shall maintain and submit with his Annual Report returns of percentage allowed by him in all districts to Government Pleaders."

A. MONEY, ESQ., C.B.

Adds Rule 32B (page 8) to the Salt Manual.

No. 4.

THE following should be added as Rule 32B (page 8) to the Salt Manual:—

32B.—Within twenty-four hours after the completion of deliveries of salt from boardship upon Rowannahs and Certificates, the holders thereof must present them at the Board's office for the purpose of having the endorsements made on them by the Preventive Officers examined. Challans will then be granted with regard to such Rowannahs as would require them according to section 34 of the Rules. This Rule will not prevent salt merchants removing their salt-laden boats from the ships' side to safe and convenient places in the river, under the boat-notes previously granted by the Preventive Officers. Any person failing to comply with the provisions of this Rule shall be liable to a fine not exceeding Rs. 100.

OCTOBER 1874.

HON'BLE H. L. DAMPIER.

Substitutes new rule regarding Allowa Sub-Division Officers for urgent conti Expenses.

No. 1.

THE following is substituted for c 10A, section 5, Chapter XI., page 17 the Board's Rules, which is no lo necessary under the new rules for Divisional Treasure chests issued Accountant-General's Circular No. dated 1st August 1873:—

A permanent advance of Rs. 30 is allo to every officer in charge of a Sub-Divi to enable him to meet urgent contin expenses: see Accountant-General's Circ Order No. 243, dated 13th May 1872.

Cancels Circular No. 2 of May 1874 o mode of dealing with the Surplus Profi Wards' Estates, and circulates an Ord Government on the subject.

No. 2.

UNDER the orders of Government extra ed below, No. 1889, dated 4th Septem 1874, the Circular Order No. 2 of May 18 on the subject of the mode of dealing the surplus profits of Wards' Estates, cancelled:—

"The question of the disposal of surp "funds of Wards' Estates may be conside "from two points of view: there "objections to investing such funds "adding to an already overgrown est "because of the impossibility of the la "lord and his tenants becoming prop "acquainted, or having interests in comm "whilst, on the other hand, the accumula "of large sums of ready money (or "securities readily convertible into mon "offers great temptations to young zemind "coming of age, and surrounded, as they "unfrequently are, by people whose inter "and pleasure it is to induce their patron "squander such savings. The advant "which belongs to investments in land,

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uch cases, is that land is not so easily convertible into money, and the feelings of a young proprietor are against selling landed property directly on coming of age.

"On these considerations the Lieutenant-Governor believes the proper solution of the difficulty would be so to manage a ward's affairs that there should be no surplus at the end of a minority beyond such reasonable working balance as might be required for working the estate and maintaining the household in fitting style. Nothing can be more appropriate than for the Manager of a ward's estate to pay off outstanding debts. But when an estate is clear of debt, a Manager should understand that all he can save by economical administration ought to be spent on the improvement of the estate and the well-being of its inhabitants. Such surplus income as accumulates might be expended on wells, small irrigation works, tanks, roads, or on additions to the cultivated area of the estates by reclaiming waste. In certain cases the area of the estate might be enlarged where such an addition would improve the estate, or money might be expended on works for the benefit of the tenantry, such as schools, hospitals, and the like. The formation of really good establishments for the management of village affairs, such as village accountants and watchmen, and the laying out of money on the permanent improvement of the land, such as on embankments, are also objects which a Manager might well keep in view. The feeling among good and economical Managers, that their paramount duty is to amass a large cash balance for the minor whose estate they may be administering, though certainly loyal on the Manager's part toward the ward, may fail to operate for the best interests of all concerned. As expressed by Sir George Campbell, a well-managed estate under the Court of Wards ought to be to the surrounding country a good example of what a solvent, wisely-administered property should be.

"I am therefore to request that the Board's Circular No. 2 of May 1874, which was issued under the authority of Government Order No. 1041, dated the 5th idem, may be withdrawn, and a revised Circular issued in accordance with the present instructions."

2. It has subsequently been explained by the Government that these orders are not intended to imply that a larger part of the surplus should be spent on the improvement of the estate and the benefit of the tenantry than a judicious and far-sighted landlord would be willing to expend for such purposes; and that there is no prohibition against the purchase of landed property, where such purchase would either improve the estate, or be for the general advantage of the ward; the orders in short contain an exposition of the principles by which the management should be guided in administering surplus funds, but they do not lay down hard-and-fast rules. Thus, for instance, though it would be quite contrary to the above policy to purchase additional land on account of an estate which had been much neglected, and where much in the way of material improvement required to be done, yet there will be no objection to such purchase when it can be shown that everything which a prudent and far-seeing landlord would do for the improvement of the estate has been already done, and there is no other eligible way open for the investment of these funds. Similarly, in cases which so frequently occur in Bengal, where a landlord has alienated his rights in perpetuity on the payment of a fixed yearly rent, it is clear that to spend all the surplus funds of the ward in improvements in these estates whence, he can derive no benefit, would be going beyond what a judicious and good landlord would do; in such cases some other mode of investing the surplus profits of the estate should be adopted. In short, all the circumstances of each case must be carefully weighed under the recollection that a landowner's first duty is to improve his estate, not in a merely selfish point of view for his own benefit, though that consideration should not be lost sight of, but likewise for the benefit of his tenantry.

3. Each estate should, however, keep in hand a sufficient sum of ready money to meet unforeseen contingencies.

Amends Salt Manual consequent on the introduction into Backergunge of the sub-charchittee system.

A. MONEY, ESQ., C.B.

No. 3.

THE introduction of the sub-charchittee system into the District of Backergunge having been sanctioned by Government, the following amendments are made in the Salt Manual:—

For the words "Orissa alone" in clause 3, Rule 26, and the word "Orissa" in Rules 29 and 31, substitute "the Orissa Division and Backergunge."

NOVEMBER 1874.

Hon'ble V. H. Schalch, C.S.I.

Explains Circular Order No. 2 of March 1873 as to how receipts from "forest tracts" are to be entered.

No. 1.

As Circular Order No. 2 of March 1873 appears in some cases to have been misunderstood, District Officers should distinctly understand that receipts from lands declared by Government to be "forest tracts" should be credited to the Forest Department. Receipts from lands of the nature of forest tracts, but not set apart as such, are to be credited to "Miscellaneous *Land* Revenue;" casual and trifling receipts, such as sale of fruits and trees in office compounds, to "Miscellaneous Receipts."

Adds 3 Clauses to Chapter XXV., section 1, p. 341, Board's Rules, regarding expenses contingent on filing appeals in Wards' cases.

No. 2.

The following has been added as Clauses 13A., 13B., and 13C, Chapter XXV., section 1, p. 341, Board's Rules—

13A.—To meet the expenses contingent on filing appeals in wards' cases, District Officers should submit annually, to the Legal Remembrancer, an estimate of the probable cost for estates under the Court of Wards, in which litigation is pending, or in which litigation is foreseen, in the course of the year estimated for.

13B.—The Legal Remembrancer will, after approving of these estimates, direct the District Officers to remit the required amount to the Bank of Bengal in Calcutta, where it will be placed at the credit of a fund called "The Litigation Fund." Cheques will be drawn by the Legal Remembrancer against this fund from time to time, as money may be required by him.

13C.—A separate account of the amounts debitable to each estate should be kept in the Legal Remembrancer's office, and the District Officer warned when the portion of the fund to the credit of any one of the estates is overdrawn. After the receipt of such warning, funds should be immediately sent.

Requests District Officers to intimate t prietors, &c., whenever their estate ha transferred from the towjih of one dist that of another.

No. 3.

To obviate the inconvenience whi stated to be often felt by holders of e for want of a rule providing for the t notification of transfers of estates fro district to another, District Officer requested henceforward invariably to in to proprietors or farmers the trans their estates from the towjih of one d to that of another. When such trans complete, the intimation should be se the District Officer from whose distri transfer is made, and a copy shou forwarded to the District Officer rec the transferred estate for information guidance.

Such notices should also be served o proprietors or farmers when tend revenue at the treasury of the distri the revenue-roll of which they were b previous to the transfer.

Rule as to travelling and halting allowanc officers, &c., employed by Managers of of Wards' Estates.

No. 4.

In order to secure uniformity i payment of travelling and halting allo to officers, clerks, &c., employed by Ma of Estates under the Court of War allowances should, in future, be gran the scale sanctioned by Governm ministerial officers.

In cases where the salary of the is too small, and the allowance in conseq is inadequate, the rate should be calc on the scale of Rs. 20 per mensem being taken that officers on small sala not unnecessarily deputed.

Hon'ble V. H. Schalch, C.S.I. A. Money, Esq., C.B.

Draws attention to Financial Departm solutions of 5th December 1873 and 1 1874. which require Commissioners to periodically all revenue treasuries, an out how those Circulars are to be car

No. 5.

The attention of Commissioner Collectors is drawn to the Resolution

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vernment of India in the Financial partment No. 3461, dated 5th December 73, published at page 1376 of the *lcutta Gazette* of the 10th December 73, which imposes on Commissioners the ty of periodically inspecting all revenue asuries in supersession of the orders der which such inspections were formerly nducted by the Accountant-General and puty Accountant-General. In continuan of this Resolution, the Resolution of Government of India in the Financial partment No. 3853, dated 19th June 74, requires that a Commissioner, when pecting a district treasury, should specially e the following and similar points—that boxes in which the money is kept are in d order; that the guard is properly posted; the treasurer is not allowed to keep too ch money in his hands; that the spare es of Pill Forms are kept under proper tody; that the Money Order accounts, osit registers, and pension registers are up to date; that the standing orders of department are observed; that the ulars from the Accountant-General are erstood and filed to date; and, generally, the office registers and records are in d order. It should be understood, how-, that these instructions are not restric-. In any case in which a Commissioner s that the treasury-management is not tactory, he would necessarily go very h deeper into details in his inspection.

Every Collector and every Sub-ional Officer in charge of a treasury ld make a systematic inspection of the king of his treasury once in six months. want of such inspections, abuses and s have been found to prevail in uries for years, although they were of a nature that they could not have l to attract at once the attention of an ecting officer looking at them from her stand-point than that of "the m of the office."

Collectors should transmit copies of inspection-memorandums to Commis-ers for information. No date for this n can be fixed, as it is not desired that inspection shall be made on any fixed .

Commissioners should inspect every ry in their division at least once in years, the memorandums embodying esult of their inspection being forwarded e Board, who will pass them on to the untant-General of Bengal in original.

5. The general rules* for the management of treasuries are contained in the orders marginally noted.

6. In connection with the present orders of Government transferring the duty of inspection to Commissioners, the Accountant-General, Bengal, has, under the orders of Government, drawn up the annexed memorandum for the guidance of Commissioners and District Officers during the inspection of treasuries. In addition to what is there indicated, the Board would direct the attention of inspecting officers to the importance of satisfying themselves that the personal assurances which are periodically given by officers in charge of money and stamps are strictly and literally in accordance with fact. In this respect instances of laxity are constantly coming to light. Recently an officer certified that a certain sum (which had actually been paid out) was in his custody in the shape of pice; and in another case, a treasury-officer was found to have periodically certified to the effect that he held certificates from the Sub-divisional Officers that they had themselves counted the money in their charge on a certain date and found it to be so much, whereas, in fact, the Sub-divisional Officer had not certified to that effect. It is evident that, if these personal certificates are not given in strict accordance with fact, not only are they

* Pamphlets issued by Accountant-General :—

1. Rules for the guidance of treasury-officers in the receipt and payment of money, the preparation of accounts in the local treasury, and the submission of accounts and returns to the Accountant-General, issued in 1866.
2. Rules for the management and control of local funds, including the district allotment for local works under the Magistrate, from the Amalgamated District Road Fund, prescribed by Accountant-General, Bengal, issued in 1868.
3. Rules for observance by Judges, Magistrates, and other Civil Officers not in direct account with the Accountant-General in the receipt and payment of money appertaining to their Courts or offices, issued in 1872.
4. Rules for sub-divisional treasure-chests in Bengal, issued in 1873.
5. Indian Bill Rules, issued in 1873.
6. Accountant-General's Circular No. 263, dated 22nd February 1873, promulgating rules for the custody, distribution, and sale of telegraph stamp labels.
7. Rules for the custody, distribution, and sale of postage stamp labels being Supplement E of the Indian Post Office Manual of February 1873.
8. Inland and Overland Money-Order Rules for the guidance of treasury-officers corrected up to 31st May 1874.
9. Rules for District Savings Banks (revised), 1874.

Board's Rules.

10. Chapter II., sections 7 to 12 of the Board's Rules.
11. Chapter XXI., sections 1 to 6 of the Board's Rules.

useless, but they are mischievous, as creating an impression of security on the part of the controlling officers for which there is no ground. If, in any case, the requirement of these personal certificates impose on any officer a duty which practically he cannot perform, the proper course is obviously to point out the difficulty to a superior authority, and not to allow certificates to be submitted which comply with the requirement in form only.

MEMORANDUM.

The Government of India having decided that the ordinary periodical inspection of treasuries shall in future be made by Commissioners instead of by the Accountant-General or his Deputy, the following questions are noted for guidance of inspecting officers as being of importance, with reference to the duties more immediately coming under the notice of the Accountant-General.

2. The Government of India, in its latest Resolution (Financial Department No. 3853, dated 19th June 1874), paragraph 2, enumerates the principal subjects to which the Commissioner's inspection should be directed, and observes that they cannot be expected to go into detail on questions of account. Accordingly a few points only are noted on which laxity is frequently observed, where neglect is specially likely to frustrate the check of the Accountant-General's Office, and where the opinion of an experienced officer is valuable, whether the precautions adopted are really effectual and systematically enforced.

3. Commissioners should, whenever practicable, acquaint the Accountant-General beforehand with their intention to visit treasuries, in order that they may be informed of any matters requiring special attention.

4. Other subjects will no doubt present themselves, but it is requested that Commissioners will always inquire into the following points, reporting the result to the Accountant-General in the form of which a supply accompanies this memorandum. The questions will be varied from time to time as occasion requires, but care will be taken to make them as few as possible, as they are by no means intended to form an exhaustive list.

Cash and Valuables.

(1) Are the following kept in the sole personal custody of the Treasury Officer :—
One key of each treasure-chest.
Ditto ditto store of stamps.
Ditto ditto ditto opium.
Ditto currency-chest (where one exists).
Blank forms of Supply Bills.
Ditto ditto Remittance Transfer Receipts.
Ditto ditto Money Orders.
Spare treasure-locks and keys.
Currency.

(2) Are precautions taken, and by whom, that the receipt and issue of currency notes, small silver, and copper, are as free as consistent with prudence, and that they are made impartially, and that the same system is pursued at all treasuries?

Note.—A preference is properly given to *bond-fide* travellers in cash or foreign circle notes; and the attempt of interested persons to secure a monopoly of any kind of currency should be resisted, and once reported to the Accountant-General. Where any suspicion exists of partiality or of misunderstanding on the part of the public a conspicuous notice should be posted in English and Vernacular stating what exchange facility can be given.

(3) Are remittances acknowledged promptly, that is, on the day of arrival as well as afterwards when the outturn is reported?

Money Orders.

(4) Are satisfactory precautions taken that no one can get access to the advices of orders payable, except the one clerk responsible for them?

Accounts.

(5) Are the accounts and registers of the Accountant-General written daily?

(6) Is a complete separation maintained between the Accountant's and Treasurer's Department? does the Treasury Officer balance (*sic*) their accounts at the close of each day?

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(7) Are all receipts and payments, and especially those that for any reason occur in an exceptional or irregular manner, brought at once to account? Is the rule strictly enforced at sub-divisional treasuries?

Miscellaneous.

(8) Does the Collector personally consider the three months' estimate sent to the Accountant-General?

(9) Are all references from the Accountant-General answered or receiving attention?

(10) Are proper precautions taken that every letter received is brought under the personal notice of the Treasury Officer?

A. MONEY, ESQ., C.B.

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dition to para. 17A of Land Acquisition nstructions promulgated with Circular Order o. 4 of January 1873.

No. 6.

THE following addition is made to para. A of the Land Acquisition Instructions mulgated with Circular Order No. 4 of uary 1873: "And at the time of the rd of the Court being declared, he should est the Judge to state the amount of incurred in the proceedings, and by persons and in what proportions they o be paid."

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tion to Circular Order No. 11 of November 1872.

No. 7.

TER the word "things," in the fourth of Circular Order No. 11 of November , add the words "*minus* the cost of irs of houses."

HON'BLE V. H. SCHALCH, C.S.I.

With reference to recent Government Orders, authorising the Board to confirm Permanent Settlements in certain cases, substitutes new Clause for Clause 1, and makes an addition to Clause 3, Section 9, Chapter VIII. of Board's Rules.

No. 8.

UNDER recent orders from Government the Board of Revenue have been vested with authority to confirm permanent settlements in all cases in which the proprietors have a statutory right to a permanent settlement.

2. Clause 1, section 9, Chapter VIII. of Board's Rules is accordingly cancelled, and the following clause is substituted for it:—

"The power of sanctioning permanent settlements in cases in which the proprietors have a statutory right to a permanent settlement is vested in the Board of Revenue. The power of sanctioning all other permanent settlements, and all temporary settlements of which the annual jumma exceeds Rs. 25,000, is reserved to the Government. The power of sanctioning temporary settlements will be exercised as below:—

If the jumma assessed does not exceed Rs. 2,000, and the term of settlement is for the period fixed for the settlement in the district,	By Commissioners of Revenue.
If the jumma assessed does not exceed Rs. 25,000,	By the Board of Revenue.
All other settlements,	By Government.

All orders passed by any authority regarding settlements will be open to appeal ac-

cording to law, and to revision by superior authority without appeal, unless such revision by executive authority is barred by law."

3. The following is added as Clause 3 :—

"3. All summary settlements must be reported for the sanction of the Board."

Adds a 4th column to Register No. 69, Section 4, Chapter XIV., p. 225 of Board's Rules.

No. 9.

REGISTER No. 69, section 4, Chapter XIV., page 225 of the Board's Rules, add a column after column 3, thus: "4. Date of order for the issue of process;" and alter the numbers of the other columns, 4 to 9, accordingly.

A. MONEY, Esq., C.B.

Modifies List of Pass Stations consequent on the removal of the Salt Pass Station from Sealdah to Chitpore.

No. 10.

GOVERNMENT having sanctioned the removal of the Salt Pass Station from Sealdah to Chitpore at the terminus of the Eastern Bengal Railway, the following modification is made in the list of Pass Stations contained in the Government Notification of the 22nd February 1869 :—

In the place of the words "Sealdah, at the termini of the Eastern Bengal and Calcutta and South-Eastern Railway," substitute the words "Chitpore, at the terminus of the Eastern Bengal Railway."

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